



REPUBLIC OF KENYA



**Maina v Kipruto & 3 others (Family Appeal E004 of 2023)
[2025] KEHC 319 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
FAMILY APPEAL E004 OF 2023
JRA WANANDA, J
JANUARY 24, 2025**

BETWEEN

FRANCIS TOROITICH MAINA APPELLANT

AND

MOSES KIPRUTO 1ST RESPONDENT

EDWIN KIGEN 2ND RESPONDENT

ABRAHAM KIPRUTO 3RD RESPONDENT

BENADINE JOSEPH 4TH RESPONDENT

JUDGMENT

1. This is an Appeal against the Judgment dated and delivered on 7/08/2023 in Iten Senior Principal Magistrate's Court Succession Cause No. E32 of 2021. The Judgment allowed an Objection filed by grandchildren of the deceased herein and whereof they were declared to be entitled to take up their deceased parents' inheritance from their grandfather's estate, and thus share the estate of the deceased equally with their uncle (son to the deceased).
2. The background of the suit is that the deceased, Changwony Rotich, died on 6/03/2001 aged 86 years old. On 7/06/2021, his son, Francis Toroitich Maina, (Appellant herein) through Messrs Chebii & Co. Advocates, filed an Application seeking a Grant of Letters of Administration to administer the estate of the deceased. In the Petition, it was stated that the deceased was survived by 2 widows and 3 sons, including the Appellant. 3 parcels of land were then listed as comprising the estate, namely, Mosop/Leiboinet/87, E. Marakwet/Lower Muskut/132 and E. Marakwet/Lower Muskut/218. The Grant was then given to the Appellant by the Court on 28/01/2022. Pursuant thereto, on 5/10/2022, the Appellant, this time through Messrs Ngigi Mbugua & Co. Advocates, applied for confirmation of the Grant and presented a proposed mode of distribution amongst the beneficiaries of the estate.



3. However, before the Application for confirmation of Grant could be heard, an Objection was filed on 18/11/2022 by the 4 Respondents, through Messrs Kibii & Co. Advocates. In the Affidavit filed in support thereto, the 1st Respondent, who swore the Affidavit on behalf of the rest of the Respondents, deponed that they are beneficiaries of the estate of the deceased by virtue of being his grandchildren. He deponed further that their consent to filing of the Petition was not obtained, that the Appellant had misrepresented the wishes and position of the family concerning distribution of the estate, and that the Respondents reside on properties comprising the estate.
4. The Appellant opposed the Objection and in so doing, swore the Replying Affidavit filed in Court on 22/11/2022. In the Affidavit, he acknowledged the Respondents as being his nephews and a niece, having been born of his brothers who predeceased him and deponed that it is out of that recognition that he had served the Respondents with the Summons for Confirmation for their input. According to him, the Respondents should have filed their proposed mode of distribution attaching minutes of the meetings that they claim the Appellant violated. He urged further that the Objectors, being grandchildren, obtaining of their consent to file the Petition was not mandatory as long as they were recognized. In conclusion, he deponed that the Objection had come too late in the day.
5. Subsequently, the Respondents filed their mode of distribution and it was then directed that the Objection would be determined on the basis of the Affidavits filed and would be canvassed by way of written submissions. Upon the parties filing such Submissions, the trial Magistrate considered the matter and delivered her Judgment on 7/08/2023 as aforesaid.
6. Aggrieved by the said decision, the Appellant lodged this Appeal vide the Memorandum of Appeal filed on 9/11/2023 wherein he raised 9 lengthy grounds quoted verbatim as follows:
 - i. It was neither permissible in or in fact for the Learned Trial Magistrate to have restrained the issue for determination in her Judgement as being: whether or not to distribute the deceased's estate equally among the petitioners and the objectors and in essence making no finding at all on the issue of the applicability of the deceased customary law, despite submissions being made in connection thereto.
 - ii. The Learned Trial Magistrate erred in fact and law in failing to find that the deceased Changwony Rotich hailed from the Keiyo subtribe of the Kalenjin community, was polygamous and his estate was by implication and custom to be governed by the custom and practice of the Keiyo subtribe.
 - iii. The Learned Trial Magistrate erred in law and fact when she misconstrued Section 40(1) of the Law of Succession Act, CAP 160, and failed to appreciate that the net intestate estate of a male Keiyo man, is first distributed among the households (wives) before it can trickle down to the individual beneficiaries thereby proceeded to distribute it to the survivors, treating and lumping them together as equals, when they belonged to three different layers, i.e. they hailed from different households, who should have been recipients of their shares. The Respondents, being grandchildren of the 2nd household, should ordinarily have been made to share half the estate between them, while the Appellant, being the sole survivor of his mother's house, should have received half of the estate.
 - iv. The Learned Trial Magistrate erred in law and fact in failing to inquire from the parties how they have coexisted either during the deceased's lifetime, i.e. where their dwelling houses are and how the proposed distribution would affect them. The court took a mean and commercial approach, which if implemented will result into displacements and destruction of livelihoods, particularly that of the appellant who, as the head of the family, has invested and developed his



