



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Limo Yator (Deceased) (Probate & Administration
321 of 2013) [2025] KEHC 3936 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 321 OF 2013**

JRA WANANDA, J

MARCH 28, 2025

IN THE MATTER OF THE ESTATE OF LIMO YATOR (DECEASED)

BETWEEN

MIRIAM J. KOMEN 1ST PETITIONER

**JOAN CHERASTE (SUBSTITUTED IN PLACE OF THE LATE CHERASTE
LIMO) 2ND PETITIONER**

AND

AGNES LIMO 1ST OBJECTOR

KIPROTICH LIMO 2ND OBJECTOR

JUDGMENT

1. Before this Court for determination is a Summons for Confirmation of the Grant of Letters of Administration issued herein, as well as the Objection filed in opposition thereto.
2. The background of this matter is that deceased, Limo Yator, died intestate on 28/07/1984 at the age of 82 years. On 23/10/2013, Miriam J. Komen and Cheraste Limo, as daughter and son of the deceased, respectively, jointly petitioned for Grant of Letters of Administration in respect to the estate.
3. In the Petition, it was stated that the deceased had left behind 11 beneficiaries, including all the 4 parties herein. Only one property, the parcel of land described as Baringo/Lembus/Kiplombe/39 was listed as comprising the estate. The Grant of Letters of Administration was then, on 2/02/2016, given to the 2 Petitioners, Miriam J. Komen and Cheraste Limo, as joint Administrators.
4. On 24/03/2017, the Petitioners, through Nyekwei & Co. Advocates, filed the Summons for Confirmation of Grant of the same date. The proposal contained in the Affidavit filed in support thereof was for the said property, Baringo/Lembus/Kiplombe/39 said to measure approximately 65 acres (26.5 Hectares) to be distributed as follows:



House	Children	Share
1 st house	Cheraste Limo and Miriam J. Komen	21.7 Ha
2 nd house	Emmy Limo, Tarok Chebotibin, Lilian Cherop, Silas Kipkwe Yator and Bernard Kipkulei	21.7 Ha
3 rd house	Agnes Limo and Kiprotich Limo	21.7 Ha

5. However, before the Summons could be heard, the Objectors herein, claiming as siblings, and as children of one of 3 late widows of the deceased, filed Affidavits opposing the Succession process. I note that by her Statement filed on 18/02/2019, the 1st Administrator, Miriam Komen recognized the Objectors as genuine beneficiaries and accepted their claims save for their views on the distribution of the estate amongst the beneficiaries. It therefore became apparent that the only contention was on distribution.

Objectors' Statement

6. The 1st Objector, Agnes Limo, filed an undated Statement on 23/10/2017, drawn in person. The same is however titled "Response/Objection to Succession". In the Statement, she deponed that the deceased had 3 wives and that the 1st wife had one son, Cheraste Limo. She stated further that the deceased had 3 parcels of land which he allocated to each family, but not in accordance with the number of children each family had, that the 1st family was allocated a parcel of land in Baringo North Kaplumbei village Kabatonjo Division, that this family had the said one son by the name Cheraste Limo, but the land was divided per family, not per children, and that the said parcel, measuring about 40 acres, was given to the said Cheraste Limo's mother. She stated that the 2nd family is also in Baringo North, just a few kilometres from the 1st family, and this family had 4 siblings namely; Anthony Limo, Miriam Komen, Targoke Chebotibin and Lilian Cherop, and that it was similarly given a parcel of land also of about 40 acres which the deceased did by himself when he was still alive, and that the 3rd family had 3 siblings namely; Agnes Limo, Kiprotich Limo and the late Kiplubei who were given a parcel of land at Eldama Ravine, Koibatek, Esegeri Division, Ngosero village, about 120 km from the other families.
7. She stated further that by the time the deceased died in 1984, he had left all the families settled and was buried by the 2nd family since the 1st and 3rd wife had passed on by then, and that after the demise, the families had no problems on the issue of land since all of them knew what the deceased had told them. She stated that on 12/09/2017 at 14:25 pm, she received a phone call from Nywekwei & Co Advocates informing her to go and pick a letter and on arrival, she received Court Summons dated 24/08/2017 requiring her to appear in Court on 18/09/2017 in respect this Succession Cause filed by the Petitioners, and that she noted that the Cause was filed in 2013 and was in relation to only one property of the deceased yet the deceased had several parcels of land in Baringo which he had divided amongst the family. She stated further that the intention of the Petitioners is to take from the 3rd family their lawful land which was given to them by the deceased, which this Court should not allow.



