IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 211 OF 2012

BETWEEN

ELIZABETH CHEPKOECH SALAT ..... APPELLANT

VERSUS

JOSEPHINE CHESANG CHEPKWONY SALAT..... RESPONDENT

*(An Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**L. Kimaru, J**.) delivered on 4th February, 2011*

in

Succession Cause No. 299 of 1992

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Consolidated with

H.C. Misc. Cause No. 44 of 2005 (O.S)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the judgment of the High court (**Kimaru, J.)** whereby the Grant of Letters of Administration to the estate of **Isaac Kipkorir Arap Salat** (**deceased**) was confirmed and the estate distributed to the beneficiaries. The appellant being dissatisfied with distribution of the estate filed a notice of appeal dated 17th February 2011 signifying an intention to appeal against the whole judgment.

The deceased died on 29th November 1987 leaving two spouses, **Elizabeth Chepkoech Salat** (**Elizabeth**) – the appellant who has nine children and **Josephine Chesang Chepkwony Salat** (**Josephine)** - the respondent who has four children

At the time of his death, the deceased was a Member of Parliament for Bomet and an Assistant Minister of State in the Office of the President. Until the impugned decision of the High Court his estate had not

been distributed to the beneficiaries for over 22 years, owing partly to the disputes on accounts and reimbursement of school fees, all initiated by Josephine. Each spouse accuses the other for the delay in the distribution of the estate.

[**2**] Sometime in 1992, the two spouses and one **Daniel Kipkirui Salat** – a brother of the deceased filed a petition for grant of letters of administration intestate in respect of the estate. On 3rd June 1992, a grant of letters of administration intestate was issued to the three petitioners. Subsequently, upon the death of Daniel Kipkurui Salat, his name was deleted from the grant on 11th June, 1993.

[**3**] By an originating summons dated 3rd January 2009 filed as High Court Application No. 44 of 2005 which was later consolidated with the succession cause, Josephine sought three main orders against Elizabeth, namely, an order that Elizabeth do give an account of monies generated and collected from the assets in her possession and control, a declaration that any monies appropriated by Elizabethbe apportioned and be deemed as an advance to her from the estate and that the estate be ordered to reimburse to Josephine shs. 2,794,953.80 and Australian Dollars 42,435.26 (shs. 2,546,115.60) being the amount of school fees paid for her children which the estate should have paid.

Elizabeth did not file a replying affidavit. The application was listed for hearing before **Koome, J.** (as she then was) who on 25th May 2005, allowed the application, partially exparte, and ordered Elizabeth to give accounts of various assets of the estate within 30 days and a declaration that the monies appropriated by her be deemed as an advance to her from the estate. However, the learned judge declined to order reimbursement of school fees, saying that such prayer should be handled at the stage of the confirmation of the grant once the accounts have been rendered. Thereafter, by an application dated 20th June, 2005 Elizabeth applied for setting aside of the *ex parte* orders given on 25th May 2005.

It is apparent that the application to set aside *ex parte* orders was not prosecuted but, instead, a consent order was recorded on 29th June 2005 which, *inter alia*, extended the time for Elizabeth to give accounts and ordered her to file an affidavit of protest and the proposed mode of distribution of the estate in response to the application for confirmation of grant filed by Josephine. Ultimately, the application for accounts was finally determined by **Rawal, J.** (as she then was) who, by a ruling dated 1st March 2007, found Elizabeth to have appropriated Shs. 4,492,000 and ordered that the sum appropriate be apportioned and be deemed as an advance to her from the estate. Subsequently, Josephine filed an application dated 30th March 2007 for orders that the grant of letters of administration given to Elizabeth be revoked on various grounds and that Josephine be declared the sole administratrix. The application was heard and subsequently dismissed by **Aluoch, J.** (as she then was) on 30th April 2008.

[**4**] As the dispute on accounts and reimbursement of school fees was going on, Josephine filed a summons for confirmation of the grant dated 10th January, 2005. On 2nd August 2005, Elizabeth on her part filed an affidavit indicating her preferred mode of distribution of the estate. Josephine filed a counter-affidavit of protest sworn on 16th September 2005. On 8th April 2009 Josephine filed a supplementary affidavit intimating that, at the time of the confirmation of the grant, provision should be made for the estate to refund shs. 24,406,325/- being school fees already paid and future school fees for her children and further that the shs. 4,492,000 found by Rawal, J. to have been appropriated by Elizabeth be apportioned and deemed as an advance from the estate. On 19th August 2009 Josephine filed another application – a summons under s. 26 of the **Law of Succession Act** (**Act**) for two orders namely, firstly shs. 999,500/- held in account at National Bank of Kenya Limited – Moi Avenue Branch be released to her for purposes of paying the current outstanding university fees for her children and, secondly, that the balance of school fees in the sum of shs.188,774/40 be paid from the dividends from shares of the estate in Kenya Aerotech Limited. Elizabeth filed a replying affidavit sworn on 31st August 2009 to the application. When the application came up for hearing before **Okwengu, J**. (as she then was) on 15th September, 2009 the learned judge directed that the matter be mentioned on 18th September 2009 before the Judge in charge of the Family Division with a view to having the hearing date of the application for confirmation of grant brought forward for hearing together with the application. On 18th September,

2009, the matter was stood to enable the parties to explore possibility of settlement. Ultimately the matter was fixed for hearing for 28th and 29th September 2010.