residence on title No. L.R. Mosop/Lelboinet/87, while the Respondents have their residence on L.R. Elgeyo Marakwet/Lower Musukut/218.

- v) The Learned Trial Magistrate erred in law and fact in failing to scrutinize the assets comprised in the estate, which error led her to disregard the fact that title No. L.R. Elgeyo Marakwet/Lower Musukut/218 has an existing charge in favour of National Housing Corporation for Ksh. 80,000/- which should have been addressed before distribution. Had the Court been vigilant, it would have been directed that the liabilities registered and unregistered be addressed first before sharing off the balance.
- vi. The Learned Trial Magistrate erred in law and fact in failing to import constitutional imperative into the family dispute, i.e. Article 45 of the [Constitution](#) of Kenya, 2010, which militates for the preservation and maintenance of family links and bonds rather than their mutilation and capitulation akin to the savage kingdom.
- vi. As a result of the foregoing, the trial Court fell into error and forgot or ignored to issue a Certificate of Confirmation of Grant as envisaged by Section 71 of the Succession Act, Cap 160 Laws of Kenya and left it to the designs of the parties to ascertain or infer from the judgement.
- vi. There is therefore no Certificate of Confirmation of Grant which would, ordinarily and in a special jurisdiction like the law of succession, be the equivalent of a decree capable of implementation or even registration at the respective land registries where the land parcels of the estate are domiciled.

Hearing of the Appeal

- 7. Pursuant to directions given, the Appeal was canvassed by way of written Submissions. The Appellant filed her Submissions on 7/08/2024 while the Respondents filed on 27/09/2024.

Appellant's Submissions

- 8. In his submissions, Counsel for the Appellant submitted that the bone of contention is on the issue of the land parcel known as Mosop/Leiboinet/87 which the Appellant purchased by himself as is evidenced by the payments made to Agricultural Finance Corporation (AFC), and that the only reason that made him not to be registered as the owner thereof was that he was still at school and thus did not have an Identity Card. He submitted further that at the trial Court, the Appellant proposed that the estate be distributed according to the households with each household getting an equal share as it is the norm in the Keiyo sub-tribe customary law in which the parties herein hail from. He appreciated that the Respondents, on their part, proposed equal distribution in which the Appellant and the Respondents (as grandchildren) would get equal shares across the board. In disagreeing with this "equality" approach, he submitted that the deceased had 3 children (the respective fathers to the Respondents and father to the Appellant) and as such, even if it were that parties ought to get equal shares, then the same needed to have been divided into 3 units with the grandchildren getting shares from their respective deceased father's shares.
- 9. On the submission that trial Court should have, in distributing the estate, adopted and applied the customs and practices of the Keiyo sub-tribe, he cited Section 3(2) of the [Judicature Act](#), and the case of *Mary Rono vs Jane Rono & Another* [2005] eKLR, Eldoret Court of Appeal Civil Appeal No. 66 of 2002. He also cited Cotran's Restatement of African law, Vol. 2, which he submitted, listed the Elgeyo sub-tribe (also referred to as Keiyo) in the same Chapter as the Marakwet and Tugen and guided that their pattern of inheritance is patrilineal, and that in polygamous households, distribution was by reference to the house of each wife, irrespective of the number of children in it. According to Counsel



