

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA.
SUCCESSION CAUSE NO. 2 OF 2019
(FORMERLY KITALE HIGH COURT SUCCESSION CAUSE
NO. 206 OF 2006)
IN THE MATTER OF THE ESTATE OF JAMES POLOKOU
ANAMILE -DECEASED

RAEL POLOKOU 1ST
APPLICANT

SABINA C. ALAMILE 2ND
APPLICANT

- V E R S U S -

SELINA POLOKOU 2ND
RESPONDENT

CATHERINE POLOKOU 2ND
RESPONDENT

J U D G M E N T

This matter relates to the Estate of **James Polokou Anamile** (the deceased) who died intestate on 25/11/1997 at Chemwochoi Sub Location, Kapkoris Location in West Pokot County.

On 10/3/2008, Grant of Letters of Administration were issued to Selina Polokou, Catherine Polokou, Rael Polokou and Sabina C. Anamile.

By the summons for Confirmation of grant dated 18/10/2016, Rael Tolokou and Sabina C. Anamile, the applicants, moved the court to have the grant issued on 10/3/2008, confirmed.

The summons was supported by the joint Affidavit of Rael and Sabina dated 18/10/2016 and a further affidavit dated 28/9/2017. The applicants deponed that the deceased was survived by the following persons.

- (i) Selina Polokou
- (ii) Rael Polokou
- (iii) Augostine P. Polokou
- (iv) Catherine Polokou
- (v) Grace Polokou
- (vi) Eric Polokou
- (vii) Hellen Polokou
- (viii) Elizabeth Cherotich
- (ix) Philip Polokou
- (x) Sabina Cherop Anamile
- (xi) Lilian Pololkou
- (xii) Tecla Polokou
- (xiii) Fredrick K. Polokou
- (xiv) Pamela Polokou

(xv) Antony Polokou

(xvi) Musa P. Anamille

(xvii) Emmanuel Maddy Polokou

(xviii) Polokou Evelyne

From the affidavit, Rael is the second wife of the deceased while Sabina is a daughter of the deceased. They further deponed that the deceased left the following properties.

- 1. West Pokot/Siyoi A/107**
- 2. Commercial plot at Bendera within Kapenguria**
- 3. Payment from Kenya Electricity Transmission Company (KETRACO)**
- 4. Pension and Retirement Benefits.**

The applicants proposed that the assets of the deceased be shared equally between the two houses of the deceased.

This matter was supposed to proceed by way of viva voce evidence. However, the deceased's widows were said to be unwell and unable to attend court to testify. Mr. Teti, Counsel for the applicants and Ms. Chebii, Counsel for the respondents agreed that the witness statements and lists of documents be adopted as evidence. The applicants filed a list of documents dated 1/10/2019 which includes the applicant's witness

statements, who are Rael, Polokou, Sabina Polokou, Anamile Musa and Stephen Komolket.

In her statement, Rael Polokou stated that by the time of his death, the deceased had not subdivided the land West Pokot Siyoi A/107; that in 1988, the deceased had merely demarcated the said parcel into two portions in 1988 in the presence of their relatives Stephen Komolket and Joel Loyatum to avert disputes between the deceased's two houses; that the subdivision was done on a temporary basis before a Surveyor could be called in to sub divide the land into two equal portions; that the 1st applicant was allocated the left side of the land facing East while the co-wife Selina and her family was allocated the right side. The first applicant's proposal is that the land be shared into two equal parts. She denied that the statements by Evans Makumbi and Simon Polokou are true. The 1st applicant also proposed that the plot at Bendera be shared equally between the two houses while the payment from KETRACO and Pension should be shared equally between the two houses. Rael denied knowing of deceased having any property in Chepareria and Kamatira as alleged by the

Respondents. Sabina C. Anamile, also filed a statement dated 1/10/2019. Her averments are similar to those of PW1.

Anamile Musa (PW3) also filed a statement dated 1/10/2019. He is the son of the deceased and the 1st applicant Rael. He agreed with his mother, Rael, that the deceased had not subdivided West Pokot/Siyoi A/107 but that the land was temporarily subdivided into two, to avoid disputes between the two houses and that it was done in the presence of Joel Loyatum and Stephen Komolket; that the father died before Surveyors divided the land into two equal parts. He is of the same view as Rael on the sub division of the other properties belonging to the deceased's estate. He denied knowing of any other properties in Chepareria or Kamatira.

