



**In re Estate of Okoth (Deceased) (Succession Cause E029 of 2024)
[2026] KEHC 3963 (KLR) (25 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE E029 OF 2024**

A MABEYA, J

MARCH 25, 2026

IN THE MATTER OF THE ESTATE OF SAMSON OTIENO OKOTH - DECEASED

AND

**IN THE MATTER OF AN APPLICATION FOR CONFIRMATION OF
GRANT BY CAROLINE ADHIAMBO MANGICHO - PETITIONER**

**AND IN THE MATTER OF A PROTEST TO THE MODE OF DISTRIBUTION
BY HYLINE AKINYI OYIER & PETER O. OMENO - PROTESTORS**

BETWEEN

CAROLINE ADHIAMBO MANGICHO PETITIONER

AND

HYLINE AKINYI OYIER 1ST PROTESTOR

PETER O OMENO 2ND PROTESTOR

RULING

1. Samson Otieno Okoth (the deceased), passed on 22/1/2022. On the 17/1/2023, Grant of Letters of Administration Intestate were issued to Caroline Adhiambo Mangicho, Hyline Akinyi Oyier and Godfrey Collins Omondi. Vide an application dated 26/6/2025, the Petitioner seeks to have the Grant of Letters of Administration confirmed.
2. It is the Petitioner’s case that she is the deceased’s only lawful widow having procured a Christian marriage with him on the 16/8/2008 and as such he lacked the capacity to contract a subsequent marriage and that they were blessed with 3 children, Mercy Otieno, Rippon Otieno & Avni Anyango. That the deceased also provided for one Shanelle Lyney Atieno, the Petitioner’s niece whose mother passed away in 2007



3. That sometime in 2015, the deceased had an affair with one Hyline Akinyi Oyier (the Protestor) with whom they had one child, Precious Aludo. That at the time the deceased and Hyline started their relationship, Hyline had two children from a previous marriage, Elvis Marcel Oile and Ryan Michael Oyier.
4. That the deceased acquired Land Parcel No. Kisumu/Dago/1226 during the subsistence of their marriage but that she recently discovered that the same was fraudulently transferred to Hyline Akinyi Oyier and as such she proposed that the same be held by the Protestor in trust for Precious Aludo, the minor.
5. The Petitioner therefore proposed the mode of distribution of the deceased's estate as detailed in paragraph 17 of the Supporting Affidavit she swore on the 26/6/2025 to the application.
6. The application was opposed vide an affidavit of protest sworn on the 27/6/2025 by Hyline Akinyi Oyier. It was her contention that the mode of distribution proposed by the Petitioner was an effort to disenfranchise her, the deceased's spouse, their children and the deceased's elderly and sickly parents.
7. It was her case that her and her children were beneficiaries of the deceased whereas one Mr. Ngala and Collins Ochieng were not beneficiaries of the deceased's estate and ought not be allocated anything. That the deceased procured a customary marriage to her at the insistence of his parents and he subsequently built a home for her adjacent to the Petitioner's house at his traditional home.
8. That the alleged debts payable by the deceased's estate to its workers as detailed in the Petitioner's supporting affidavit, were unpayable as the Petitioner had not accounted for proceeds payable to the estate from the date of the deceased's demise to-date.
9. That in accordance with the deceased, they procured a loan to aid in payment for the Petitioner's ailing child and whereas the repayments over the said loan were made from the deceased's company, Ravaco enterprises, the said payments were stopped citing low business.
10. That the deceased's assets were being used to run a limited liability company in which he was not a director/shareholder thus the value of the deceased's assets were depreciating whilst succession has not been finalized. It was her contention that she was ready to undertake a DNA to ascertain the deceased's children. The Protestor similarly annexed a proposed mode of distribution of the deceased's assets.
11. In rejoinder, the Petitioner filed a supplementary affidavit in which she reiterated her claims that the Protestor was not a spouse to the deceased but rather it was their child whom they recognised and thus duly provided for in the schedule of distribution.
12. That Elvis Marcel Oile and Ryan Michael Oyier were already adults and not sired by the deceased and further did not depend on the deceased prior to his death. That Mr. Ngala was a business partner with the deceased with whom they set up Ravaco Enterprises, sharing start-up capital, running the same and acquiring properties together and was thus entitled to benefit from the estate in compensation.
13. That at the time Ravaco Enterprises was being set-up, the Protestor was not in the picture and she was thus unaware of the history of the business and the assets acquired therein.
14. That the allegations of a loan taken to pay for her son's treatment were unfounded and unsubstantiated as the same were paid up by insurance and further that the alleged loan surpassed the cost of treatment.
15. Peter O. Omeno, the deceased's father and interested party similarly filed an affidavit in protest to the mode proposed by the Petitioner. The affidavit was sworn on the 24/7/2025 and the Interested Party contended that the same was unjust and unfair as it did not take into account his rights.



