

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
FAMILY DIVISION
PROBATE & ADMINISTRATION CAUSE NO. 915 OF 2010

IN THE MATTER OF THE ESTATE OF AUGUSTINE MOCHERE OMBATI
(DECEASED)

BERNADETTE MAGEMBE OMBATI.....OBJECTOR/ADMINISTRATOR

VERSUS

SOROPHINA WAKESHO OMBATI1ST RESPONDENT

LUKE ABUGA IKAMBA 2ND RESPONDENT

ANTONIO NYABOGA OMBATI 3RD RESPONDENT

RULING

1. The matter before this Court pertains to the administration and distribution of the estate of the Deceased, who passed away intestate on 27 July 2009. As is common in the realm of family and succession law, the demise of the patriarch has precipitated a deeply contested dispute regarding the devolution of the estate, pitting the surviving widow against an adult child of the Deceased sired out of wedlock.

2. The Deceased was survived by his widow, Sorophina Wakesho Ombati, the 1st Respondent, and five biological children born of their monogamous marriage: Angela Sabiri Ombati, Luke Abuga Ikamba, Antonio Nyaboga Ombati, Linus Mageka Ombati, and Edel Bochere Ombati. Initially, the

Petition for the Grant of Letters of Administration Intestate listed only the widow and the aforementioned five children as the known beneficiaries of the estate. Consequently, a Grant of Letters of Administration Intestate was issued to the 1st, 2nd, and 3rd Applicants on 5 February 2019.

3. However, the administration of the estate was interrupted when Bernadette Magembe Ombati, the Objector, instituted objection proceedings seeking the rectification of the Grant, introducing herself for the first time to the widow and the other beneficiaries as a biological daughter of the Deceased sired out of wedlock. Recognizing the constitutional imperatives of equality and non-discrimination under Article 27 of The Constitution, the parties amicably compromised the objection application. A consent was recorded and adopted as an order of the Court on 8 October 2019. As a result of this consent, the original Grant was rectified to formally include the Objector as a Co-Administrator, jointly serving with the widow and her two sons, and officially recognizing her as a beneficiary ranking equally with the other children of the Deceased.
4. The estate of the Deceased is singularly modest in its composition, comprising only one known asset: a parcel of land and the residential developments erected thereon, legally described as Title Number Ngong/Ngong/6240. The property measures approximately 0.1 hectares and contains a bungalow which was constructed by the Deceased and his widow, and which continues to serve as the sole matrimonial home and current residence of the surviving spouse.
5. The present proceedings are triggered by a Summons for Confirmation of Grant dated 24 May 2024, filed by the 1st, 2nd, and 3rd Administrators/Respondents. The Objector has vehemently opposed this proposed distribution, filing an Affidavit of Protest dated 17 July 2024,

accompanied by detailed written submissions, demanding the immediate carving out and liquidation of her fractional share.

The Case for the Administrators

6. The Administrators/Respondents, represented by the surviving spouse and two of the Deceased's sons, submit that the surviving spouse is legally and absolutely entitled to a life interest in the net intestate estate, which consists entirely of the Matrimonial Home. They assert that the surviving spouse is a retiree whose sole source of income is her pension. She does not possess the financial capacity to buy out the Objector's demanded share of Kshs. 6,000,000, nor do the other children possess such means. The Administrators argue that forcing the sale of the singular estate property to satisfy the Objector's monetary demand would render the widow completely homeless and destitute. Furthermore, they contend that the Objector has been accorded an equal future share of the property alongside the Deceased's other children, and, therefore, suffers no legal prejudice. They rely on the precedent set in ***Tau Katungi v Margrethe Thorning Katungi & Another eKLR***, emphasizing that the children's rights to access the net intestate estate do not crystallize as long as there is a surviving spouse enjoying a life interest.

