



REPUBLIC OF KENYA



**In re Estate of Agiya (Deceased) (Succession Cause 338 of 2005)  
[2026] KEHC 3985 (KLR) (25 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3985 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 338 OF 2005**

**A MABEYA, J**

**MARCH 25, 2026**

**IN THE MATTER OF THE ESTATE OF ALEX MBOK AGIYA - DECEASED**

**AND**

**IN THE MATTER OF AN APPLICATION FOR CONFIRMATION  
OF GRANT BY CONSOLATA NGODE MBOK - PETITIONER**

**AND**

**IN THE MATTER OF A PROTEST TO THE MODE OF  
DISTRIBUTION BY JOSEPH OTIENO MBOK - PROTESTOR**

**RULING**

1. Alex Mbok Agiya (the deceased), passed away on 25/6/1988. He was a polygamous man, with two wives, Justina Adong Mbok (now deceased) and Consolata Ngode Mbok. At the time of applying for succession, the following were disclosed as the deceased's beneficiaries: -

1<sup>st</sup> House

- i. Justina Adong Mbok (Widow – now deceased)
- ii. Melda Anyango Mbok – Daughter
- iii. Joseph Otieno Mbok – Son

2<sup>nd</sup> House

- i. Consolata Ngode Mbok (Widow)
- ii. Emelda Atieno Otieno – Daughter
- iii. George Odhiambo Mbok – Son
- iv. Peter Kennedy Mbok – Son



- v. Philigence Mwalo Mbok – Daughter
  - vi. Albert Olivan Debralian Mbok – Son
  - vii. John Mbok – Son
  - viii. Alexander Mbok – Son
  - ix. Agnes Akoth Mbok – Daughter
  - x. Caroline Adhiambo Mbok - Daughter
2. The deceased's estate consisted of 2 assets being Land Parcel No. South Nyakach/Diang'a East/1489 and Plot No. 341 in Ngei Estate Nairobi.
  3. On the 17/7/2025, Grant of Letters of Administration Intestate were issued to Consolata Ngode Mbok and Joseph Otieno Mbok. Vide an application dated 2/10/2025, the 1<sup>st</sup> administrator sought the confirmation of the Grant. It was her case that she was the deceased's second widow having gotten married to him in 1972 under Luo Customary Law.
  4. She proposed the distribution of the deceased's estate with Land Parcel No. South Nyakach/Diang'a East/1489 being divided amongst the two households with the 1<sup>st</sup> household getting 0.4HA and the 2<sup>nd</sup> household getting 1.6HA. That Plot No. 341 Ngei Estate Nairobi be divided with the 1<sup>st</sup> House getting 2 Units and the 2<sup>nd</sup> Household getting 6 Units.
  5. The application was opposed vide an application (Protest) dated 27/9/2025 by the 2<sup>nd</sup> administrator Joseph Otieno Mbok. In his list of beneficiaries, he omitted two beneficiaries included by the 1<sup>st</sup> administrator in the 2<sup>nd</sup> household, to wit, Agnes Akoth Mbok and Caroline Adhiambo Mbok.
  6. He proposed that the Land Parcel No. South Nyakach/Diang'a East/1489 be equally divided between the two households as intended by the deceased and evidenced by the current occupancy while the plot in Nairobi be put up for sale and the proceeds divided equally according to the number of units per house and in respect of any liabilities to land rates and rent.
  7. The matter was disposed of by way viva voce evidence. The Protestor, Joseph Otieno Mbok testified as Pw1. He adopted his affidavits of 27/9/2025 and 13/10/2025, respectively as his evidence in chief. He testified that Agnes Akoth Mbok and Caroline Adhiambo Mbok were not the biological daughters. That in the Nairobi property there were 8 units, 3 put up by himself and his mother and 5 set up by the 2<sup>nd</sup> household. That he wished the property to be sold as it is the source of conflict in the family. That the deceased wished that the plot be shared equally by his widows.
  8. That as regards the homestead, South Nyakach/Diang'a East/1489, the deceased built houses for his 2 wives and that the land is used equally with each house having their portion which is fenced with barbed wire and live fence. That both the deceased and his mother were buried on the land next to his house. That fencing was done in 2002 after the deceased's death.
  9. In cross-examination, Pw1 told the Court that the deceased died on 25/6/1988. That admitted that he had not provided anything to show that the Nyakach property was divided into two halves by the deceased. That the deceased wanted the Nairobi plot to be divided into 2. That he had no evidence to show that his brother Albert was collecting rent from the Nairobi property. That he no longer lived in the Nyakach property as he bought his own land where he built his homestead. He concluded by stating that he was the eldest child of the deceased having been born in 1969 while the youngest, Alex Mbok was born in 1989.