8. She also stated that on 24/03/2017, they were made to understand that there was a consent in which they were included but which was never done, and that she wants the Court to punish the Petitioners for lying before Court, to stop orders issued on 26/01/2016 to the Petitioners as purported representatives of the family since they are planning to defraud the family and yet have no authority from the family and that they are forging documents. She urged the Court to set aside the orders since the deceased divided his properties within his family and the Petitioners are purporting to seek administration of a property belonging to another family, and that one of the Administrators is a daughter and married and therefore cannot purport to be coming back to administer her father's properties which were given to another family. She reiterated that the Administrators are asking to administer only one property of the deceased, yet the deceased has 3 families with each family having been given a property, and that their step-sister, Lilian, was given 10 acres by the deceased and nobody has claimed the same. She reiterated her desire that the Grant of representation issued on 13/10/2015 to be set aside and the matter be referred back to the Chairman of the sub-County.
9. The 2nd Objector, Kiprotich Limo, also swore an Affidavit of the same date and by which she basically reiterated the same matters contained in the 1st Objector's Statement. Several other Statements and/or Affidavits were also filed by other people in support of her case but which I will not refer to as these other people did not testify as shall be noted hereinbelow.

Petitioners' Statement

10. On her part, the 1st Petitioner, Miriam J. Komen, filed the Statement dated 18/02/2019. She confirmed that the Objectors are her half-brother and half-sister, born of her step-mother, and stated that their father (the deceased) had 3 wives and many children. She stated that the deceased, at the time of his death, left only one property, and urged that each heir ought to be apportioned a share thereof. She stated further that the Objector's side of the family enjoys 65 acres while the other families live on individual parcels of land measuring 5 acres each, rocky and economically unproductive and that the Objectors want their side of the family to benefit to the exclusion of others.

Hearing of the Objection

11. Directions were then taken on the hearing of the Objection, upon which it was directed that the same be conducted by way of a viva voce trial. The matter then proceeded for trial and all the witnesses testified before O. Sewe J.

Objectors' Testimony

12. The 1st Objector, Agnes Limo, testified as OW1. She testified on 18/2/2019. She adopted her Statement referred to earlier and basically reiterated the same matters contained therein. She added that members of the first 2 houses live in Baringo North sub-County, 1 km apart and each possesses 40 acres in Baringo. She stated that her side of the family does not have any problem with that, and that they live in Eldama Ravine, 120 kms from the other 2 families. She stated that one Anthony Limo passed on in 2012 and thereafter the Petitioners filed this Cause but they did not inform them at all or include them in the proceedings, that on 12/9/2017, she received a telephone call from Nyekwei Advocates informing her that she was required in Court together with her brother Kiprotich Limo, and that is when she got to know that there was a Succession Case before the Court in respect of the estate of their father and when they came to Court, they found that the Petitioners had already been appointed as Administrators, and that the issue before Court was the said property, Baringo/Lembus/Kiplombe/39 which however belonged to her mother as it had been given to her and her 3 children.



13. She stated further that on 24/03/2017, a consent for Confirmation of the Grant was filed but in which the consent presented was not a true document and that the Petitioners should be punished for lying to Court, and that the Grant should be revoked because it was based on lies. She reiterated that the Petitioners wanted to defraud them as the 3rd house, and forged documents to indicate that the Objector's family gave consent when this was not true. She urged the Court to set aside the Grant. She reiterated that their father shared out his property to his 3 wives, but not according to the children, that the 2nd Petitioner has 40 acres to himself and the Objector's family has not claimed it, that the same applies to the 2nd house and that therefore, the Administrators have no basis to claim the Objector's family shamba.

Substitution of Deceased 2nd Petitioner

14. From the testimony of the Objector, the Court having noted that the 2nd Petitioner (Cheraste Limo) was by then deceased, gave the Petitioners the opportunity to substitute her. Accordingly, the parties, by the consent order recorded on the same 18/02/2019, amended the Grant whereof Joan Cheraste, a daughter of the deceased 2nd Petitioner, came into the matter in place of her deceased father and also became a co-Administrator in his place. The 1st Objector was also appointed an additional Administrator. The Administrators thus became 3, namely, Miriam J. Limo, Joan Chepkemboi Cheraste and Agnes L. Limo.