The Case for the Objector

7. The Objector, conversely, roots her protest in sections 35(3) and 35(4) of the Law of Succession Act, arguing that the surviving spouse has unreasonably withheld the power of appointment. The Objector deposes that there is a toxic relationship between herself, her stepmother, and her half-siblings, and that they live separately. She argues that the essence of a life interest is to protect minor children, and since all the beneficiaries in this instance are adults capable of fending for themselves, the life interest should be terminated. The Objector further submits that the surviving spouse cannot claim an absolute right to the property as she merely holds it in trust for the

beneficiaries. Consequently, the Objector seeks a court-ordered fresh valuation of the property—which she currently estimates at above Kshs. 35 million—and a mandatory payout of her 1/7th share, translating to Kshs. 6 million within 30 days.

Analysis & Determination

8. Upon an exhaustive examination of the pleadings, this Court isolates the following core issues for determination:
 - a) Whether the statutory life interest of a surviving spouse over a singular matrimonial home can be forcefully terminated or circumvented by an adult beneficiary under the guise of an unreasonably withheld power of appointment pursuant to section 35(3) of the Law of Succession Act.
 - b) Whether the Objector has successfully discharged the evidentiary burden required under section 35(4) of the Act to warrant the immediate appointment and liquidation of her share.
 - c) Whether it is legally tenable and equitable for this Court to order the valuation and forced buyout of the Objector's fractional share from an estate comprising a single, indivisible residential property currently occupied by a retired surviving spouse.
 - d) What constitutes the most lawful, equitable, and legally sound mode of distribution for the Estate of the Deceased.

The Nature and Constitutional Dimensions of a Life Interest

9. The devolution of an intestate estate where the deceased leaves behind a surviving spouse and children is governed primarily by section 35 of the Law of Succession Act. Section 35(1) expressly provides that subject to the provisions of section 40, where an intestate has left one surviving spouse

and a child or children, the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely, and a life interest in the whole residue of the net intestate estate.

10. The concept of a life interest operates as the central pillar of spousal protection within succession law. While not explicitly defined in the definitions section of the Act, its parameters have been exhaustively delineated by our courts. In the highly persuasive and frequently cited case of ***Tau Katungi v Margrethe Thorning Katungi & Another eKLR***, the Court provided a definitive interpretation, noting that a life interest allows the surviving spouse to exclusively enjoy the rights of user over the residue of the net intestate estate during their lifetime. The legal effect of this provision is profound: the children of the deceased are legally precluded from accessing the net intestate estate as long as the surviving spouse is alive and the life interest remains intact. The children's rights to absolute ownership merely crystallize upon the legal determination of that life interest.
11. The legislative intent behind section 35(1) is fundamentally protective. As observed by the Court in ***Mulungye v Kisangi (Family Appeal E004 of 2021) [2025] KEHC 9430 (KLR)***, a case with striking similarities to the present dispute, the device of the life interest is explicitly designed to safeguard the position of the surviving spouse from destitution. The Court in ***Mulungye*** astutely noted that if the property were to pass directly to the children in cases where there is a surviving spouse, the spouse would be highly vulnerable to eviction and poverty, particularly where the surviving spouse was wholly dependent on the departed spouse or where the estate consists of a single asset such as a matrimonial home. Therefore, the life interest acts as a statutory shield, granting the widow an exclusive right of user while holding the ultimate capital in trust for the children as remainder.