On the hearing date, that is 28th September, 2010, Josephine swore a 135 paragraphs supplementary affidavit which mysteriously bears a filing date stamp of 8th September, 2009.

[**5**] The deceased was survived by the following beneficiaries;

First house:

(1) Elizabeth Chepkoech Salat – Widow

(2) Michael Kipyegon Korir Salat

(3) Nelson Kiprotich Korir Salat

(4) Margaret Chepkemoi Salat

(5) Edwin Kipkemoi Korir Salat

(6) Nicholas Kiptoo Korir Salat

(7) Johnstone Kipkoech Korir Salat

(8) Nancy Chemutai Salat

(9) Beatrice Chepngeno Salat

(10) Collins Kipchirchir Korir Salat

Second house:

(1) Josephine Chesang Chepkwony Salat – Widow

(2) Joyce Chelangat Salat

(3) Stella Chepkemoi Salat

(4) Raymond Kiprotich Salat

(5) Walter Kipngetich Korir Salat

Michael Kipyegon Korir Salat and Nancy Chemutai from the first house died during the pendency of the proceedings but each was survived by a spouse and children. That their respective heirs were entitled to a share of the estate that their parents should have taken was not in dispute.

[**6**] The estate comprised of the following undisputed assets at the time of distribution by the High Court:

Farms:

- LR 6055/9 Sotik – measuring approximately 143 acres
- LR Kericho/Ndubai/113 (Siwot Farm – measuring approximately 15 acres)
- LR Kericho/Olokyin/62 (Mulot farm) measuring 10 acres.

- LR No. 7288/272 (Club 181 farm) in Sotik township measuring approximately 9 acres.

Plots:

- LR No. 630/1036 (Kericho commercial plot measuring approximately 0.2983 hectares
- LR No. 631/1075 – Kericho residential property measuring approximately 0.1142 hectares
- LR No. 8939/43 – commercial plot Bomet Township measuring approximately 50 ft x 100 ft.
- LR. 209/10223 – Nairobi Industrial Plot measuring approximately 0.5060 hectares

Other assets:

- Kenya Aerotech shares and dividends
- Cattle

In addition, Elizabeth in her affidavit sworn on 1st August 2005 relating to confirmation of the grant proposed, *inter alia*, that Kiambu Road Plot in Nairobi and Karen plot in Nairobi be sold and proceeds be used to pay debts and the balance be shared among all the children equally. Josephine in paragraph 28 of the lengthy supplementary affidavit sworn on 28th September 2010 named Karen Plot as amongst the properties she solely retrieved. Further, Josephine in paragraph 18 of the affidavit of protest sworn on 16th September 2005 in answer to Elizabeth's affidavit, deponed that the Kiambu road plot, Karen plot and the Industrial Area plot were all sold soon after the death of the deceased to liquidate debts. She annexed to that affidavit a handwritten letter dated 10th May 1996 which she alleged was signed by Elizabeth and herself instructing the estate's then advocates,

M/s Salim Dhanji & Company, to proceed with the sale of the Karen and Industrial Area plot to their proposed buyers. Apparently, the Industrial Area plot was not sold and the details of the Kiambu road plot and Karen plot were not disclosed to the High Court nor any disputes raised about their existence or otherwise, either in the High Court on in this Court. We have only mentioned the Karen and Kiambu road plots for completion of the inventory of the estate.

The estate had some liabilities which Josephine listed in the application for confirmation of the grant without computing the total liabilities. The liabilities included debts owed to some institutions including banks and other sundry creditors. It seems that some liabilities have already been paid.

[**7**] One of the major disputes in the estate is whether or not LR. No. 13287/35 (Ngata farm) situated in Nakuru comprising of approximately 30 acres should be considered as part of the estate and whether or not it was available for distribution to the beneficiaries. The title of the farm is registered in the name of Josephine with effect from 13th July 1992. Elizabeth claimed, in essence, that, the farm was given to the estate by retired President Toroitich Arap Moi, a friend of the deceased, for settlement of Josephine and that it should be inherited by three children of Josephine and be taken into account in the distribution of the residual of the estate. Josephine on her part claimed that the farm was allocated to her in her personal capacity after which she purchased the farm and therefore it should not be taken into account.

The dispute on the distribution of the estate was heard by viva voce evidence. Josephine gave evidence but did not call any witnesses. Elizabeth gave evidence and called two witnesses namely, Johnson Chepson – a cousin to the deceased and Margaret Chepkemoi Salat – Elizabeth's daughter.

[**8**] The High Court evaluated the evidence and made a finding that Ngata farm Nakuru belongs to Josephine and hence it is not available for distribution to the dependants of the deceased.

Regarding the distribution of the estate, the High Court said that it would take into account the following

principles – in essence, the wishes of the deceased in so far as practicable with a view to achieving an equitable settlement of the assets to the beneficiaries; that the children of the deceased had during the intervening period before the judgment, various needs especially educational needs which ought or should have been met from the assets of the estate; the provision for dependants under section 28 of the Act; the finding by the High Court that Elizabeth had misappropriated shs. 4,492,000 from the estate; and lastly, proposal by parties on the distribution of the estate.