therefore, under Keiyo customs, the property of the deceased is divided into the number of wives the deceased had, that in this case, being 2 wives, the estate should be divided into two. On this aspect of the practice of the Keiyo sub-tribe and its alleged notoriety thus justifying the taking of judicial notice under Section 60(1) of the *Evidence Act*, and thus requiring no proof, he cited the case of Ernest Kinyanjui vs Muiru Gikanga & Another. He then cited Article 159(2)(c) and (3) of the *Constitution* of Kenya which permits application of traditional dispute resolution mechanisms.

10. He submitted further that the Keiyo custom and practice referred to above is not discriminatory or repugnant to the *Constitution* but enhances equity and faulted the trial Magistrate for failing to consider and/or determine the issue. According to him, although the Appellant raised the issue of the applicability of the Keiyo customs, neither the Respondents nor the Court dealt with the issue and thus nothing was called to controvert that evidence and it therefore stands as uncontroverted. On the issue of applicability of African customs, he also cited the case of Sheikh Musany Hassan vs Nathan Mwangi Kamau Transporters & 5 Others C/A 123/685, the case Otieno v Ougo & Another, *CA No. 31 of 1987*, the case of Gichuhi (James Ngugi Kamau) vs Kamau (Succession Cause 10 of 1985) [2022] KEHC 9907 (KLR 7th July 2022), and also Section 3 of the *Law of Succession Act* which defines “house” to mean “a family unit comprising a wife whether alive or dead at the time of the death of the husband, and the children of that wife”. He submitted that it is not in dispute that the deceased had 2 wives, the Respondents being from the 1st house and the Appellant from the 2nd house and as such taking into account Section 40 of the *Law of Succession Act* as well as the Keiyo customs referred to above, the estate ought to be divided into 2 equal parts with each house taking half of the estate.
11. Counsel revisited the submission that the property, Mosop/Leiboinet/87 does not form part of the “free property” of the deceased as it is the Appellant who purchased it when he was still in high school as evidenced by the payments made to AFC as aforesaid, and that it also came out from the pleadings that it is the Appellant who has been servicing the loaned monies that was used to purchase the property. He submitted that the duty of the Probate Court is to identify the estate of the deceased person, identify the lawful beneficiaries and distribute the estate to them. He cited the case of Re estate of Job Ndunda Muthike (Deceased) 2018 eKLR and the case of Re Estate of Alice Mumbua Mutua (Deceased) [2017] and faulted the trial Court for failing to address the issue of the purchase of the said land by the Appellant. According to him, whenever Administrators of an estate claim that a certain property belonged to the deceased and there is a third-party laying claim to it, such dispute has to be determined by the Environment & Land Court (ELC) under Article 162(2)(b) of the *Constitution*.

Respondent’s Submissions

12. In his brief Submissions in opposition to the Appeal, Counsel for the Respondents, in respect to the Respondent’s right to inherit as grandchildren, cited Section 41 of the *Law of Succession Act*, the case of In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR, and the case of Cleopa Amutala Namayi vs. Judith Were [2015] eKLR, among others. In arguing in favour of equal distribution as the method to be applied, Counsel cited Section 38 of the Act and also the case of Christine Wangari Gachenge vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, among others, and submitted that Section 38 must be read with Section 41 aforesaid.