12. This protection is not merely statutory; it has acquired profound constitutional and human rights dimensions. In recent years, Kenyan jurisprudence has progressively fortified the rights of widows. In the landmark constitutional petition of ***Ripples International v The Attorney General & Others (Constitutional Petition No. E017 of 2021)***, the Court declared the proviso to section 35(1)(b) of the Act—which previously stripped a widow of her life interest upon remarriage—unconstitutional for being discriminatory against women. The Court affirmed that widows have an entrenched entitlement to the continued enjoyment of the deceased spouse's property, emphasizing the constitutional guarantees of equality under Article 45(3) and non-discrimination under Article 27 of The Constitution.
13. Furthermore, the Supreme Court of Kenya, while addressing matrimonial property in ***Joseph Ombogi Ogentoto v Martha Bosibori***, reiterated the sanctity of the matrimonial home and the recognition of non-monetary contributions by spouses to the acquisition and maintenance of family property. To order the forced sale of a singular matrimonial home to satisfy an adult child's demand for an immediate cash inheritance effectively bypasses both the letter of the Law of Succession Act and the spirit of The Constitution, treating a grieving widow as a mere temporary occupant of her own home.
14. The Objector, through her legal counsel, has heavily relied on a selection of authorities to bolster the argument that the life interest in this case should be terminated and the property distributed immediately. A meticulous review of these authorities by this Court reveals substantial factual and legal distinctions that render them entirely inapplicable to the Objector's cause.
15. The Objector cites the decision of Musyoka J. in ***In re Estate of Jolly Jimmy Githeiya eKLR*** to argue that a toxic relationship among beneficiaries justifies the immediate distribution of an estate and the termination of a life interest. A

careful reading of **Githeiya** demonstrates a fatal flaw in the Objector's reliance. In **Githeiya**, it was the surviving spouse herself (the administrator) who voluntarily applied to the Court to terminate her own life interest and distribute the property immediately to her children, citing their hostility as the reason she wished to divest herself of the property and achieve peace. The Court merely facilitated her voluntary exercise of the power of appointment under section 35(2). This case does not establish a precedent allowing a hostile child to forcefully strip a widow of her life interest against her will. On the contrary, Musyoka J. explicitly affirmed that the exercise of the power of appointment remains entirely at the discretion of the life interest holder.

16. The Objector also relies on **Bethuel Kimiti Gathage v Wangechi Gachingiri & 2 Others eKLR**, asserting that the Court ordered equal distribution amongst the spouse and children, thereby bypassing the life interest. However, the factual underpinning of **Gathage** involved an estate where the original administrator had died, and the Court was overseeing the final distribution to both the widow and the children to correct previous unlawful omissions of certain beneficiaries. The Court still acknowledged the widow's life interest in her portion. More importantly, the estate comprised 3.24 hectares (approximately 8 acres) of land, which was sufficiently large to allow for physical subdivision among all heirs (allocating 1.14 acres to each). It did not involve the forced liquidation of a 0.1-hectare plot containing a single, indivisible matrimonial home.
17. Further reliance is placed by the Objector on **In re Estate of the Late Jane Kagure King'ori KEHC 4512 (KLR)**, where the Court ordered the sale of a small parcel of land and the sharing of proceeds because the children were adults capable of fending for themselves. Once again, the Objector fundamentally misapprehends the procedural posture of the case. In **King'ori**, it was the widower (the holder of the life interest) who approached the Court seeking permission to sell the property and distribute the proceeds,

as he no longer wished to hold it in trust for his hostile adult children who were fighting him. The children actually opposed the sale, attempting to bar their father from dealing with the property. The Court explicitly noted that "*Life interest is not a matter of choice by the surviving spouse; it is an imposition by the law... to safeguard both the children and the surviving spouse*". The Court allowed the widower to voluntarily waive his life interest and liquidate the estate because it was his right to do so under section 37 of the Act. The case firmly supports the protection of the life interest holder's discretion and categorically does not empower a child to unilaterally demand the liquidation of the estate against the surviving spouse's wishes.