The High Court ultimately proceeded to distribute the estate as follows: Kericho/Ndubai/113 - where deceased had erected a 4 bed roomed house and where he was buried - to Elizabeth in accordance with the wishes of the deceased;

LR No. 8939/43 Bomet - to Josephine in accordance with the wishes of the deceased; LR. No., Kericho/Olokyin/62 to Nicholas Salat – a son of Elizabeth mainly on the ground that Nicholas Salat had already settled there and constructed a house; LR. No. 6055/9 -143 acres Sotik farm – 15 acres to Josephine including the temporary house currently occupied by Elizabeth, the remaining 128 acres to all the children of the deceased excluding Nicholas Salat, each child to be allocated 10.6 acres. LR. No. 7288/272 (Club 181 farm) - to Elizabeth on her own behalf and on behalf of her children; LR. No. 630/1036 – Kericho Town commercial plot - to Josephine together with her children; LR. No.630/1036 – Kericho commercial plot to Josephine together with her children; LR No. 631/1075 – Kericho residential plot – to be sold and proceeds be divided equally between Elizabeth and Josephine; LR. No. 209/10223 – Nairobi Industrial Area plot – to be sold and proceeds be applied to:

(i) Pay accumulated land rent and rates in respect of Kericho plots- Sotik township property and Nairobi property.

(ii) Refund of shs. 10,000,000 to Josephine in respect of amount she expended on behalf of the estate to educate the children.

(iii) To refund Josephine shs. 2,246,000 being half of the shs. 4,492,000 which Elizabeth, misappropriated from the estate.

(iv) Remaining balance to be distributed equally among all the 15 dependants.

Kenya Aerotech shares and dividends – to all beneficiaries, each getting $^{1}/15$ of the shares; Elizabeth was given one of the three remaining cows and Josephine two cows. The court directed that each party should bear her own costs.

[**9**] As already stated, Elizabeth appeals against the whole judgment of the High Court. There are 19 grounds of appeal in which the appellant avers, *inter alia*, that the learned judge erred in law and fact; in excluding LR. No. 13287/35 (Ngata farm) from distribution; allocating LR. No. Kericho/Olokyin/62 solely to Nicholas Salat which is located in a semi arid area; in allocating Elizabeth's matrimonial home in LR. No. 6055/9 (Sotik farm) to Josephine; in allocating the Kericho Commercial property LR. No. 630/1036 solely to Josephine and the Sotik property LR. No. 7288/272 solely to Elizabeth without taking into account the number of beneficiaries in each house to the disadvantage of Elizabeth's house; in awarding a refund of shs. 10,000,000 to Josephine and, in awarding Josephine shs. 2,246,000 and, lastly; in treating Josephine's children preferentially with the effect that the estate was distributed inequitably contrary to the contemplation of the Constitution. By the memorandum of appeal, the appellant seeks orders that the appeal be allowed and the decision and orders of the High Curt be set aside with costs in the High Court and in the appeal.

[**10**] The respondent has filed a notice of grounds for affirming decision. By rule 94(1) of the Court of Appeal Rules, such a notice is filed when a respondent desires to contend that the decision of the High Court should be affirmed on grounds other than, or additional to those relied upon by the High Court. The notice filed by the respondent is not such a notice as it does not refer to other grounds or additional grounds for affirming the decision. The notice is, in essence, a reply to the appellant's grounds of appeal.

[**11**] It is convenient to first consider the appeal relating to finding in respect of LR. No. 13287/35 (Ngata farm). Josephine testified that the farm was sold to her by **Agricultural Development Corporation** (**ADC**) for shs. 90,000 in 1988, after the death of her husband and produced the relevant documents relating to the land. One of the documents produced is an allocation letter dated 7th June 1988 from W. K. Kilele, Manager Director of ADC addressed to Mrs. J. Salat which states:

> ***"ALLOCATION OF LAND AT NGATA"***
>
> ***I am pleased to inform you that the Government has decided to allocate you for purchase 30 acres of land at ADC Ngata complex.***
>
> ***By a copy of this letter I am informing Mr. W. K. A. Chamdany who is the Senior Complex Manager Ngata to show you the said portion of land.***
>
> ***You will shortly be informed of the mode of payment etc. In the meantime you can go ahead and settle on the said parcel of land."***

She also produced a letter dated 12th June 1997 from ADC asking her to pay the purchase price of shs. 90,000 by 30th June 1997 and a copy of a cheque dated 2nd July 1997 showing that she paid shs. 90,000 to ADC for the purchase of the farm.

[**12**] The evidence of Elizabeth regarding Ngata farm was in essence that the farm was given to Josephine by retired President Moi; that there were two meetings with retired President Moi who gave the farm to Josephine so that the two widows could be separated and that President Moi said that Josephine should not get the Sotik farm. In her evidence in re-examination, Elizabeth said:

> ***"Ngata farm was given to Josephine by President Moi. President Moi gave the land to Josephine and her children so that there is no dispute between me and Josephine"***

On her part, Margaret Chepkemoi Salat testified that the retired President attended the funeral of her father and that she later, in company of her grandfather, Sonoiya, (father of the deceased) went to see the former President in Nairobi; that the former President inquired what land the deceased had and when he was informed he said that he was going to look for a farm in Ngata or Ole Nguruone to settle Josephine and her children so that she could leave the Sotik farm to Elizabeth.

Josephine in her evidence in cross-examination testified that it was the former President in the presence of Elizabeth who ordered Kilele to give the Ngata farm to her. Although she denied that the former President settled her on Ngata farm so that she could not claim other land, she testified that the former President said that he gave her the land to assist her children who were still very young. Josephine added that the former President also cleared the debts in respect of Sotik farm.