16. That in addition to what had been allocated to himself by the Petitioner, he wanted to be granted Kshs. 200,000/- in cash from the estate of the deceased.
17. The suit was disposed of by viva voce evidence. The Protestor, Hyline Akinyi Oyier testified as Pw1. She adopted her affidavit of protest dated 27/6/2025 as her evidence in chief and her bundle of documents from page 1 – 16 as PExh1. Further, it was her testimony that she has a home at the deceased's Bondo homestead of the deceased's father (IP1).
18. In cross-examination, she reiterated that the Interested Party was her father in law being the father of the deceased. That proposed that IP1 be given a Tipper and a Premio from the vehicles listed as part of the deceased's estate. That at the time the deceased died, he had two widows. That she was left with 3 children. It was her testimony that she did not agree with the Petitioners mode of distribution.
19. That she had 2 children from her previous marriage to one Crispin Odera Oile, Elvis Marcel Oile (born on the 28/4/2000) and Rayan Michael Oyier (born on 1/6/2003) but that the said marriage was dissolved in court in 2006. That she was the deceased's second wife and they got married in 2010 when he knew him. That the deceased's parents visited her parents' home in 2017 and 2018 to show the deceased's interest in marrying her and to complete traditional marriage rites. That she was aware at the time that the deceased was already married to the Petitioner.
20. That she and the deceased were blessed with 2 children but one died prematurely. That the Petitioner had provided for her surviving child in her proposed mode of distribution by bequeathing her, her own property which was under mortgage. That the said property, Kisumu/Dago/1236, was sold to her by the deceased during his lifetime.
21. She stated that she wanted her 2 children from her previous marriage to benefit from the deceased's estate despite them having a father whom she was not aware if he had any properties. That she had not provided any evidence of the deceased providing for the two children who were already adults.
22. That she took a loan to cater for the treatment of Rippon, the deceased's son. That the said loan was taken before the child was admitted in 2017. She however admitted that, some monies for the child's treatment were paid by AAR Insurance and the said documents show that the payment was done in the 2020s, a period that does not coincide with the dates when she took a loan to cater for the treatment as alleged.
23. That the parties had a cordial meeting at Acacia Hotel Kisumu where they agreed to a partial distribution of the estate. That Mr. John Ngala was apportioned the Konya House, Rav 4 and Tipper while the deceased's father was not apportioned anything and never complained.
24. That Mr. Ngala and one Odinga ran the deceased's business at the time the deceased was ill and even managed to offset some of the deceased's hospital bills and even acquired new tankers. She insisted that Mr. Ngala was not a business associate but just an employee of the deceased. That she was not present when the business started and did not contest the Petitioner's averments that Mr. Ngala contributed to the start of the business.
25. Whilst she admitted that the deceased's estate owed employees of Ravaco Enterprises, she still insisted that she did not know if there were any such dues pending. That there were properties transferred to the deceased in lieu of debts accruing to him. That the deceased was survived by his parents, IPw1 and his mother Wilkista Okoth who were dependent on her and whom she provided for in her proposed mode of distribution.
26. In re-examination, she admitted that she distributed the Busoso properties to herself. That she changed her mind about the properties distributed to Mr. Ngala because an advocate, Moses Omondi, turned