10. Pw2 Melda Auma Mbok testified that the deceased was her father, and that Pw1 was her brother. She adopted her affidavit of protest dated 13/10/2025 as her evidence in chief. It was her testimony that Agnes Akoth Mbok and Caroline Adhiambo Mbok were not biological children of the deceased as they were born long after the demise of the deceased to the petitioner and one Joseph Owade. She supported the averments of Pw1 and his proposed mode of distribution.
11. In cross-examination, she stated that they were only 2 survivors from their household while in the 2<sup>nd</sup> house had 8. That the deceased had sub-divided the land at Nyakach before he died though she had no evidence on the same. That by 1990, succession of the deceased's estate had not commenced.
12. In re-examination, she stated that by the time he died, the land in Nyabondo had been sub-divided as each household was cultivating on its own side of the property. That there was a fence erected in between the property.
13. Pw3 Rose Auma Opollo testified that she was the deceased's sister. She adopted her affidavit sworn on the 13/10/2025. She testified that the Nairobi plot was purchased in 1980 and the deceased constructed 2 semi-permanent structures thereon which were the only structures erected by the time of his demise. That he never informed her how he intended the property to be used.
14. In cross-examination, Pw3 testified that there was no evidence to show that she was the deceased's sister. That she lived in Nairobi from 1963 to 1980. That there was nothing to show that the Nyakach property was sub-divided into two.
15. Consolata Ngode Mboke testified as Rw1. She adopted her affidavits sworn on the 2/10/2025 and 22/10/2025, respectively as her evidence in chief and produced the documents attached thereto as RExh1. It was her testimony that she had 7 children with the deceased and 2 other children after his demise. That she had not included Agnes Akoth and Caroline Adhiambo in the distribution. That the deceased had not divided the Nyakach property prior to his demise and that she suggested that the property be divided in terms of the units.
16. That by the time the deceased died, the Nairobi property had 3 permanent houses constructed thereon and 5 semi-permanent and did not tell them how to divide the same. That the deceased stated that the Nairobi property was his investment and that he wanted to enjoy it with the entire family.
17. In cross-examination, she admitted that Agnes and Caroline were not the deceased's biological children. That the Protestor and his sister did not consent to her mode of distribution but his son Peter Kennedy had signed on their behalf. That the 2<sup>nd</sup> administrator has been collecting rent from the Nairobi property since the deceased's death until 1994 after which she and her co-wife took over till 2007 after which the 2<sup>nd</sup> administrator took over again. That it is a small plot with 8 units.
18. That the deceased built a house each for her and her co-wife at their Nyabondo land with each house using the land behind each of the houses. That there's no path between the houses but a fence. That George, her son, has a house on the land behind her house though she did not know what it meant culturally.
19. She further stated that the 2<sup>nd</sup> administrator had benefitted from the Nairobi property for a long time and as such he should get the Mabati units while she and her children get the permanent units and Mabati unit.
20. I have keenly considered the record, the responses and submissions. The Court is being called upon to determine how the estate of the deceased should be distributed. It is evident from the record that



Agnes Akoth Mbok and Caroline Mbok are not beneficiaries of the deceased's estate having been born after the deceased's death.

21. Consequently, the deceased's beneficiaries are: -

1. 1<sup>st</sup> House
  - i. Melda Anyango Mbok – Daughter
  - ii. Joseph Otieno Mbok – Son
2. 2<sup>nd</sup> House
  - i. Consolata Ngode Mbok (Widow)
  - ii. Emelda Atieno Otieno – Daughter
  - iii. George Odhiambo Mbok – Son
  - iv. Peter Kennedy Mbok – Son
  - v. Philigence Mwalo Mbok – Daughter
  - vi. Albert Olivian Debralian Mbok – Son
  - vii. John Mbok – Son
  - viii. Alexander Mbok – Son

22. The assets of the deceased are not in dispute, they are Land Parcel No. South Nyakach/Diang'a East/1489 and Plot No. 341 in Ngei Estate Nairobi.

23. As regards distribution of the estate, section 40 of the Law Succession Act deals with the distribution of an estate of a polygamous family and provide as follows: -

- a) 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 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.
- b) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."

24. In Re Estate of Michael George Tendwa Said [Deceased] [2020] eKLR, the Court stated that section 40 aforesaid is the applicable law where there is no agreement on distribution of the estate. It was stated that: -

"Any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings"



25. Regarding “equality” in distribution as mentioned in section 40 above, in Stephen Gitonga M’urithi v Faith Ngira Murithi [2015] eKLR, the Court of Appeal observed as follows: -

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles ... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased ...”

26. Further, In Re Estate of John Musambayi Katumanga – [Deceased] [2014] eKLR, Musyoka J held as follows: -

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that, the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35. 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.”

27. In the present case, the parties are not agreeable on the mode of distribution. Taking into account the provisions of the Law, the estate shall be distributed as follows: -

- a. Land Parcel No. South Nyakach/Diang’a East/1489 divided equally in the ratio 2:8 with the 1<sup>st</sup> house getting 2 equal shares and the 2<sup>nd</sup> household getting 8 shares taking into consideration the positioning of the houses built for the 2 households by the deceased.
- b. Plot No. 341 in Ngei Estate Nairobi divided equally in the ratio 2:8 with the 1<sup>st</sup> house getting 2 units one of which is permanent and the 2<sup>nd</sup> house getting 8 units.

alternatively, since the Protestor desired to have the same sold, the same should be valued and the Protestor and his sister be paid the value of their units.

It is hereby so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MARCH, 2026.**

**A. MABEYA, FCI Arb**



**JUDGE**