[**13**] On two occasions Josephine admittedly approached Joshua Sonoiya, the father of the deceased, to call clan elders and resolve the issue of the distribution of the estate. The first meeting of clan elders was held on 3rd January 1994 where Marindany Chepkwony the father of Josephine attended. The minutes of the meeting indicate that, at that meeting Elizabeth and Josephine agreed to share three farms namely, Ngata, Sotik and Mulot, and further agreed that the three farms be shared equally among the thirteen children. Elizabeth and Josephine signed the resolution.

The second meeting of clan elders was held on 5th March 1995. The minutes of that meeting again show that Elizabeth and Josephine agreed that the estate be shared equally amongst all the children including Ngata farm which would be inherited equally by three of Josephine's children. Both Elizabeth and Josephine signed the minutes. Josephine has in the lengthy supplementary affidavit sworn on 28th September 2010 stated in detail what transpired in the two meetings and the reasons why she objected to the decision of the elders. More particularly, she stated that she signed the minutes to signify her attendance and not to signify her agreement with the mode of distribution.

[**14**] **Mr. Wandabwa**, learned counsel for Elizabeth, submits, *inter alia*, that Ngata farm was given by the former President to Josephine to avoid conflict and to ease pressure on the estate's assets by keeping Josephine out of Sotik; that Ngata farm should be treated as a gift to the estate available for distribution, that by signing the resolution of the elders Josephine waived her rights to Ngata Farm and further, is estopped from claiming Ngata farm.

[**15**] On the other hand, **Mr. Oriema Okoth,** learned counsel for Josephine, submitted amongst, other things, that, by section 2(1) as read with section 3(1) of the Act, Ngata farm is not part of the estate; that parties cannot by consent grant jurisdiction, waive the law or amend the law by calling in aid estoppel, that Josephine by signing the resolution of elders never intended to incorporate Ngata farm as part of the property of the deceased.

[**16**] The High Court made a finding of fact that Ngata farm was not part of the properties that were owned by the deceased and added:

> ***"However, during the funeral of the deceased (which was attended by the former President), a request was made by members of the family of the deceased, who included the father of the deceased, Mr. Joshua Sonoiya, for the former President to allocate land to Josephine since she had not been settled by the deceased prior to his death. The former President acceded to this request and duly instructed the then Managing Director of Agricultural Development Corporation, Dr. Walter Kilele to allocate land to Josephine at Ngata farm. The former President specifically directed that the said parcel of land should be allocated and registered in the name of Josephine. Elizabeth and members of the extended Salat family insist that, were it not for the intervention of the family, Josephine would not have been allocated the Ngata farm. They therefore urged the court to reach a finding that the said parcel of land is part of the estate of the deceased.***
>
> ***On the part of the court, it is clear that Ngata farm belongs to Josephine. Although members of Salat family were at the forefront of making a request to the former President to allocate the Ngata farm to Josephine, the legal position is that a property which was not in existence or which did not belong to the deceased at the time of his death cannot, by any stretch of imagination be considered as part of the estate of the deceased."***

[**17**] The findings of fact by the High Court relating to circumstances leading to the allocation of Ngata farm to Josephine by the former President have not been impugned. Indeed, those findings of fact are consistent with both the oral and affidavit evidence of the respective parties. It is evident that during the funeral of the deceased, the members of the family of the deceased including the father of the deceased, in recognition of the fact that the deceased had not settled Josephine on any of his farms, requested the former President to allocate land to Josephine which the former President ultimately did. It is not Josephine who individually approached the former President with a request for allocation of land. Josephine has never made any application to the government or former President for allocation of any government land. The evidence shows that she played no role in the allocation. There was evidence from Elizabeth and her daughter Margaret Chepkemoi, in essence that, Josephine was allocated the Ngata farm so that she would leave Sotik farm to Elizabeth. It is a fact, and which was admitted by Josephine, that the deceased had not settled her on any farm nor provided her with a matrimonial home.

[**18**] By section 119 of the Evidence Act, a court may presume the existence of facts which it thinks likely to have happened having regard, *inter alia*, to human conduct in relation to the facts of a particular case. We deduce from the circumstances of this case that in approaching the former President to allocate land to Josephine and by the former President allocating land to Josephine both the family members and the former President intended that such land would be a gift to the estate for settlement of Josephine to be taken into account in the distribution of the estate.

In distributing the estate the clan elders on two occasions took into account that Josephine had been allocated the Ngata farm. The record of the meetings of the elders indicate that both Elizabeth and Josephine agreed, *inter alia*, that Ngata farm be distributed to Josephine and her children. It is true that

Josephine later wrote a letter to Joshua Sonoiya dissociating herself from the distribution of the assets by clan elders. She also claims that she signed the resolutions only to acknowledge her attendance and not her acceptance. However, she does not say that she did not know the contents of the two documents. She is no doubt educated. She annexed documents to one of her affidavits showing that she is a Senior Immigration Officer in the government. It is not probable that she was "**twisted**" to sign as she claimed in one of her affidavits or that she appended her signature on the documents without full knowledge of their contents.