- against her. That she had not seen any contribution by Mr. Ngala to the establishment of Ravaco Enterprises which was a sole proprietorship. That the deceased took care of her other children. That the deceased's parents were not provided for by the Petitioner. That there was no documentation to show the alleged liabilities arising out of payment of Ravaco workers.
27. IPw1 Peter Okoth Omeno testified that he was the deceased's father and that both the Protestor and Petitioner were her daughters in law with homes in her home. He adopted his Further Affidavit in Protest dated 24/7/2025 as his evidence in chief. It was his testimony that he had attended the meeting on distribution of the deceased's estate at Acacia Hotel. That he knew Mr. Ngala as an employee of his son and further that he was told that Mr. Ngala was to be given a Tipper and a lorry which they had shared with the deceased though there was no evidence of the same.
 28. That the deceased had 2 wives, the 1st with 3 children, 2 born with the deceased and 1 she came with while the 2nd had 3 children 1 who was born with the deceased and 2 with whom she had come with from a previous relationship. That the deceased provided for him and his siblings in his lifetime. That he had asked for Kshs. 200,000/-.
 29. In cross-examination, he stated that he had rental properties in Siaya which were not repaired and as such he was not collecting any rent from them. That the deceased used to repair the rental houses. That the deceased was the only one of his children who was helping him. That after the deceased passed on, Pw1 provided for her. He concluded that he wanted to be given the Tipper and 2 small cars, which 2 cars he would sell to service the Tipper.
 30. The Petitioner testified as Rw1. She adopted her affidavits sworn on the 26/6/2025 and 8/10/2025, respectively as her evidence in chief and the produced the documents attached thereto as PExh1. It was her testimony that she was presently taking care of the deceased's business but prior to his death she was a housewife. That she got married to the deceased customarily and had the same solemnized in Church at St. Stephen's Cathedral on the 16/8/2008.
 31. That she came to know of the Protestor in 2016 when she saw her in a funeral of his brother in law's niece. It was her testimony that the Protestor was a girlfriend of the deceased as the deceased could not marry another wife. That the relationship between the deceased and the Protestor begot 2 children, one who died at infancy, but that the Protestor had 2 other children from a previous relationship who were now adults.
 32. That the Premio motor vehicle claimed by the Interested Party was under her use and care. That the loan alleged to have been taken by the Protestor to settle her son's medical bill was not understandable to her as the treatment was payed off by the deceased and AAR thus she was not willing to repay the same.
 33. It was her testimony that John Ngala was a partner to the deceased who contributed Kshs. 200,000/- during the establishment of Ravaco Enterprises. That he managed the business when the deceased was sick for a whole year. That in the meeting held at Acacia Hotel, Mr. Ngala was apportioned motor vehicle registration numbers KAZ 425L, a Toyota Rav 4 which he had used during the lifetime of the deceased and was still in his possession, Tipper KCP 139N and a house near Mambleo. That she lives on properties Kisumu/Kanyakwar "B" 812, 813 & 509 which have been fenced into one. That she did not sign any document nor give spousal consent authorizing the transfer of any property to the Protestor.
 34. That the deceased was providing for the Interested Party who was her father in law. That after the deceased's demise, she together with Mr. Ngala continued providing for him but later the Interested Party told them to stop. That she had provided for the Interested Party and the deceased's mother in



- her mode of distribution. That at the Acacia Hotel meeting, the IP did not dispute the apportionment of the Tipper to Mr. Ngala nor did he request for the Toyota Premio.
35. That the rentals in Bondo and Siaya are sufficient for the Interested Party at the moment and that there was nothing to show that the rental houses were in bad shape. Further, that she was willing to continue supporting him.
 36. That Collins Omondi was the deceased's longtime friend who was well versed with the business. That the Protestor had not objected to his being appointed administrator over the deceased's estate. That she had been using the deceased's properties without a court order and that she had listed all the liabilities of the estate.
 37. That they had incurred debts during the post death period which she had not settled and that she was not aware of any debts she wanted shared. That at the Acacia Hotel meeting, the Ravaco accountant said that there was a loan that the business had paid though there was no evidence presented of the same. She admitted that she had not listed all of the debts owed to the estate or the properties surrendered as securities for the same.
 38. In re-examination, she told the Court that there was no evidence that the deceased paid Rayan's fees during his lifetime and further that the Interested Party could not manage the Tipper at his advanced age.
 39. Rw2, John Ngala testified in support of the mode of distribution as proposed by the Petitioner. He adopted his witness statement dated 8/10/2025 as his evidence in chief. He stated that he knew the deceased in 1995 when they were still working together in an Asian's business. That in 2006 they started Ravaco Enterprises together with the deceased and that he contributed Kshs. 200,000/- to the startup. That he used the Rav 4 and house he was living in during the lifetime of the deceased and that he had lived together with the deceased till he married the Petitioner.
 40. That he knew of the Protestor as the deceased's girlfriend in 2017 with whom they had one child. It was his testimony that the deceased was unwell for a period of 1½ years during which time he was managing the business. It was his testimony that he was aware of debts accrued to the deceased's estate which had been secured by title deeds surrendered to the deceased (being the Busoso properties).
 41. It was his testimony that he was the deceased's partner in business though there was no formal agreement of the same as they were friends and trusted each other. That when the deceased was alive, he provided for his father, the interested party, and that after his demise, both he and the Petitioner provided for him. That all the provisions made for him by the Petitioner were still in the name of the deceased.
 42. In cross-examination, he stated that he had not filed a creditor's claim against the deceased's estate. That they had agreed to run the business together with the deceased and neither of them had anticipated queries over the business being dragged to court. Further, that the meeting held at the Acacia Hotel was attended by both the Protestor, Petitioner, Interested Party, their advocates as well as himself.
 43. I have keenly considered the record, the responses and submissions. This Court is being called upon to determine the distribution of the deceased's estate. There are two proposals on record for consideration. Before this can be done, it is noteworthy that a few issues arise.
 44. Firstly, the status of one Godfrey Collins Omondi has been challenged by the Protestor as an administrator of the estate given that he has no relationship with the deceased. On her part, the Petitioner testified that Collins Omondi was the deceased's longtime friend who was well versed with the deceased's business.



45. To my mind this point is moot, if at all the Protestor is unsatisfied with the position held by the aforementioned Mr. Omondi, the Law of Succession Act provides a clear procedure on revocation/annulment of grants under Section 76. There is no application before this Court for revocation of grant. Consequently, this challenge is without merit.
46. The first issue to determine is who the beneficiaries of the estate of the deceased are.
47. It has been argued by the Protestor that she was a dependent of the deceased, being the deceased's spouse and as such she ought to be provided for from the deceased's estate independently. That the deceased provided not only for her but her three children and as such they ought to be provided for as beneficiaries.
48. The Petitioner on her part contended that the deceased was not married to the Protestor as he lacked capacity to do so having conducted a civil marriage with her. That the Protestor was just a girlfriend to the deceased and having had a child with the deceased, only the child could be provided as a beneficiary of the deceased as the Protestor had failed to prove that the deceased provided for her two other children who were adults and not biologically his.
49. There is no doubt that a man who has contracted statutory marriage does not have capacity to contract a second marriage before the first civil marriage is dissolved. Apart from the Protestor saying that the deceased was married to her, no evidence was adduced to confirm that the marriage between the Petitioner and the deceased was dissolved. The deceased did not therefore have capacity to contract a second marriage with the Protestor.
50. However, the evidence on record shows that the Protestor lived with the deceased for a long period of time. That they were blessed with two issues, one who unfortunately passed on at infancy and that friends and the deceased's family perceived the Protestor as the deceased's second wife. The deceased went ahead and constructed a house (home) in the compound of his Father, the interested party in Siaya. There was a house for the Protestor as was for the Petitioner. His Father, IPw1 appeared at the trial and confirmed that according to him, the deceased had married the Protestor as a second wife.
51. The Court has already observed that under the Marriage Act, the deceased did not have capacity to contract a second marriage before dissolving the statutory marriage. That and even if the Protestor's marriage was conducted under the customary law as stated by IPw1, the same was a nullity as there existed a civil marriage between the deceased and the Petitioner which has to-date not been dissolved under the Marriage Act.
52. There is no doubt that the deceased and the Protestor lived together for long and presented themselves to their relatives as husband and wife; they were known as husband and wife by general repute.
53. Section 3(5) of the Law of Succession Act Cap 160 Laws of Kenya provide as follows: -
- “(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”
54. From the foregoing, the Succession Act under section 3(5) comes in to protect women or children in unions contracted with a man after statutory marriage. The woman in such a union who is able to prove marriage or an arrangement that may result as such, is considered as a wife for purposes of succession.