Petitioners' Further Statements/Affidavits

15. Before the trial resumed, the Petitioners on 3/02/2020, filed additional Statements and/or Affidavits.
16. The 1st Petitioner, Miriam J. Komen, filed the Supplementary Affidavit sworn 3/02/2020. She stated that she represents the 2nd house, that the title deed for the property Baringo/Lembus/ Kiplombe/39 was misplaced by the late Cheraste Limo on 6/09/2012 at his rural home in Kabartonjo, Baringo, and the loss was reported to the police as shown by the copy of the abstract, and that it is therefore surprising that the Objector claims to have the title deed yet the same has been missing for the last 18 years. She stated further that the parcel of land in which her said brother, Cheraste Limo and his family live in Baringo was not inherited from the deceased but had been purchased from neighbours as shown by the Agreements produced. She reiterated that they have relied on the estate land for upkeep and are thus entitled to a share thereof being heirs of the deceased.
17. The 2nd Petitioner, Joan J. Cheraste, also filed the Affidavit sworn on the same 3/02/2020. She, too, stated that she represents the 2nd house. The matters in the Affidavit are a word-by-word replica of the Affidavit sworn by the 1st Petitioner.

Petitioners' Testimony

18. PW1 was Joan Chepikemoi Cheraste (current 1st Petitioner), testified on 3/02/2020. She stated that the deceased is her grandfather and that she is the daughter of the initial 1st Petitioner, the late Cheraste Limo, who was one of the sons of the deceased, and that her mother is Hellen Cheraste who is alive but ailing. She stated that she resides at Kiplombe on a parcel of land that her father bought, that she is married but not far from her parents' home, that her brothers and sister live on the same land that her father bought, which he bought in 1959, and that their father also bought other pieces of land and made a record in a book which was produced in evidence. She stated that in total, her father has 5 acres in different areas, that she has come to Court to represent their father's interests and that although initially, their father had no land, later, he was given land at Kiplombe Settlement Scheme in Baringo County, namely, the title number Baringo/Lembus/Kiplombe/39 measuring 65 acres, and that it was



- acquired during the reign of President Kenyatta, before 1978. She stated that at that time, her father lived there with the 1st Objector's mother who has since died and that they also used to farm and rear cattle on the same farm.
19. She stated further that said land is in the southern part of Baringo County, and that her grandfather had a piece of land in Baringo North but which he left to his siblings when he was given Baringo/Lembus/Kiplombe/39. She stated further that her grandfather did not own any other property apart from the said parcel of land and that it on that basis that the same should be shared equally amongst the houses, upon which the respective houses can then share out their pieces amongst themselves, and that each house would get 21.7 acres. She insisted that in their proposed mode of distribution, the Objectors' family is well provided for. She stated that she could not recall when the 1st Objector's mother passed away, but that the 1st Objector was very young by then, about 10 years old, and that before she died, the 1st Objector's mother handed the 1st Objector over to the 1st Petitioner (Miriam Komen) to take care of her, that the 1st Petitioner took the 1st Objector in and has since then been taking care of the 1st Objector, that herself (PW1) and others, assisted the 1st Petitioner to take care of the 1st Objector and her siblings, and also paid school fees, that the 1st Objector and her siblings have all along co-operated until the issue of Succession came up, and that they have tried to discuss and resolve the issue but the 1st Objector and her siblings have not been co-operative. She stated that before her grandfather died, he was staying at the home of Anthony, the son from the 1st house.
 20. She opposed the 1st Objector's proposal on distribution since the property Baringo/Lembus/Kiplombe/39 is the only asset that her grandfather had and that she also knows that her father, Cheraste, contributed to purchase of the property as indicated in the records (instalment payments) written in the exercise book that was kept by the deceased and which was produced in evidence. She stated that from the records, in total, her father contributed Kshs 335/- between 1963 -1966. She denied that her family (2nd house) has 40 acres in Kabartonjo as alleged by the Objectors and contended that as far as she knows, the title deed for Baringo/Lembus/Kiplombe/39 was in the custody of Cheraste Limo, but it got lost and a Report was made to the police vide OB No. 16/6/9/2012. She was therefore surprised that the 1st Objector has the original title deed.
 21. In cross-examination, she stated that the land in question was under the custody of Anthony and Cheraste because OW1 was not of age, that Cheraste invited OW1 and her siblings for discussions over the dispute but they always failed to attend. She stated that the deceased used to stay at the late Anthony's farm where he stayed, and that all she knew was that he surrendered the land to his siblings when he acquired Baringo/Lembus/Kiplombe/39. She stated that she was not aware of the details surrounding her grandfather's marriage to OW1's mother and also on whether her father Cheraste, was born out of wedlock. She stated that all she knew was that his father's mother died when he was young.
 22. PW2 was the 1st Petitioner, Miriam Komen. She testified that Limo Yator was her father, the 2nd Petitioner is her niece, and the 1st Objector is her step-sister. She stated that her mother was the 1st wife and as already done in her Statement, she proceeded to list the children according the houses (mothers). She reiterated that in the 2nd house, Cheraste was the only son and is the 2nd Petitioner's father, that the 1st Objector is from the 3rd house and whose mother used to live on the Baringo/Lembus/Kiplombe/39 property which was bought by the deceased a long time ago, and that the 1st Objector's mother was born in the 1960s although she could not remember the exact date. She further stated that the deceased used to have a small piece of ancestral land which he gave to his brother, that her grandfather did not own any property and that the Baringo/Lembus/Kiplombe/39 farm was the only property that her father owned. She reiterated that Anthony Limo bought for himself a small piece of land in North Baringo on 11/8/1973 as shown in the records produced, and that he (Anthony Limo) bought a total