[**19**] It is true that Josephine paid shs. 90,000 in July 1997 as purchase price of the Ngata farm which was demanded in June 1997, five years after title was issued to her. Her reaction to the demand letter is contained in her letter to the Managing Director of ADC apparently dated 27th June, 1999 in which she stated in part:

> ***"Sir, according to the verbal discussions between you and me in your office sometime back in 1992, I was made to understand from you that the above land LR. No. 13287/35 was paid by his Excellency the President Daniel Toroitich Arap Moi. The only fee I was asked to pay was a small amount to clear the title deed of which I even over paid and I was refunded some amount of money with your full authority as it is shown in your words. After all these requirements, I was issued with the Title Deed".***

Indeed, the demand for shs. 90,000 is a mystery as ADC by a letter dated 28th September 1992 indicated an overpayment of shs.4,860 which it stated would be credited to Josephine's account to serve as part payment of the purchase price which was still outstanding. However, the endorsement by hand on that letter shows that a negotiated settlement was reached and shs. 4,860 was refunded to Josephine. Josephine did not produce a receipt from ADC to acknowledge receipt of shs. 90,000. It is probable that shs. 90,000 was demanded by mistake and that it was not accounted for by ADC.

[**20**] Nevertheless, having regard to the peculiar circumstances of this case, we are satisfied that although Ngata farm was not in law a part of the estate, it was gifted to the estate by the former President upon plea by the family members for settlement of Josephine and that Josephine agreed at the two meetings of the clan elders that it should be distributed to her three children. As a posthumous gift to the estate enhancing its value, it should, in justice, be taken into hotchpot in the distribution of the residuary estate as if the deceased in his lifetime had settled the property to Josephine. The doctrine of hotchpot generally applies to the administration of estates as provided by section 42 of the Act.

There is no evidence that the shs. 90,000 demanded by ADC was the market price of the land as opposed to a token price. If the shs. 90,000 was genuinely demanded and paid the payment in the circumstances of this case only entitles Josephine to a refund from the estate.

From our consideration of the peculiar circumstances of this case we are satisfied that the learned judge misdirected himself in failing to take into account the Ngata farm in determining the final share of the second house.

[**21**] The order for refund of shs. 10,000,000 by the estate to Josephine being the amount she expended on behalf of the estate to educate her children, has been challenged on grounds, *inter alia*, that the court failed to consider that Rawal, J. had found that Elizabeth had only misappropriated Shs. 4,952,000, that the court ignored the fact that Elizabeth had similarly expended money to educate her children; that the court failed to consider that Elizabeth had children of equal age to Josephine's and that in making the order the court treated Elizabeth's house inequitably.

The appellant's counsel submitted, amongst other things, that the claim for refund has no legal basis; that the court had no discretion to order refund of money expended on behalf of beneficiaries in the absence of a proper suit; that the proceeds from the estate had been equitably shared between the two houses; that the reimbursement of fees could only be limited to the monies that Elizabeth was found to have misappropriated and that, at the stage of confirmation of the grant, it is not open for the court to allow a claim for provision for school fees on behalf of some beneficiaries against the estate.

On his part the respondent's counsel submitted, *inter alia*, that Koome, J. on 10th January 2005, ordered that the claim for school fees be determined at the confirmation stage once the accounts are tendered; that the issue of refund of school fees was not raised before Rawal, J. nor determined; that under section 28

(c) of the law of Succession Act the court could take into account the future and existing needs of the dependants; that the appellant did not make a claim of refund of school fees for her own children; that Elizabeth's three children had finished school at the time of death of the deceased while Josephine's children were very young; that the final wish of the deceased in his will was that Josephine's children be educated from the proceeds of the assets and, that, not all proceeds of the estate were being deposited in the estate account.

[**22**] The basis of the claim for refund of shs. 24,406,325 was stated in paragraphs 84-94 of Josephine's supplementary affidavit sworn on 28th September 2010 and in her earlier supplementary affidavit sworn on 8th April 2009. The claim includes shs. 3,272,000 as fees to be paid in future.

As regards the issue raised by the appellant's counsel as to whether or not the High Court had power at confirmation of grant stage to order reasonable provisions for dependants' school fees under part III of the Law of Succession Act – that is, under sections 26, 27 and 28, we consider this issue as a procedural technicality. We say so because it is clear that, in essence, Josephine's claim was for refund of school fees paid for the education of her children which the estate should otherwise have paid and for provision for future school fees. The court was required by Article 159(2) (d) of the Constitution to do justice without undue regard to procedural technicalities. There is no doubt that ordinarily school fees payable for the beneficiaries before confirmation of a grant would be considered as a liability of the estate. The issue in this appeal is whether or not the learned judge erred in ordering a refund of school fees in the circumstances of the case.

[**23**] It is apparent that **Koome, J**. by her Ruling of 25th May 2005 intended that the issue of reimbursement of school fees should be determined at the hearing of the application for confirmation of the grant once Elizabeth had tendered accounts which she ordered her to provide. Elizabeth provided the accounts, after which **Rawal, J**. on 1st March 2007 found Elizabeth to have appropriated shs. 4,492,000 and ordered that the sum be deemed as an advance to her from the estate.

[**24**] By section 71 as read with section 83(9) of the Act, the confirmation of the grant and the completion of the administration of the estate is intended to take a short time. The application for the confirmation of the grant is required to be made after expiration of six months from the date of the grant and the administration of the estate is required to be completed within six months from the date of the confirmation of the grant. Failure or neglect to complete the administration of the estate expeditiously is a breach of the Act.

Further, the administrators are required by section 83(e) to produce to court within six months from the date of the grant a full and accurate inventory of the assets and liabilities of the deceased and also an accurate account of all dealings therewith up to the date of the account. In this case, the grant was issued on 3rd June 1992. The dispute on the distribution of the estate has been raging in the High Court for over 22 years. In the meantime a lot of water has passed under the bridge.