55. In *Irene Njeri Macharia v Margaret Wairimu Njomo* and another Nairobi Court of Appeal Number 139 of 1994, the Court of Appeal held that section 3(5) of the *Law of Succession Act* was meant to protect women who marry men under customary law, who are already married to or who subsequently marry another woman under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding that by virtue of section 37 of the *Marriage Act*, the man had no capacity to marry such a woman.
56. Further, the Court stated that the said section 3(5) of the *Law of Succession Act* was introduced in 1981 by the Statute Law (Repeals & Miscellaneous Amendment Act, No. 10 of 1981 and the purpose of the amendment was to mitigate instances that did not recognize as beneficiary, widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage.
57. The Court limited recognition of such marriage under that section for succession purposes only. In this regard, such a woman is recognized as a wife for the purposes of the Act, and in particular sections 29 and 40 thereof and her children are considered children within the meaning of the *Law of Succession Act*.
58. In view of the foregoing, to the extent that there is a marriage arising from presumption of marriage, the prior monogamous marriage of the deceased to the Petitioner would not preclude the Protestor from being recognized as a beneficiary of the deceased. In my view therefore, the Protestor is a wife for the purposes of succession by virtue of section 3(5) of the Law of Succession and therefore a beneficiary of the deceased. When enacting the provisions of the *Marriage Act*, the Legislature knew or was aware of the provisions of section 3(5) of the *Law of Succession Act*. Yet it did not use the words ‘Notwithstanding the provisions of the *Law of Succession Act* or any other written law’ in the *Marriage Act*.
59. In this regard, for the purposes of Succession, the Protestor is a dependent under section 29 and a unit under section 40 of the *Law of Succession Act*.
60. What then is the status of the children of the union between the deceased and the Protestor? The Protestor contended that the deceased, in addition to providing for his biological child, P.A., also provided for her 2 other children who were adults and with whom she had come into the relationship from her previous marriage. This was disputed by the Petitioner who asserted that the deceased did not provide for the said two adult children prior to his death.
61. Automatically, the minor P.A., whom the deceased had with the Protestor is a direct beneficiary of the deceased by virtual of section 3(5) aforesaid. What about Elvis Marcel Oile and Ryan Michael Oyier?
62. Section 29(a) of the *Law of Succession Act* is relevant. It defines a ‘dependant’ to mean; -
- “For the purposes of this Part, “dependant” means—
- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;”
63. In *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* (2016) eKLR, the court observed that: -
- “A dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”



64. It is my view that in order for one to be considered a dependent under this section, there must be prove of such dependence. The section applies to persons who are not ‘children of the deceased’. This is so because children of deceased are automatic beneficiaries. In this case, the two adult children of the Protestor were not children of the deceased and there was need to prove dependency.
65. Having considered the record in its totality, there was no evidence that was produced to by the Protestor or the said two children to show that the deceased provided for the 2 boys prior to his death. Allegations that he used to pay for their school fees were not backed by any supporting documents of whatsoever kind.
66. Consequently, the Protestor failed to prove dependency of the 2 boys on the deceased and they are thus excluded as beneficiaries of the deceased.
67. There’s no doubt about the status of the Petitioner and the deceased including Shanelle Lyney Atieno whom the deceased and the Petitioner took in following the death of her mother.
68. What about Mr. John Ngala? The Protestor contended that Mr. Ngala was a partner to the deceased with whom they set up Ravaco Enterprises together and who managed the said business during the deceased’s ailment. That in the course of Mr. Ngala’s running of the business in conjunction with the deceased, he had taken possession of a Toyota Rav 4 and was using one of the houses registered in the name of the deceased as his home.
69. I have considered the evidence on record. Mr Ngala admitted that he had not lodged any claim against as a creditor to the estate. Where on has a claim against an estate of a deceased person, if he is not a beneficiary so recognized under the Law of Succession Act, all that he can do not to claim as a beneficiary but as a creditor to the estate and so prove his claim.
70. In the present case, Mr. Ngala did not make or lodge any claim as a creditor to the estate. He did not point any section of the law from sections 35 to 41 of the Law of Succession Act that would permit him to be included as a beneficiary to the estate of the deceased. His claim is rejected.
71. As regards the Interested Party, all parties agreed that he was a dependent of the deceased prior to his death, but the evidence also reveals that the deceased’s mother, Wilkista Okoth, was similarly a dependent on the deceased.
72. From the foregoing, it is evident that the deceased’s proven beneficiaries are as follows: -
 - i. Caroline Mangicho
 - ii. Mercy Otieno
 - iii. Rippon Otieno
 - iv. Avni Anyango
 - v. Shanelle Lyney Atieno
 - vi. Hyline Akinyi Oyier
 - vii. Precious AludoDependents
 - i. Peter Okoth Omeno
 - ii. Wilkista Okoth



73. The parties herein do not contend the list of assets as set out in the Petitioner’s proposed mode of distribution as set out in paragraph 17 of the Petitioner’s supporting affidavit sworn on the 26/6/2025.
74. However, another issue arising from the record presented before this Court is that the deceased’s estate has incurred some debts after his passing. Similarly, the evidence of the Petitioner and Mr. Ngala was that there are also outstanding debts owed to the estate of the deceased which have been secured by title deeds deposited with the deceased prior to his death and that these debts though due have not been collected. In short, that there are debts incurring to and from the estate that have not been ascertained by the administrators. That is a misconduct on the part of the administrators. It is expected that by the time the administrators apply for confirmation, all debts should have been identified and either settled or provided for in the proposed distribution.
75. On her part, the Protestor contends that she took out a loan to pay for the treatment of the Petitioner’s child, Rippon Otieno. This allegation remained unproven. Even if there was such a loan, that will not be subjected to the estate of the deceased. It will be a debt between her and the beneficiary of the loan proceeds, if any.
76. In any event, that claim was unfounded. Firstly, the said loan was taken a few years before the said child became unwell and further, there was evidence by the Petitioner that the treatment of the said child was paid for by her insurance. Secondly, the amount obtained as loan by the Protestor far exceeds the cost of the alleged treatment.
77. Section 40 of the Law Succession Act deals with the distribution of the 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.”
78. In Re Estate of Michael George Tendwa Said [Deceased] [2020] eKLR, the Court stated that the said section 40 is the applicable law where there is no agreement on distribution of the estate. It was stated as follows: -
- “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”
79. Regarding “equality” in distribution as mentioned in section 40, in Stephen Gitonga M’murithi 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...”

80. Additionally, in *In Re Estate of John Musambayi Katumanga – [Deceased]* [2014] eKLR, Musyoka J stated 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.”

81. The primary role of the Family Court in succession matters is twofold: first, to identify the lawful beneficiaries according to the provisions of the *Law of Succession Act*, and second, to determine the free estate available for distribution so that it may be shared equally among those beneficiaries in accordance with the law.

82. More recently, discussing the provision section 40, the Court of Appeal in the case of *In re Estate of Eliud Wanyama Saratuki (deceased)* (2021) eKLR, stated: -

“This provision has been subjected to judicial interpretation in a number of instances. In *Mary Ronoh v Jane Ronoh & another*, [2005] eKLR, for example, this court firmly reiterated the position that, in distributing the estate under that section, the judge has a discretion to take into account or consider the number of children in each house; and that the section does not set down any firm rule that, in the distribution of the estate, there must be equality between houses. The court explained that: -

“If Parliament had intended that there 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 provision in the act that each child must receive the same or equal portion. That would clearly work injustice ... I am satisfied that the act does not provide for that kind of equality.” (per Omolo, JA).



83. In *Kyoya Ndewa v Patrick Mulyungi Ndewa & another* (2022) eKLR, it was held as follows: -

“In *Scholastic Ndululu Sura v Agnes Nthenya Sura* [2019] eKLR, the Court of Appeal weighed into that position when it held as follows: -

“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.”

84. It is my view that the mode of distribution proposed by the Petitioner is much more equitable than that proposed by the Protestor. Indeed, in her own admission, the Protestor testified that this was the mode agreed upon during the meeting held by the parties at Acacia Hotel and that she only reneged on it because one Moses Omondi Advocate turned against her.

85. I am inclined to adopt the mode of distribution proposed by the Petitioner however, despite the fact that a majority of the deceased’s assets have been identified, there are debts owed to the estate that are yet to be materialized and further there are liabilities pending settlement. The Petitioner testified that in addition to the liabilities listed in her mode of distribution, the Ravaco Enterprises accountant said that there was a loan that the business was paying and further that she has since incurred debts on behalf of the estate since his passing though she did not quantify the same.

86. As earlier stated, this court can only distribute the deceased’s estate and further that the primary duty of a Family Court is to ensure the distribution of a deceased’s estate to his beneficiaries. Rule 73 of the Probate and Administration Rules grant this Court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

87. The Court has already identified who the beneficiaries are as well as the dependents. The free estate of the deceased has not been identified. In this regard, the Court directs the administrators to file in Court within 45 days of the date hereof, the free assets of the estate and the value of the said assets and the debts that are due to and from the estate, taking into consideration, the Busoso properties. Upon such filing, the Court will then distribute the estate accordingly.

88. There will be no order as to costs.

It is hereby so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2026.

A. MABEYA, FCI Arb

JUDGE