Determination

13. This being a first Appeal, this Court has the duty to analyze and re-examine the arguments or submissions made before the lower Court and reach its own conclusions. In regard thereto, the Court



of Appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. The issues arising for determination in this matter are, in my view, the following:

- i. Whether the trial Court should have applied the Keiyo sub-tribe practices and customs in distributing the estate of the deceased who was polygamous.
- ii. Whether the property described as Mosop/Lelboinet/87 comprised part of the deceased’s “free property” capable of being distributed as part of his estate or whether the same belonged to the Appellant.
- iii. Whether the trial Court was justified in distributing the estate on equal share basis amongst the 3 beneficiaries instead of on the basis of the number of households/wives.

15. I now proceed to answer the above questions.

i. Whether the trial Court should have applied the Keiyo sub-tribe practices and customs in distributing the estate of the deceased who was polygamous

16. As aforesaid, it is not disputed that the deceased was polygamous, that during his lifetime, he married 2 wives and got 3 children, all sons, 2 from the 1st house and 1 from the 2nd house. From the 1st house, the 2 sons were the late father of the 1st, 2nd and 3rd Objectors, and the late father of the 4th Objector. From the 2nd house, the only child/son was the Appellant. In summary, the 4 Objectors are therefore all scions of the 1st house while the Appellant is the only descendant from the 2nd house. The above scenario can be summarized as follows:

<i>Wife</i>	Sons	Grand-children
Teriki Changwony (1st Wife)	Simon Kipruto Changwony	Moses Kipruto Changwony (1st Objector)
		Edwin Kigen (2nd Objector)
		Abraham Kipruto (3rd Objector)
	Joseph Cheruiyot Changwony	Bernadine Joseph
Kobilo Changwony (2nd Wife)	Francis Cheruiyot Changwony (Appellant)	

17. The dispute therefore pits the Appellant, on one side, against his 3 nephews and 1 niece (Respondents), on the other. The entitlement of the Respondents to inherit from their grandfather, their fathers having predeceased them, has, correctly, not been challenged in this case. Such entitlement is in any event recognized under Section 41 of the *Law of Succession Act* which provides that where one of the



children of the deceased is himself/herself deceased, and such deceased child is survived by a child or children of his/her own, then the share due to him/her ought to devolve upon his/her said child, and where more than one, the children would take equally. This issue was addressed in the case of *Re Estate of Wahome Njoki Wakagoto* (2013) eKLR where W. Musyoka J held as follows:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

18. Further, the Court of Appeal in the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR also held as follows:

“Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents’ pre-deceased the deceased, the rate of substitution of a grand child for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child’s issue alive or en ventre sa mere on that date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate’s death.”

19. The Plaintiff’s Counsel has urged that the trial Court, in distributing the estate, ought to have adopted and applied the customs and practices of the Keiyo sub-tribe of the Kalenjin tribe. He advanced this narrative because according to him, the Keiyo practice is that in a polygamous setting, inheritance was in accordance with the number of wives/houses, irrespective of the number of children in each house.
20. Although Counsel for the Appellant faults the trial Magistrate for failing to apply the Keiyo practice and customs as aforesaid, I have perused the record and the pleadings filed by the Appellant before the trial Court and nowhere have I found any evidence that the said issue was pleaded or deponed. In fact, the very first time that I came across the issue was in the Appellant’s final Submissions filed before the trial Court. There is even nowhere where it was mentioned that the deceased or the parties herein are of the Keiyo sub-tribe or that they subscribe to the alleged customs. These matters seem to have been an afterthought.
21. I make the above observation in light of the principle that parties are bound by their pleadings. It would have therefore been unjust and prejudicial to the Respondents, if the Appellant were allowed to introduce, at the stage of Submissions, the new issue of Keiyo customary law. I reach this conclusion because there is no evidence that the Respondents were at any time given prior notification that the same would be an issue for determination to enable them respond. Trial by ambush is not allowed in our justice system and especially, when introduced at such late stage. There are many authorities on this proposition, most notably, the Supreme Court case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR in which it held as follows:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its



pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings

22. There are also various Court of Appeal cases advancing the same principle, for instance, the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR, the case of Galaxy Paints Co Ltd v Falcon Guards Ltd [2000] 2 EA 385) and also the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR).
23. In view of the principle that parties are bound by their pleadings, the Appellant could not therefore lawfully attempt to canvass such new matters at the Submissions stage, and obviously not at this appeal stage. On this point, I refer again to the Court of Appeal case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi (supra) in which the following was stated:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
24. It should also be remembered that the suit was determined on the basis of Affidavit evidence only. No viva voce trial was therefore conducted whereof it may be claimed that the issue of the customs of the Keiyo sub-tribe was verbally testified upon by witnesses.
25. In view of the foregoing, my finding is that the Appellant irregularly sought to introduce the new matter of the applicability of the customs and practices of the Keiyo sub-tribe at the Submissions stage. For this reason, my verdict is that the trial Magistrate cannot be faulted for not considering or determining the issue.

ii. Whether the property described as Mosop/Lelboinet/87 comprised part of the deceased’s “free property” or whether the same belongs to the Appellant

26. Counsel for the Appellant submitted that the parcel of land known as Mosop/Leiboinet/87 was purchased by the Appellant as evidenced by the payments made to Agricultural Finance Corporation (AFC), and that the only reason why he was not registered as owner thereof was because he was still in school and did not have an Identity Card. According to Counsel therefore, the said property does not form part of the “free property” of the deceased as it also came out from the pleadings that it is him who has been servicing the loaned monies that was used to purchase the property.
27. I have perused the record, including the respective Affidavits therein, and like in the issue above, again, I cannot find any portion of the Affidavits where the claim that it is the Appellant who purchased the said property was pleaded or deponed, leave alone the claim that the same was not registered in his name because allegedly he was in still in school or that did not hold a National Identity Card. This issue, too, is a matter that seems to have only emerged for the first time in the Appellant’s Submissions before the trial Court. Again, this appears to be a new matter irregularly sought to be introduced at the Submissions stage.



28. For the same reason as in the earlier issue of the application of the Keiyo customs, I find that this issue of the Appellant having been the one who purchased the property not having been pleaded or deponed in the Affidavits, the trial Magistrate cannot be faulted for not considering or determining it. Being registered in the name of the deceased as at the time of his death, as evidenced by the Search Report exhibited by the Appellant, I have no reason to disagree with the trial Magistrate's treating it as comprising part of the "free property" of the deceased.

iii. Whether the trial Court was justified in distributing the estate on equal share basis amongst the 3 beneficiaries, instead of on the basis of the number of households/wives

29. Regarding distribution of the estate of a polygamous intestate, Section 40 of the [Law of Succession Act](#) provides as follows:

- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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;
- (2) 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”.

30. As was stated by Hon. Justice J.K. Karanja in the case of *In re Estate of Michael George Tendwa Said (Deceased)* [2020] eKLR, Section 40 above is the applicable law where there is no agreement on distribution of the estate and 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.”

31. Regarding “equality” in distribution as mentioned in Section 40 above, the Court of Appeal in the case of *Stephen Gitonga M’murithi –v- Faith Ngira Murithi* [2015] eKLR, 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...”

32. Further, in the case of *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.”

33. However, in the case of *Esther Wanjiku Burugu Vs Margaret Wairimu Burugu*, Civil Appeal No. 319 of 2002, the Court of Appeal guided that the Section 40 does not stipulate that the division of the estate must be equal and states that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, nonetheless distribution would be done according to the number of children in each house. The Court stated that the language adopted in Section 40 negates any argument that the division must necessarily be equal between or among the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.
34. In the case of *Elizabeth Chepkoech Salat Vs Josephine Chesang Salat* [2015] eKLR, another Court of Appeal case, the Judges reiterated and fortified the fact that Section 40 of the *Law of Succession Act* does not provide for equality between houses or that each child must receive the same or equal portion. The court held as follows:

“Section 40 of the Act does not give discretion to a court to deviate from the general principles therein annunciated.

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 had 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 adjustment 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”.

35. Similarly, in the other Court of Appeal case of *Mary Rono Vs Jane Rono & Another* [2005] eKLR, Omollo JJ stated that if Parliament had intended that there must be equality between the houses, then there would have been no need to provide in Section 40 above that the number of children in each house be taken into account. This is how he put it:

“My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there 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 an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality.”

36. The above views, read together, give rise to the generally agreed position that Section 40 does not give blanket discretion to a Court to deviate from the general principles stipulated therein. Thus, where a matter is contentious and the parties have not reached a consent, the Court is bound to apply the statutory provisions. In other words, the Court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. It is however also agreed that a Court has some level of limited residuary discretion within the statutory provisions to make adjustment to the share of each house or of a beneficiary. This was the view adopted in the case of *Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR.
37. In this instant case, as aforesaid there are 2 houses/wives. The 4 Objectors are all scions of the 1st house and the Appellant is the only descendant from the 2nd house. The Appellant’s contention that the 2 houses should therefore share the estate at 50:50, appears to breach the principle of “equitable” distribution as he will end up with a very much larger share than the 4 Objectors combined. If adopted, it will mean that the Appellant will end up with a whole 50% for himself alone, while each one of the 4 Objectors will end up with only 12.5% each. Apart from evidently not being “equitable”, this does not also meet the principle of “equal” distribution.
38. In my view, the most “equitable” mode of distribution would not be to distribute the estate along the basis of the 2 houses, or equally amongst the 5 parties herein as directed by the trial Magistrate, but along the line of the 3 sons of the deceased as 3 separate units. The estate shall therefore be distributed “equally” amongst the 3 sons of the deceased, namely, Simon Kipruto Changwony (1st, 2nd and 3rd Objectors’ father), Joseph Cheruiyot Changwony (4th Objector’s father) and Francis Toroitich Changwony (Appellant), with each son getting 33.33% share. The Respondents, as grandchildren, would therefore inherit their father’s respective shares.

Final Orders

39. The upshot of my findings above is that this Appeal only partially succeeds. I therefore rule as follows:
 - i. I set aside the Judgment dated and delivered on 7/08/2023 in Iten Senior Principal Magistrate’s Court Succession Cause No. E32 of 2021 and substitute the same with orders as follows:
 - a. The distribution of shares of the estate of the deceased – Changwony Rotich - shall be as follows:



Sons of the Deceased	Shares	Grand-children of the Deceased to share
Simon Kipruto Changwony (late)	33.33%	Moses Kipruto Changwony (1st Objecter)
		Edwin Kigen (2nd Objecter)
		Abraham Kipruto (3rd Objecter)
Joseph Cheruiyot Changwony (late)	33.33%	Bernadine Joseph
Francis Cheruiyot Changwony (Appellant)	33.33%	

- b. In light of the directions given above, I now remit this matter back to the trial Court upon which the trial Court shall give the parties the opportunity, within timelines to be fixed, to attempt an amicable settlement, either by themselves or through Court annexed Mediation, in respect to the manner in which they wish to execute and/or implement the distribution formula given above, for the trial Court's adoption. In the event of failure to reach such settlement within the timelines to be given, the trial Court shall then be at liberty to determine the distribution in accordance with the formula given above.
- ii. The trial Court's finding that the parcel of land known as Mosop/Lelboinet/87 comprises part of the deceased's "free property" and thus subject to the distribution of his estate herein is upheld.
 - iii. For avoidance of doubt therefore, it is declared that the 3 parcels of land comprising the estate of the deceased are Mosop/Lelboinet/87, E. Marakwet/Lower Muskut/132 and E. Marakwet/Lower Muskut/218
 - iv. Being members of one family, each party shall bear his/her own costs of both the trial Court litigation and that of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025.

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ngigi Mbugua for the Appellant

N/A for the Respondents



Court Assistant: Mr. Kuto