[**25**] It seems that the only income to the estate was from the bank account at National Bank of Kenya, dividends from shares held by the deceased at Kenya Aerotech Limited; income from farming relating to Sotik farm and rents from Kericho Commercial Plot. LR. No. 630/1036. From the affidavit evidence and oral evidence of Elizabeth and Josephine, the estate account at National Bank Account was operated by both and money shared equally by both from time to time. The dividends from Aerotech were similarly shared by both from time to time. Elizabeth gave accounts, *inter alia*, of her dealings with farming activities at Sotik farm and income from the Kericho Commercial plot and Rawal, J. found that she had altogether appropriated shs. 4,492,000. There was no appeal from that finding.

Josephine had four young children at the time of death of the deceased. She admitted in her evidence that

Elizabeth had more school going children than her at the time of death of the deceased. Elizabeth claimed that she has been educating her children from her share of income, from dividends and share of funds in the bank account. She also claimed to have sold her own property in Nairobi to finance the education of her children. In her affidavit sworn on 31st August 2009, Elizabeth deposed that she also pays school fees for her four grandchildren – children of Michael Kipyegon - her deceased son, and that Josephine misappropriated shs.500,000 from Kenya Aerotech. She did not ask for refund of the school fees paid from her own resources.

On her part, Josephine in paragraph 92 of her supplementary affidavit sworn on 28th September, 2010 claimed to have sold her property in Nairobi to pay school fees. She stated in her evidence that she has no objection to refund of school fees expended by Elizabeth.

When proposing how the shares at Kenya Aerotech should be distributed, Josephine suggested that before the distribution she should be allowed to recover fees that she paid from dividends.

Josephine also claimed that the Karen and Kiambu Road properties belonging to the estate were sold to pay liabilities. She stated in her affidavit that she and Elizabeth sorted out the debts. Indeed, correspondence shows that some debts were paid. There is, for example, a letter dated 23rd August 2005 from the National Housing Corporation acknowledging that shs. 359,309/55 was received from the advocates of the estate in repayment of the loan account.

[**26**] Since the issue of refund of school fees was very contentious, it is appropriate to set out the justification by the learned judge for the order of reimbursement. The learned judge reasoned thus:

> ***"From the evidence adduced, it was clear that at the time the deceased died the deceased had educated some of the children of Elizabeth to university level. The children of Elizabeth benefited from the good will of the deceased immediately after his death since some of children were offered scholarships by the government to complete their university education. Since Josephine's children were young at the time, they did not substantially benefit from the estate in regard to education. Josephine told the court that she struggled on her own to educate her children. Elizabeth countered this argument by stating that if Josephine was to be compensated for the education of her children, then she should likewise be compensated for the school fees that she paid for her younger children. It is the view of the court that there is no doubt that Josephine's children did not benefit from the opportunities that the children of Elizabeth were availed during the lifetime of the deceased."***

[**27**] It is apparent from that excerpt that the award of shs.10,000,000 was compensation for lost opportunities to Josephine's children which they did not enjoy during the lifetime of the deceased. It was not an award for the actual school fees paid by Josephine. Indeed, the learned judge neither analysed the relevant evidence nor made a finding that Josephine had actually spent her own money to pay school fees.

Furthermore Josephine did not provide account of all the income she had received from the estate since the demise of her husband, including accounts relating to the sale of the plot in Karen which is said to be 5 acres, and Kiambu Road plot or even the basis of the contingent school fees.

In the circumstances of this case, including the long delay before the confirmation of the grant and the absence of accounts, Josephine did not prove nor justify the claim for reimbursement of school fees. Furthermore, it would be against the policy of the Act of expeditious completion of administration of estates to allow payment of liabilities incurred by any beneficiary which has arisen by reason of breach of the Act. With due respect, the learned judge fell into error by making the award on the basis of lost opportunities.

[**28**] As regards the distribution of the estate, the principles which the learned judge applied, the manner in which the estate was disturbed and the grounds of appeal have already been set out.

The learned judge, *inter alia*, took into account the wishes of the deceased to arrive at what he referred to

as an equitable distribution of the estate. The distribution by the clan elders in which they had indicated that they had taken into account the wishes of the deceased was rejected by Josephine leading to the protracted proceedings.

The so called wishes of the deceased originates from a handwritten photostat copy of a document dated 17th November, 1987 allegedly written by the deceased on his letter head in London where he was undergoing treatment. It was in Kipsigis language and the translated version stated in essence that all his children by the elder wife and the younger wife shall each get equal shares if he died; that Siwot farm would devolve to Elizabeth and Bomet Plot to Josephine, and that the remaining properties should be shared equally. The document has one signature.

Josephine has referred to that document occasionally to support equal distribution of the estate to the children and the two houses. The appellant's advocates gave a notice dated 15th September 2005 to Josephine to produce the original document. However, Josephine in her affidavit sworn on 26th September 2005, deponed, amongst other things, that, the original was either destroyed, lost or misplaced in the office of the estates advocates; that the administrators applied for grant of letters of administration intestate and that the lost will is immaterial, inadmissible and irrelevant.

It is true that the cause was filed as a petition for grant of letters of administration intestate and not a petition either for grant of probate or grant of letters of administration with terms of oral will annexed or as an application for proof of an oral will, in form that the Probate and Administration Rules provides.