18. To provide a complete and balanced jurisprudential analysis, the Court has considered authorities that directly address the forced termination of a life interest by a dissenting beneficiary—authorities which the parties failed to bring to the Court's attention.
19. In ***Mulungye v Kisangi (Family Appeal E004 of 2021) KEHC 9430 (KLR)***, an adult daughter sued her mother (the widow) under section 35(3), demanding her share of the estate and claiming that the widow unreasonably withheld the power of appointment by allegedly favouring the male siblings in the distribution of rental income. The Court unequivocally dismissed the appeal, holding that the widow possessed an absolute right to the life interest and the exclusive enjoyment of the income generated from it until her death or remarriage. The Court reiterated that the appellant failed to prove that the widow unreasonably withheld the power of appointment, noting that a surviving spouse has a fiduciary duty but also an exclusive right of user that cannot be truncated simply because an adult child faces financial difficulties.
20. Similarly, in ***In re Estate of Doris Wanjiku Johro Mwigaruri eKLR***, an adult daughter protested the distribution of a 20.5-acre land parcel, demanding an immediate absolute share of 4.5 acres rather than waiting for the

determination of the surviving widower's life interest. The Court dismissed the protest as vexatious and lacking in good faith, reinforcing that the surviving spouse's life interest under section 35 takes absolute precedence, and the children's rights remain contingent remainders until the life interest determines.

21. The only circumstances under which courts have aggressively intervened under section 35(3) to order an immediate payout to a child involve highly liquid assets (such as cash in bank accounts or shares) rather than immovable matrimonial property. For instance, in *In re Estate of Rosemary Mukwanjeru Kiria eKLR*, the Court ordered a death gratuity of Kshs. 612,427/= to be paid directly to a destitute student daughter rather than the surviving husband, utilizing the section 35(4) factors regarding the daughter's acute educational needs and lack of parental support. However, the jurisprudential distinction between dividing liquid cash in a bank account and ordering the forced sale and eviction of a widow from her residential home is vast, profound, and legally determinative.

The Power of Appointment and the Burden of Unreasonable Withholding

22. While section 35(1) establishes the protective life interest, section 35(2) grants the surviving spouse a discretionary power of appointment. This power enables the holder of the life interest to voluntarily distribute all or part of the capital of the net intestate estate by way of an immediate gift to the surviving children during the spouse's lifetime. It is a facilitative mechanism intended to allow a parent to advance children in life—such as allocating a portion of a large agricultural tract for a child to build a house—without requiring the legal determination of the entire life interest.
23. Section 35(3) provides a statutory remedy for a child who feels unduly prejudiced by the surviving spouse's inaction. It stipulates that where a child considers that the power of appointment under subsection (2) has been

unreasonably exercised or withheld, the child may apply to the Court for the appointment of their share.

24. However, the invocation of section 35(3) does not grant an automatic right to an immediate inheritance. The burden of proof rests squarely on the applicant to demonstrate, on a balance of probabilities, that the surviving spouse's refusal to exercise the power of appointment is unreasonable. The term "unreasonably withheld" implies a standard of objective unreasonableness, evaluated against the specific factual matrix of the estate. It is not sufficient for a child to simply desire their inheritance immediately; they must prove that the widow's refusal to distribute the assets defies logic, equity, and the practical realities of the estate.
25. The Objector's application is fundamentally anchored in the premise that the surviving spouse has unreasonably withheld her power of appointment. To adjudicate this premise, the Court is statutorily commanded to subject the facts of this case to the rigorous, multi-pronged test outlined in section 35(4) of the Act.
26. First, regarding the nature of the estate, the same is exceedingly small in scope, comprising a single asset: Ngong/Ngong/6240, measuring a mere 0.1 hectares, which contains a bungalow. The property is indivisible. It is physically and legally impossible to carve out a 1/7th physical share of a single residential house without destroying the utility of the whole. The nature of the property strongly militates against immediate fractional distribution.
27. Secondly, the surviving spouse has sworn that she is a retiree whose only income is her modest pension. The Estate property is her only home; she has no other residence. If the property is sold, she will be rendered homeless and destitute in her twilight years. Conversely, the Objector is an adult. While

the Objector demands Kshs. 6 million, she has entirely failed to adduce any documentary evidence of exceptional financial destitution, medical necessity, or disability that would elevate her monetary need above the widow's basic human need for shelter. The balance of needs overwhelmingly favours the preservation of the life interest.