of 5 acres which are scattered. She then denied that those 5 acres were inherited by Anthony from their father. She also denied that the 1st house received 40 acres from the deceased during his lifetime and insisted that they all used to rely on produce from the Baringo/Lembus/Kiplombe/39 farm. She stated that she raised the 1st Objector before and after her mother died and that she was responsible for her education.

23. She insisted that the only asset the deceased had is the Baringo/Lembus/Kiplombe/39 farm and which should be shared equally among the 3 houses, that she swore an Affidavit proposing that each house be given 21.7 acres, and that all the beneficiaries have been taken care of in her proposal and that it would be unfair for the 3rd house to get the whole of the Baringo/Lembus/Kiplombe/39 farm. She maintained that she did not receive any property from her father during his lifetime and that she is aware that the title deed for the Baringo/Lembus/Kiplombe/39 farm got lost and a Report of the loss was made to police by Cheraste.
24. In cross-examination, she stated that her as far she knows, her father used to live with his brother called Kipkulei Yator, that his father had no land of his own which he inherited from his father, that his father used to educate them from the little he had as he reared goats and which he would sell to raise money for fees, and that they also used to cultivate the Kiplombe farm with their father's authority. She stated that they called for a meeting while Cheraste was still alive but the Objectors and their siblings did not attend. She stated further that she is not aware that Anthony was given 40 acres of land by the deceased. In the end, she insisted that they have a right to claim a share of the Kiplombe land.

Post-trial proceedings

25. The conclusion of the 1st Administrator's testimony coincided with the advent of the corona virus/ COVID pandemic and the proceedings were therefore suspended for some time. However, upon resumption of operations, the Objectors could not be traced for a long time. I also note that there was no express indication that the trial had been concluded or closed and I also note that even after 1st Petitioner concluded her testimony, the record indicates that in some instances, the matter was still being fixed for "further hearing". On several occasions, dates were fixed on the basis that the matter was part-heard. Indeed, even when I took over the matter, the parties moved me to fix a date for further hearing. I note that on 17/10/2023, Mr. Kipnyekwei, Counsel for the Petitioners, and the 1st Objector (Agnes Limo), when addressing the Court, submitted, and the Court directed, in the manner hereinbelow:



Kipnyekwei	“One Agnes Limo is the Objector. She is acting in person. My clients had testified. It is now the turn of the Objector.”
Agnes Limo	“I had not finished cross-examining Mr. Kipnyekwei’s witnesses.”
Kipnyekwei	“I thought she had cross-examined.”
Court	“Parties to peruse the Court file and determine how to proceed before I allocate time.”
Kipnyekwei	“We have perused the file and confirm that the Respondent finalized her cross-examination.”
Court	“Hearing to proceed at 2.30 pm for defence case.”
3 pm	Coram as before
Kipnyekwei	“I have perused the file and note that the Objector testified and once she finished, my witness also gave evidence so the Objector cannot purport to again give evidence. She already did.”
Agnes Limo	“I am surprised that it is being said that I closed my case. It is only I who testified. My witnesses had not. I have always had witnesses. I was not informed that I had closed. This is because I did not have a Lawyer and I do not know the rules.”
Court	<p>“i) It is true that the Record states/indicates that indeed the Objector gave her testimony on 18/02/2019. Later, on 3/2/2020, the 2 witnesses for the Petitioner testified. As it stands therefore, the Objector cannot again testify.</p> <p>ii) If the Objector genuinely feels that she needs to be given an opportunity to call her witnesses then she will have to file a formal Application seeking such orders.</p> <p>iii) To give the Objector time to decide how she wishes to proceed, this matter shall be mentioned on 19/12/23”</p>

26. On 19/12/2023, Mr. Esikuri held brief for Mr. Kipnyekwei. The Objector then handed over to the Court some unfiled Affidavits. This is how the proceedings were recorded:



Esikuri	“You had given the Objector leave to file an Application to re-open her case. We have not been served with any Application from her.”
Agnes Limo	“I filed some Affidavits.”
Court	“(i) Instead of filing an Application to re-open her case, the Objector has instead filed some Affidavits from her intended witnesses. Since she was never granted leave to do so, the Affidavits/Statements of the Witnesses are expunged from the record.” ii) In the meantime, further hearing of Administrators’ case shall proceed on 29/4/24 – viva voce.”

27. On 24/04/2024, the Court was on leave and so a fresh date was given at the Registry for 25/04/2024. On that latter date, the Objectors did not turn up in Court. I thus fixed the matter for Mention on 30/07/2024. On that date, the 1st Objector appeared and Ms. Cheruiyot Mitei, held brief for Mr. Kipnyekwei. The proceedings are recorded as follows:

Cheruiyot	“Objection proceedings had already been concluded. Parties should now file Submissions.”
Agnes Limo	“I had filed an Application seeking that my other witnesses be called as you had directed.”
Court	“(i) I gave the Objector leave way back in October 2023 to file an Application requesting the Court to re-open her case and call witnesses. To date, she has not filed such Application. Instead, she has only written a letter. ii) This case has taken too long and it must now come to an end. In the circumstances, I now mark the trial as closed”

28. I then proceeded to give directions on filing of written Submissions. The 1st Objector was to start and I gave her 14 days to file and serve and fixed the matter for Mention on 30/10/2024. On that date however, the 1st Objector had not complied with the direction to file Submissions. When the Court inquired, the following is what she stated:

Agnes Limo	“I will not write Submissions. I feel you are biased.”
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29. Since Mr. Kipnyekewi had, on his part, already filed the Submissions dated 30/10/2024, I proceeded to fix the matter for Judgment.

Petitioner's Submissions

30. Counsel for the Petitioners, after recounting the oral evidence tendered by the parties, submitted that based on the evidence tendered by the Objector, there is no sufficient basis to deviate from the proposed mode of distribution particularized in the Petitioners' Summons for Confirmation of Grant dated 24/3/2017. He maintained that as much as the Objector claims that in addition to land parcel Baringo/Lembus/Kiplombe/39, the deceased had other parcels of land allegedly measuring 40 acres each in North Baringo Sub-County, she did not tender any evidence to support that claim. He urged that it is a basic rule of evidence that "he who alleges must prove" and that in the present case, contrary to the Objector's claim, the only estate property available for distribution is the land parcel Baringo/Lembus/Kiplombe/39. Regarding the mode of distribution, he cited Section 40 of the Law of Succession Act and also the case of John Musambayi Katumanga (Deceased) [2014] eKLR.
31. He then submitted that since the law contemplates equal distribution of the estate, the Court should hold that there is only the one asset Baringo/Lembus/Kiplombe/39 measuring 65 acres to be distributed. He reiterated that the Objector has not presented sufficient basis in opposition to the proposed mode of distribution as per the Summons. He submitted that all parties in this Cause are in agreement that the division be as per the houses. In conclusion, he urged that the said property be distributed equally amongst the houses, with each household getting approximately 21.7 acres.

Determination

32. Since as aforesaid, after the Objectors filed the Objection, the Petitioners accepted and recognized them as genuine beneficiaries. The sole issue for determination is therefore on "the mode or method to be applied in distributing the estate amongst the beneficiaries".
33. I may state that although the 2nd Objector was claimed to have been a party to filing of the Objection (and indeed there is an Affidavit bearing his name filed at the inception), he has never filed any further pleading in this matter or attended Court, and it is only the 1st Objector who has been appearing.
34. Be that as it may, it is not in dispute that the deceased herein was a polygamous man. He was married to 3 wives, with whom he had 8 children. While the Petitioners are both from the 1st house, the Objectors are both from the 3rd house. Regarding the 2nd house, I note that its members, save for those who are said to have been minors at that time, signed the consent in support of the Petitioner's mode of distribution.
35. While the Petitioners presented the distribution schedule through which the said one property said to comprise the entire estate, namely, Baringo/Lembus/Kiplombe/39, would be shared out equally amongst the 3 houses, according to the Objectors, the deceased owned other parcels of land and had, before his death, allocated a parcel to each of the houses. According to the Objectors, the instant property, Baringo/Lembus/Kiplombe/39, was allocated entirely to her family (3rd house). It is therefore her case that each of the 3 families should retain and remain in the respective parcels of land allocated to each by the deceased. The Petitioners have countered that argument by claiming that any other property owned or occupied by their families, were purchased by such respective families, and were not at all inherited from the deceased.
36. The Petitioners further argued that the Objector's side of the family occupies 65 acres while the other 2 families live on respective parcels of land measuring only 5 acres each, and which are rocky and



economically unproductive. According to them, the Objectors want their side of the family to benefit to the exclusion of the others

37. Regarding the law on 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”.

38. 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.”

39. 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...”

40. 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.”

41. 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 stated 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.

42. 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 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 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”.

43. 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.”

44. 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.
45. In this case, the Objectors are inviting the Court to find that the deceased had settled the 3 houses/families separately. The bone of contention is the parcel of land known as Baringo/Lembus/Kiplombe/39 which, from the Search Report on record, is indicated to be 26.5 Hectares (approximately 65 acres) which the Objectors assert, was allocated solely to their household (3rd house) and thus, should not be shared amongst all the 3 households.
46. However, at the viva voce trial of this matter, the 1st Objector was clearly unable to tender any evidence to support her assertions. It is trite law that “he who alleges must prove”. The 1st Objector failed to tender any evidence whatsoever to prove her claims that the 1st and 2nd houses were each settled on or allocated 40 acres of land in Baringo North by the deceased. The Search Report indicates that the parcel of land known as Baringo/Lembus/Kiplombe/39 is still in the name of the deceased. In the absence of any evidence to show that the deceased owned any other property, and in the absence of any evidence to prove that the 1st and 2nd house were each settled on respective parcels of land as alleged, this Court has no material before it to disprove the Petitioners’ contention that the only asset owned by the deceased and thus available for distribution in the estate is the said Baringo/Lembus/Kiplombe/39. I therefore find the claim by the Objector to be unsubstantiated.
47. I have not been presented with any material to justify departing from the “equality” principle enunciated in Section 40 of the *Law of Succession Act* as the Objectors did not produce any evidence to support their claims. In the circumstances, the said parcel of land will have to be distributed in accordance with the provisions of Section 40 of the *Law of Succession Act*, and thus equally amongst the 3 houses. Since this is the proposal presented in the Petitioner’s Summons for Confirmation, I adopt the same.

Final Orders

48. In the premises, I find, direct and order as follows:
- i. The Objection filed herein by the Objectors is dismissed.
 - ii. The Summons for Confirmation dated 24/03/2017 is allowed in terms of prayers 1, 2 and 3 thereof.
 - iii. Consequently, the sole property proved to comprise the estate, namely, the parcel of land known as Baringo/Lembus/Kiplombe/39 shall be distributed in the following manner:



House	Children	Share
1 st house	Cheraste Limo and Miriam J. Komen	21.7 Ha
2 nd house	Emmy Limo, Tarok Chebotibin, Lilian Cherop, Silas Kipkwe Yator and Bernard Kipkulei	21.7 Ha
3 rd house	Agnes Limo and Kiprotich Limo	21.7 Ha

- iv. A Certificate of Confirmation of Grant shall now be issued in the above terms.
- v. The parties being members of one family, each shall bear her own costs of the Objection.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Kipnyekwei for the Petitioner

Agnes Limo – 1st Objector

Court Assistant: Brian Kimathi