For an oral will to be valid, it has, *inter alia*, to be made before two or more competent witnesses (section 9(1)(a) of the Act). Similarly, for written will to be valid it has, amongst other things, to be attested to by two or more competent witnesses [(section11(c) of the Act]

The document dated 17th December, 1987 is not a will which in law is capable of taking effect and thus deceased died intestate as defined in section 34 of the Act. The wishes of the deceased person are expressed either in the written or oral will or in the settlement of properties in his lifetime. In the absence of any valid will, the learned judge erred in law in taking into account the '**wishes**' of the deceased.

[**29**] The appellant's counsel has submitted that the estate should have been distributed in accordance with section 40(1) of the Act which provides:

> ***"Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residual of the net intestate 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."***

Section 40(2) provides:

> ***"The distribution of the personal and house hold effects and the residual of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38. "***

Section 35 which is directly relevant provides in part that, subject to section 40, where an intestate has left one surviving spouse and a child or children the surviving spouse is entitled to personal and household effects absolutely and to a life interest in the whole of the residual of the net interest estate. However, as section 35(2) of the Act provides, during the continuation of the life interest the surviving spouse has power of appointment (that is power to determine disposition of the property) of all or any part of the capital of the net intestate estate by way of a gift among the surviving children or beneficiaries.

As section 32 of the Act provides, in distributing the net intestate estate to the beneficiates or a house, the property, inter alia, settled to a beneficiary or house by the deceased in his life time or by will should be taken into account in determining the share finally accruing to the beneficiary or house. Moreover, as section 35(5) provides, if the life interest of the surviving spouse in each house is determined either by

death or remarriage, the net intestate estate is, subject to any previous benefit to any beneficiary, equally divided among the surviving beneficiaries.

From the consideration of sections 35, 40 and 42 of the Act, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net interstate estate devolves upon a house is divided among the surviving beneficiates equally subject to any previous benefit to any beneficiary.

[**30**] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

As this Court said in **Mary Rono v. Jane Rono & Another, Civil Appeal No. 66 of 2002 (Eldoret) [2005] eKLR**, section 40 does not provide for equality between houses or that each child must receive the same or equal portion. The application of section 40(1) is illustrated by the case of **Catherine Nyaguthii Mbauni v Gregory Maina Mbauni, Civil Appeal No. 34 of 2004 (Nyeri) [2009] eKLR** where the Court shared the net intestate estate according to a ratio reflecting the number of units in two houses.

[**31**] In the instant case, it is apparent that the learned judge qualified the full vigour of section 40(1) when he said:

> ***"The Court shall take into consideration the provisions of section 40(1) of the Law of Succession Act in so far as it will aid the court to arrive at an equitable distribution of the properties that comprise the estate of the deceased to the dependants."***

It is also apparent that the court did not distribute the estate according to the number of children in each house. The learned judge instead divided the assets of the estate to the beneficiaries as it thought equitable and, in cases of some assets, according to the proposals of the spouses whilst in some cases disregarding their proposals. The respective proposals of the spouses did not result into a consent judgment. The proposals of each, was apparently, subject to the entire scheme of distribution proposed by each being accepted by the court. Such proposals have little weight in the application of statutory principles.

[**32**] The first house (Elizabeth's) had a total of ten units while the second house (Josephine's) had a total of five units. The estate should therefore have been distributed in the ratio of 10:5, the house of Elizabeth getting $^{10}/_{15}$ of each asset and the house of Josephine getting $^{5}/_{15}$ of each asset. There was evidence that the deceased had settled Elizabeth on Siwot farm LR. No. Kericho/Ndubai/113 which is 15 acres as her matrimonial home. Josephine agreed that Elizabeth could retain that property. Applying the statutory formula, the share of the first house in that property is 10 acres while the share of the second house is 5 acres. Thus, if the first house retains the entire 15 acres, the second house has to be compensated by 5 acres from another property. The Ngata farm - L.R. No. 13287135 is 30 acres and Elizabeth agrees that the second house should retain the farm. Again, using the statutory formula the share of the first house is 20 acres while the share of the second house is 10 acres. If Josephine retains the entire farm, then the first house has to be compensated by 20 acres from another asset. The Sotik farm LR. 6055/9 measurers 143 acres. Applying the statutory formula the share of the first house would be 95.33 acres while the share of the second house would be 47.67 acres.

In our view, Sotik farm being the largest farm, Elizabeth should be compensated for loss of 20 acres in Ngata farm from this farm. Similarly Josephine should be compensated for loss of 5 acres from Siwot farm from the same farm. The share of the first house would thus be 95.33 acres added to 20 acres less 5 acres which yields a total of 110.33 acres. The share of the second house would be 47.67acres added to 5 acres less 20 acres which yields a total of 32.67 acres

In our view, those are the only adjustments which should be made. The rest of the properties should be distributed according to the statutory formula. However, it would be impracticable or uneconomical to apply the statutory formula to the town plots and they should be shared equally between the houses.

Applying the statutory formula, the first house is entitled to 6.67 acres from the 10 acres of Mulot farm - LR. No. Kerichol/Olokyin/62, and the second house to 3.33 acres. As proposed by Elizabeth, one acre which is developed and operated as a commercial property should be excised from the Club 181 farm and shared equally between the two houses. The remaining 8 acres should be distributed according to the statutory formula, the first house getting 5.33 acres and the second house 2.67 acres. The two spouses are in agreement that the Nairobi Industrial Plot - LR No. 209/10223 should be sold. There are no documents to verify the number of shares owned by the deceased in Kenya Aerotech Limited. In the absence of any document, there is no certainty that they are divisible according to the statutory formula and should be shared between the two houses equally. The documents relied on by Josephine show that she has paid a total of shs. 96,000 for Ngata farm. The money paid should be refunded by the estate. According to the statutory formula, Josephine's house would have been entitled to approximately shs.1,500,000 from shs. 4,4492,000 that Elizabeth was adjudged to have appropriated from the estate.