28. There is no evidence on record regarding advancements made to either the Objector or the surviving spouse by the Deceased during his lifetime.
29. The Objector's submissions concede the existence of a toxic relationship between herself and the widow. The widow characterizes the Objector's conduct as callous, disrespectful, and unnecessarily combative. The Act does not reward hostility by expediting inheritance. A beneficiary cannot manufacture a toxic environment and then cite that very toxicity as equitable grounds to dismantle a statutory life interest.
30. There are five other biological children of the Deceased. All five have formally consented to the mode of distribution proposed by the Administrators, wherein the widow enjoys a life interest and the property is shared equally upon her demise. It is a profound principle of equity that the demands of one dissenting beneficiary cannot be allowed to prejudice the harmonious settlement agreed upon by the overwhelming majority of the heirs.
31. Finally, the surviving spouse's reason for withholding the power of appointment is singular, compelling, and unassailable: the estate consists of only one house, which is her matrimonial home. She cannot exercise the power of appointment by carving out the Objector's share without liquidating the asset and rendering herself homeless.

32. Based on the exhaustive evaluation of the Section 35(4) criteria, it is the unequivocal finding of this Court that the surviving spouse has not unreasonably withheld the power of appointment. Her refusal to liquidate her only home is not merely reasonable; it is the exact protective scenario the Act was drafted to address. To hold otherwise would be to weaponize section 35(3) against the very individuals it was designed to protect alongside the children.

The Demand for Valuation and Buyout

33. The Objector has prayed for an alternative order compelling a fresh valuation of the property and mandating a buyout of her 1/7th share within 30 days, proposing a figure of Kshs. 6 million based on her own estimated property value of Kshs. 35 million.
34. The legal mechanism of a buyout in succession and co-ownership disputes is well-established. As seen in cases such as ***Edwin Kariuki Ngotho v Michael Koirugo Ngotho & 2 Others [2017] eKLR***, a buyout allows one beneficiary or co-owner to purchase the fractional interest of another to preserve the integrity of the property and prevent forced partition or sale.
35. However, a buyout is fundamentally predicated on the existence of liquidity and mutual agreement, or the realistic capacity of the estate to absorb the cost. In the instant case, the surviving spouse is a pensioner with no independent means to raise Kshs. 6 million. The other co-administrators and siblings have not indicated a capacity or willingness to finance the Objector's buyout out of their own pockets. Therefore, ordering a buyout in these specific circumstances is functionally identical to ordering the forced public sale of the property, as the widow would inevitably default on the payment, triggering execution proceedings against the matrimonial home.

36. Furthermore, the Objector's valuation of Kshs. 35 million is entirely speculative and lacks evidentiary foundation. No professional valuation report by a registered valuer has been tendered to the Court to substantiate this figure. The Objector cannot arbitrarily affix a premium to an undivided fractional share of a property that is currently encumbered by a life interest. Even if a formal valuation were conducted, the legal impediment remains absolute: the widow's life interest acts as a statutory bar to the forced liquidation of the underlying capital asset.
37. The Objector's rights are not extinguished by the life interest; they are merely deferred. The Objector's fractional entitlement (an equal 1/6th share alongside the Deceased's other five children, dividing the remainder after the widow's portion is accounted for) is structurally secure and will vest in possession upon the determination of the widow's life interest.

The Sanctity of the Intestate Succession Regime and the Trust Concept

38. The analysis of the submissions reveals a fundamental misconception by the Objector regarding the nature of trust in succession law. The Objector posits that because the surviving spouse holds the estate in trust, she cannot claim an absolute right to the property and must, therefore, distribute it upon demand.
39. While it is legally accurate that a surviving spouse holding a life interest acts as a trustee for the ultimate beneficiaries (the children), a life interest trust is unique under section 37 and section 84 of the Act. As articulated in ***In re Estate of Doris Wanjiku Johro Mwigaruri [2015] eKLR***, the trust operates restrictively to prevent the surviving spouse from selling, wasting, or unilaterally gifting the capital asset to third parties, thereby preserving it for the children. However, the trustee (the widow) is simultaneously the sole principal beneficiary of the usufruct (the right of use, occupation, and enjoyment) during her lifetime. The children are remaindermen. The fiduciary

duty of the widow is to preserve the *corpus* of the estate (the house), not to dismember it to provide liquid cash to the remaindermen prematurely. Any attempt by an administrator to unilaterally lease, sell, or liquidate estate property without the consent of all beneficiaries or the Court constitutes unlawful intermeddling, an offense under section 45 of the Act, as affirmed in ***In re Estate of Erastus Njoroge Gichuhi [2017 eKLR]***. The widow is, therefore, legally bound to preserve the property, not to sell it to pay off the Objector.

40. The Objector's status as a child born out of wedlock ensures her protection under The Constitution and the Law of Succession Act, granting her an equal ranking with the children born within the marriage. The Administrators have rightfully recognized this by amending the Grant to include her as an Administrator and a beneficiary. Equality, however, guarantees an equal share of the ultimate distribution; it does not grant the Objector elevated or accelerated rights to bypass the statutory protections afforded to the surviving spouse. The Objector cannot demand better terms of inheritance than those applicable to the Deceased's marital children, all of whom have accepted that they must await the determination of the life interest. Furthermore, as demonstrated in ***In re Estate of Mary Njoki Gitau [2020] eKLR***, consents entered into by beneficiaries—such as the 8 October 2019 consent which the Objector signed to join the administration on equal footing—create binding legal obligations from which a party cannot capriciously resile simply because they now desire immediate cash.
41. The administration of justice in succession disputes requires a delicate, often painful, equilibrium between the rights of the surviving spouse to live in dignity and the rights of the descendants to their lawful inheritance. The Law of Succession Act successfully navigates this inherent tension through the mechanism of the life interest.

42. The mode of distribution proposed by the Respondents aligns flawlessly with the strictures of the Act. It recognizes the surviving spouse's life interest while securely charting the future devolution of the estate to all legitimate beneficiaries, including the Objector, in equal fractional shares.
43. Based on the above, the Court makes the following determinations and orders:
- a) The Objector's Affidavit of Protest dated 17 July 2024 is hereby dismissed.
 - b) The Summons for Confirmation of Grant dated 24 May 2024, is hereby allowed. The Grant of Letters of Administration Intestate issued on 5 February 2019, and rectified on 8 October 2019, is confirmed.
 - c) The Estate Property, namely Title Number Ngong/Ngong/6240, shall be distributed precisely in accordance with section 35(1) of the Law of Succession Act.
 - d) A Life Interest over the entirety of the Estate Property is hereby granted to the surviving spouse, SOROPHINA WAKESHO OMBATI. The surviving spouse shall hold the property in trust for herself and the surviving children. She shall enjoy exclusive rights of use and occupation during her lifetime. She is strictly restrained from selling, transferring, alienating, or charging the property without the express written consent of all adult beneficiaries or an Order of this Court, pursuant to section 37 of the Law of Succession Act.
 - e) Upon the legal determination of the life interest, the Estate Property shall devolve absolutely and in equal shares to the Deceased's six

surviving children: Angela Sabiri Ombati, Luke Abuga Ikamba, Antonio Nyaboga Ombati, Linus Mageka Ombati, Edel Bochere Ombati, and Bernadette Magembe Ombati.

- f) Each party shall bear their own costs of these proceedings.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF MARCH 2026

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

for the Objector: Mr Ojienda
for the Respondents: Ms Anyango h/b Nancy Waweru
Court Assistant: Lucy Mwangi s