The fourth witness whom I shall refer to as PW4, is Stephen Komolket who filed a statement dated 16/5/2019. He recalled that in 1988, the deceased invited him to his home and other relatives to resolve quarrels between the deceased's two wives; that the land was West Pokot/Siyoi A/107; that the relatives advised him to separate the two wives by dividing the land into two equal portions and built them houses at the far end of the land; that the 1st wife's house occupied the land on the right

side facing towards the sun while the second wife occupied the left side; that they estimated the centre of the land and put a temporary fence and the wives were asked to cultivate upto the said fence as they awaited formal sub-division into two equal parts. But the deceased died before the said sub division; that it seemed the deceased wanted each house to have an equal share of the land Siyoi A/107.

Selinaa Chemakal James and Catherine Cherop Polokou the Respondent's swore a joint replying affidavit dated 27/11/2018. They deponed that before the demise of the deceased he, demarcated and sub-divided West Pokot/Siyoi A/107 into two portions for the two houses; that the boundary was marked by planting indigenous trees by the deceased personally; that either house was warned not to ever cross the fence and that each house has respected the decision to date; that the demarcation was done in the presence of the Chief and elders. It is the Respondent's view that the status of the land do remain as the deceased left it; As regards the plot at Bendera which measures 100 X 100, the same belongs to the 1st Respondent to the exclusion of all others; that the applicants

should remain on the plots at Kamatira and Chepareria. They agreed that the deceased's pension be shared equally but that the benefits from KETRACO should not be shared because the line passes through the 1st house's portion of land and the compensation should all go to that house.

Ms. Chebii, Counsel for the Respondents introduced the witness statements of Selina Chemakal, Evans Makumbi Apaun and Smith Polokou and a list of documents as their evidence. The court will refer to them as defence witnesses. DW 1 to 3

Selina Chemakal (DW1) in her statement stated that she is the

deceased's first wife while Rael is the 2nd wife; that sometime in 1988, she quarreled with PW1 over the boundary on parcel Siyoi A/107; that quarrels over the boundary continued till 1991 when the deceased called the local administration, elders and his relatives to try and resolve the issue. They resolved that the land be sub divided into two portions for each house and boundaries were marked using sisal and trees planted from the upper part towards the river; that both wives confirmed being satisfied with the exercise and thumb printed the agreement; that since then, the boundary has never been altered and she

urged the court to distribute land Siyoi A/107 as per the deceased's wishes.

DW2 Evans Makumbi Apaun, a village elder for Kapkoris and neighbour of the deceased, confirmed that the deceased's wives had a dispute in 1988. The deceased called elders and relatives of whom he was one, who discussed the issue and the land was sub-divided into two portions to each wife and her children; that trees and sisal were planted and posts placed on the boundary,

and next day, a barbed wire was put in place from the upper part to the river. He went home and wrote down the deliberations and took it to the deceased's wives to sign in the presence of the area Assistant Chief; that the fence still stands to date and should be respected.

DW3 Smith James Polokou described himself as a nephew to the deceased. He filed his statement dated 20/3/2019. He reiterated what DW1 and 2 said about the deceased resolving the land disputes between his two wives by dividing the land Siyoi A/107 into two portions. He said he took part in digging

holes and putting up the fence; that the agreement was reduced into writing to which both wives thumb printed; that thereafter, the deceased's wives lived peacefully without any complaint.

The applicant filed their submissions dated 24/9/2025 through their Counsel, Teti and Company Advocates while the Respondents filed their submissions through the firm of Chebii Advocates dated 14/10/2025. I have carefully considered the said submissions.

It is not in dispute that the deceased died intestate in 1997 and that he was survived by two spouses and their children.

The 1st House comprises

1. Selina Polokou - Wife

- (i) Catherine Polokou - Daughter
- (ii) Grace Polokou - Daughter
- (iii) Eric Polokou - Son
- (iv) Philip Polokou - Son
- (v) Lilian Polokou - Daughter
- (vi) Tecla Polokou - Daughter

- (vii) Fredrick K. Polokou - Son
- (viii) Pamela Polokou - Daughter
- (ix) Antony Polokou - Son

2. Rael Polokou - 2nd wife.

- (i) Augustine P. Polokou - Son
- (ii) Hellen Polokou - Daughter
- (iii) Elizabeth Cherotich - Daughter
- (iv) Sabina Cherop Anamile - Daughter
- (v) Musa P. Anamile - Son
- (vi) Emmanuel Maddy Polokou - Son
- (vii) Evelyne Polokou - Daughter

It is also evident from the evidence placed before the court that the deceased's estate comprises the following properties;

- (1) Land title West Pokot/Siyoi A/107
- (2) Commercial Plot at Bendera within Kapenguria.
- (3) Pension and retirement benefits
- (4) Payment from Kenya Electricity Transmission Company
(KETRACO)

The deceased having been a polygamous man, with two houses, the applicable provisions of law on distribution of his estate is section 40(1) of the Laws of Succession Act.

Section 40 (1) provides for distribution of the Estate of a polygamous person as follows;

“40(1) where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.
Scolastica Ndululu Suva -vs- Agnes Nthenya Suva (2019) KECA

Courts have pronounced themselves on the application of section 40(1) of the Act as an exercise of the courts discretion which has to be exercised judiciously.

In **Mary Rono -V- Jane Rono & Another**, Waki JA stated that

“court has discretion in ensuring a fair distribution of the deceased’s estate but that discretion must be exercised judiciously on sound legal and factual basis”

In the same case Omollo JA had this to say of the court’s discretion under section 40 of Law of Succession Act.

“My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provisions in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and

generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

(17)- “It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

Guided by the above decision in distributing the deceased's estate, the court has to take into account all the factual circumstances in the case.

The parties are in agreement that the deceased's pension be shared equally between the houses. It shall be so.

As regards the land at Siyoi A/107, it is not disputed that the deceased shared out the land into two portions and settled each wife on their respective sides way back in 1991. Although the applicants claim that it was a temporary measure because of the disputes between the two wives, the Respondents urged that the

subdivision of the land into two was final. The Respondents exhibited two agreements allegedly signed at the time of the distribution of the land. Although the agreement dated 19/1/1991 is illegible, the one dated 24/2/1991 is legible and deals with the sub division of land belonging to the deceased. The names of those present are clear and it is thumb printed as confirmed by DW1 and 3. The author of the agreement is DW2. The said agreement having been annexed by the Respondents, the applicants should have responded to it by way of objection to it but they did not. Having analyzed the evidence of the applicants and the Respondents, I am persuaded to believe and find that the deceased sub divided the land Siyoi A/107 in the presence of elders, relatives and the local administration. A boundary was placed between the two parcels of land. This boundary was created about 1991 and no other action was

taken till the deceased died in 1997. The applicants have not told the court why they want the land to be subjected to survey and sub division again. This court is convinced from the evidence on record that the deceased shared out his land to his two houses during his lifetime. It does not matter whether or not the portions are not exactly the same. The law does not envisage a situation where the portions will be exactly the same. The distribution should be equitable and not necessarily equal. The courts have held that that court should respect a deceased person's wishes in regard to the manner in which his estate was to be distributed. The court will not disturb the manner in which the deceased shared out Siyoi A/107 during his lifetime and that is settled.

As regards the Bendera plot, the Respondents' view is that it should devolve wholly to Selina because Rael and her house have been using other plots in Kamatira and Chepareria. The Respondents did not provide any evidence to support the allegation that the deceased had other property in Chepareria and Kamatira. If there was, it should have been listed as part of the estate. In absence of evidence to prove existence of deceased's properties in Kamatira and Chepareria, this court

will assume that they do not exist. If it is later established that they do exist, then the court can be moved to distribute them. The land in Bendera being commercial plot and only 100 X 100 feet, this court directs that it be shared equally between the two houses. If it cannot be shared, then the same should be valued, and the 1st Respondent compensate the applicants for half the share or the property be valued, the same be sold and shared equally between the two houses. The costs of valuation will be borne equally between the two houses.

The remaining property is the compensation from KETRACO. The respondents told the court that the lines pass through their share

of Siyoi A/107. The lines take up some space of that portion. The applicants did not dispute that fact. Each of the houses has been in possession of their respective portions of Siyoi A/107 since 1991. There is no reason why the applicants should lay a claim over the Respondents side of the property. If for example a trench were dug on the respondent's land, would the applicants agree to share in the loss? I doubt it. The compensation by KETRACO should remain where it has fallen.

In the end the deceased's estate is distributed as follows; -

- 1. Siyoi A/107, to remain as sub divided by the deceased and the boundaries put in place by the deceased to remain in place;**
- 2. Bendera plot to be shared equally between the two houses or be valued and the Respondent compensate the applicants for half the plot or they sell and the proceeds be shared equally between the two houses. Costs of valuation be share equally;**
- 3. The deceased's pension be shared equally between the two houses;**
- 4. The compensation from KETRACO be paid to the Respondents.**

Being a family matter, costs be in the cause.

Dated, signed and delivered at Kapenguria this 5th day of March, 2026.

HON. R. WENDOH

JUDGE.

Judgment read in the presence of

Mr. Teti for Appellant

Ms. Chebet holding brief for Mr. Chebii for Respondent

Juma/Hellen-Court Assistants