The two spouses had proposed that Kericho Town commercial plot LR. No. 630/1036 which is approximately one acre should be equally shared by the two spouses. This is a prime plot which is income generating. It should be shared between the two houses equally. Josephine has in execution of the decree caused the plot to be registered in her sole name with effect from 17th March 2013. Josephine has explained that at the time of the execution of the decree, the stay of execution granted on 23rd March 2012 had expired. A further order of stay of execution was granted on 26th November 2013 when the appellant's counsel intimated that Josephine was in the process of selling the plot which assertion was denied by the respondent's counsel.

The Bomet Plot LR. No. 8939/43 was registered in the name of the two spouses as administrators of the estate. However, Josephine on 19th March, 2013 obtained a vesting order in execution of the decree. It is probable that she has caused the plot to be registered in her name.

[**33**] For all the above reasons, the appeal is allowed and the judgment and orders of the High Court set aside. We substitute therefor an order that the estate shall be distributed in the following manner:

1. LR. 6055/9 (Sotik farm) –

(a) 110.33 acres to Elizabeth Chepkoech Salat – holding a life interest and in trust for Michael Kipyegon Korir Salat, Nelson Kiprotich Korir Salat, Margaret Chepkemoi Salat, Nicholas Kiptoo Korir Salat, Johnstone Kipkoech Korir Salat, Nancy Chemutai Salat, Beatrice Chepngeno Salat, Collins Kipchirchir Salat, Collins Kipchirchir Salat in equally shares.

(b) 32.67 acres to Josephine Chesang Chepkwengy Salat - holding a life interest and in trust for Joyce Chelangat Salat, Stella Chepkemoi Salat, Raymond Kiprotich Korir Salat, Walter Kipngetich Salat in equal shares. The share of Elizabeth Chepkoech Salat to include existing buildings.

2. LR. Kericho /Ndubai/113 (Siwot Farm) to Elizabeth Chepkoech Salat – holding a life interest and in trust for her nine children named in paragraph 1(a) above in equal shares.

3. Kericho/Olokyin/62

(a) To Elizabeth Chepkoech Salat – 6.67 acres – to hold a life interest and in trust for her nine children named in paragraph 1(a) in equal shares.

(b) To Josephine Chesang Chepkwony Salat – 3.33 acres to hold a life interest and in trust for her four children named in paragraph 1(b) above.

The share of Elizabeth Chepkoech Salat to be demarcated to include the buildings erected thereon.

4. LR. No. 7288/272 (Club 181 farm).

(a) One acre with existing developments to be excised and registered in the names of Elizabeth Chepkoech Salat and Josephine Chesang Chepkwony Salat in equal shares.

(b) The remaining 8 acres to be distributed as follows:

(i) To Elizabeth Chepkoech Salat – 5.33 acres – life interest and in trust for her nine children named in paragraph 1(a) above in equal shares.

(ii) 2.67 acres to Josephine Chesang Chepkwony Salat – to hold a life interest and in trust for her four children named in paragraph 1(b) above in equal shares.

5. LR. No. 630/1036 – Kericho Town Commercial Plot. The registration of Josephine Chesang Chepkwony Salat as the sole proprietor dated 17th March, 2013 is cancelled. The plot to be registered in the name of Elizabeth Chepkoech Salat and Josephine Chesang Chepkwony Salat as tenants in common in equal shares each on behalf of their respective houses.

6. LR. No. 631/1075 Kericho residential plot. To be registered in the names of Elizabeth Chepkoech Salat and Josephine Chesang Chepkwony Salat as tenants in common in equal shares each on behalf of their respective houses.

7. LR. 8939/43 – (Bomet plot)

The registration of Josephine Chesang Chepkwony Salat, if any, as sole proprietor is cancelled. The plot to be registered in the names of Elizabeth Chepkoech Salat and Josephine Chesang Chepkwony Salat as tenants in common in equal shares.

8. LR. No. 13287/35 (Ngata farm) The registration of Josephine Chesang Chepkwony Salat is on her own behalf and holding a life interest and on behalf of her four children named in paragraph 1(b) in equal shares

9. LR. No. 20910223 - Nairobi Industrial Plot – to be sold by the two administrators and the proceeds to be used in the following order of priority:-

(i) To pay accumulated land rent & rates for Kericho plot, Bomet plot and Sotik Club 181 and all other liabilities.

(ii) To pay shs. 96,000 to Josephine Chesang Chepkwony Salat as refund of monies paid in respect of Ngata farm.

(iii) To pay shs. 1,500,000 to Josephine Chesang Chepkwony Salat as refund of her share of money appropriated from the estate.

(iv) The remaining balance to be shared equally between the two houses in the ratio of 10:5.

10. The cattle to be distributed in the manner ordered by the High Court. There will be no orders as to costs of this appeal.

In the event that Josephine Chesang Chepkwony Salat has sold the Kericho

Commercial plot and the Bomet Plot, then Elizabeth Chepkoech Salat shall be registered as the proprietor of both LR. No. 7288/272 (Club 181farm) and LR. No. 631/075 – Kericho residential plot on her own behalf and on behalf of her own house to the exclusion of Josephine Chesang Chepkwony Salat.

Dated and delivered at Nairobi this 12th day of June, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR