



**In re Estate of Albert Lihanda Binayo (Succession Cause
348 of 2005) [2024] KEHC 5829 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 348 OF 2005
JRA WANANDA, J
MAY 24, 2024**

BETWEEN

TRUPHOSA KAGERA LIHANDA PETITIONER

AND

KENNEDY LIHANDA OBJECTOR

RULING

1. The deceased, Albert Lihanda Binayo died on 2/11/2003 and is said have married 4 wives during his lifetime, although 2 of them, the Petitioner and the Objector's mother, are alleged to have been later divorced by the deceased before his demise. The deceased is also stated to have left behind 12 children.
2. It is generally agreed amongst the parties that the parcels of land left by the deceased as being available for distribution amongst the beneficiaries are 3 in number (save that he had sold portions thereof to third parties), namely, Kakamega/Lumakanda/3004, Kakamega/Lumakanda/2755 and Kakamega/Lumakanda/2752.
3. On 9/12/2004, the Petitioner, in her stated capacity as a widow of the deceased, filed the present Cause, and applied for Grant of Letters of Administration Intestate. However, upon notice of the Application being published, and before the Grant could be issued, the Objector, on 23/02/2005, in his stated capacity as the eldest son of the deceased, filed an Answer to the Petition and also a Cross-Petition of his own. In the Answer to Petition, the Objector claimed that the Petitioner and the deceased divorced on 2/04/1998, that the Petitioner left out 3 co-widows of the deceased in her Petition (one dead, one divorced and one still alive) and that the Petitioner also left out 7 beneficiaries-children of the deceased with the other widows.
4. From the record, there is indication that upon request made to the Court by the parties, and pursuant to a consent order recorded on 15/04/2008 before the Deputy Registrar, the Court directed the District Surveyor to visit the respective parcels of land and carry out survey and report back to



- the Court. The Survey was indeed carried out and the Report dated 9/10/2008 filed in Court on 13/10/2008.
5. Further, there is also indication from the record that, after long, protracted and contentious litigation spanning over several years, and including oral *viva voce* testimonies, on 23/07/2012 when the parties appeared before Hon. Justice F. Azangalala, they recorded another consent order appointing the Petitioner, the Objector and the other widow, Mary Namukuchu Lihanda as the 3 joint Administrators. It does not however appear that the formal duly signed Grant was ever issued or pursued by the parties.
 6. Be that as it may, the Application now before the Court for determination is the Summons for Confirmation dated 23/07/2014 and filed by the Petitioner through Messrs Manani, Lilan & Co. Advocates. It seeks the following orders:
 - i. That the Grant of Letters of Administration intestate made to the Applicant in this matter on 18th day of July, 2003 be confirmed
 - ii. That costs of the application be in the Cause.
 7. The prayer (i) above is quite confusing since, the record does not reflect the existence of any Grant made on 18/07/2003 as alleged in the prayer. In any event, this Cause having been filed on 2/12/2004, it is not possible that a Grant of Letters of Administration could have been given on the earlier date of 18/07/2003, which is before the Cause was even filed. As aforesaid, the indication from the record is that it is on 23/07/2012 that the parties recorded a consent order appointing the Petitioner, the Objector and the 4th widow, Mary Namukhulu Lihanda as the 3 joint Administrators. As further observed, it does not however appear that the duly signed Grant was ever issued.
 8. Be that as it may, the Application is expressed to be brought under Section 71 of the [Law of Succession Act](#) and Rule 40 of the [Probate and Administration Act](#). The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Petitioner, Truphosa Kageha Lihanda.
 9. In the Affidavit, the Petitioner listed 15 persons as the survivors of the deceased and the 3 properties already referred to, as comprising the estate, namely, Kakamega/Lumakanda/3004, Kakamega/Lumakanda/2755 and Kakamega/Lumakanda/2752. Regarding the beneficiaries however, she listed 16 of them to whom she proposed be allocated 0.2 acres each except for herself to whom she proposed 3.7 acres and for 2 grandsons (sons of a deceased survivor) to share 0.2 acres. The Application and mode of distribution are then supported by a Consent signed by 8 of the listed beneficiaries.

Objector's Replying Affidavit

10. In his response to the Application, the Objector swore the Replying Affidavit filed on 23/02/2009 through Messrs Ngigi Mbugua & Co. Advocates. He deponed that he has the authority of the 3rd Administrator, Mary Namukhulu Lihanda, the 4th widow of the deceased to swear the Affidavit and stated that the mode of distribution proposed by the Petitioner is not in tandem with the reality on the ground, that by an order made in this matter on 28/07/2008, a Survey was carried out on the available land and whose findings are contained in the Report filed in Court on 13/10/2008, and that as per the Report, the land available for distribution is 3.73 acres which the Petitioner wholly and solely proposes to allocate herself.
11. His proposal is that the said available 3.73 acres be distributed among the 4 houses equally at the ratio of $\frac{3}{4}$ acres each and that the remaining portion 0.73 acres, which covers the homestead remain a common residential area for the family members. It was also the Objector's contention that some of the



people proposed to benefit from the Petitioner's proposal are not heirs of the estate but the Petitioner's relatives, namely, Michael Magutu and Sammy Sebi who are her brothers.

12. He deponed further that although they were appointed joint Administrators, the Petitioner has never consulted the Objector in drawing the mode of distribution. He added that his proposal is most reasonable given that the deceased had in his lifetime sold substantial portions of his land to third parties who must be provided for as they constitute liabilities to the estate.

Survey Report

13. As already stated, pursuant to a consent order, a Survey of the estate parcels of land was conducted and the Report dated 9/10/2008 filed in Court on 13/10/2008. The conclusion of the Report was that at the time of his death, the deceased left the said 3 parcels of land totalling 7.4 acres out of which he had sold 3.7 acres to third parties and who were in occupation. According to the Report therefore, the net acreage of land remaining for distribution amongst the beneficiaries is therefore 3.7 acres

Viva Voce Hearing

14. Pursuant to subsequent directions give, the matter proceeded for *viva voce* oral hearing.
15. The Petitioner, Truphosa Kageha Lihanda, testified as PW1 before Hon. Lady Justice O. Sewe on 4/12/2018. Led by her Counsel, Mr. Mwetich, she basically reiterated the matters already set out in her prior pleadings filed herein and also generally confirmed the conclusions made in the Survey Report. She then stated that her proposal is that the estate be distributed equally among the children, that however, she should get more in terms of acreage because she bought the properties with the deceased as she was working as a nurse from 1965, that they bought the land with the assistance of her mother since the deceased did not have money when the properties were available for sale, and that the 3rd and 4th widows had not been married by then. She denied that she had been divorced by the deceased as she was never summoned for any divorce case hearing. She also stated that she never met the 1st widow and whose children were born out of wedlock, but that nevertheless, she accepted the children as legitimate beneficiaries of the estate.
16. In cross-examination, she stated that when she filed the Petition, she only listed one property but upon the Cross-Petition being filed, she learnt of the other properties. She conceded that in the Petition, she only listed 6 children of the deceased as survivors. She stated further that although she does not agree fully with the findings contained in the Survey Report which was conducted in her absence, she never commissioned her own independent Survey and that as such, only the Report on record is in existence. Regarding the divorce proceedings, she once again denied knowledge thereof although she admitted that when the deceased died, they were not living together as she was working in Eldoret. She admitted that the 4th wife upon getting married, took over her (Petitioner's) marital house. She reiterated that she is entitled to a higher acreage of 3½ acres because she contributed to acquisition of the properties although she did not have any proof of such contribution and conceded that all the properties are registered in the exclusive name of the deceased.
17. The Petitioner opposed the Objector's proposal that the properties be distributed equally among the 4 houses because she (Petitioner) had contributed to acquisition thereof. She then admitted that the deceased had sold portions of the land to third parties but claimed that some portions were sold after the death of the deceased. Regarding the persons named as Sammy Seby and Michael Magutu whom she listed as beneficiaries, she stated that they are grandsons of the deceased whose mother – one Joyce - died, and were being supported by the deceased during his lifetime as they lived with them. According to her therefore, the grandsons were dependents of the deceased.



18. Unfortunately, after giving her evidence, the Petitioner herself died sometime in the year 2020. Pursuant thereto, she was, by the consent order filed in Court on 23/11/2021, substituted with her daughter, Emily Kasandi Lihanda.
19. The Objector, Kennedy Lihanda, then eventually testified as DW1 before Hon. Justice E. Ogola on 25/07/2022. Led by his Counsel, Mr. Ngigi Mbugua, he too, basically reiterated the matters already set out in his pleadings and urged the Court to adopt the mode of distribution proposed in his Replying Affidavit. He insisted that equal share of the available 3.7 acres of the properties as proposed by him is the fair mode of distribution. He opposed the Petitioner's proposal as it includes 2 persons who are not members of the family and also because the additional acreage that the Petitioner was proposing for distribution was non-existent.
20. In cross-examination, he denied that the said Joyce alleged by the Petitioner to be the mother of the alleged grandsons and listed by the Petitioner as beneficiaries, was his sister. He claimed that the said Joyce only came to live with them briefly and later died. He conceded that his own mother had separated from the deceased and re-married elsewhere and thus she is not entitled to any share of the estate. He also denied the Petitioner's allegations that he (Objector) had sold any portions of the parcels of land and further denied that the deceased took in the said Sammy Sebby and Michael Magutu as his dependents.
21. Upon close of the trial, Hon. Justice Ogola directed the parties to file and exchange written Submissions. However, before the parties could file such Submissions, Hon. Justice Ogola was transferred to Nairobi upon assuming the position of the Presiding Judge of the entire High Court of Kenya. In view of the foregoing, I took over this matter and accepted the parties' request, made by consent, that I handle it to conclusion. Thereafter, the Objector's Counsel filed his Submissions on 4/08/2023 while the Petitioner filed his on 27/03/2024.

Objector's Submissions

22. In his Submissions, Counsel for the Objector gave an exhaustive background of the matter as already set out above and then basically reiterated the mode of distribution proposed by the Objector and which he urged the Court to adopt. In conclusion, he submitted that whichever mode of distribution this Court will adopt, it should consider the order of consanguinity in coming up with the list of legitimate beneficiaries.

Objector's Submissions

23. On his part, Counsel for the Petitioner after reciting the matters already set out hereinabove, submitted that the Petitioner has, in her proposal, applied the principle of equality and awarded at least 0.2 of an acre for each beneficiary across the 3 houses. He maintained that the Objector desires to be awarded 3.7 acres having substantially contributed to purchase of the assets and submitted that the Objector's proposal of equal distribution among the houses works injustice as it benefits with fewer children, that it also benefits widows who were not there when the property was purchased by the Petitioner and the deceased, and that it works injustice to the 1st house which has more beneficiaries. He added that the Petitioner's mother's (Sarah Kangahi) was never a widow, and that she never married the deceased save that she bore 2 sons to the deceased but moved on and got married elsewhere and as such, she cannot feature as forming a house. Regarding the Survey Report, Counsel submitted that it was conducted in the context of an application seeking interim orders and as such, has no bearing on distribution.
24. Counsel submitted further that the Petitioner does not recognize purported sale of parts of the estate by the Objector to strangers named in the Survey Report since the Objector did not have the authority



to do so, that the sale amounted to intermeddling, that the naming of the 6 strangers in the Survey Report does not validate the illegal actions of the Objector. In urging that the Petitioner be awarded a bigger share, Counsel cited the case of *In re the Estate of the Late George Cheriro Chepkosiom (Deceased)* [2017] eKLR

Determination

25. The issues for this Court to determine is “the identity of the property available for distribution of the estate of the deceased, the legitimate beneficiaries of the estate and finally, the fair and/or just mode of distributing the estate amongst the beneficiaries”:

26. As aforesaid, it is not disputed that the deceased was polygamous, that during his lifetime, he married 4 wives and that each wife gave birth to children. Although 2 of the wives are said to have been later divorced by the deceased, the parties are generally in agreement that children from all 4 houses, alongside the surviving widows, are entitled to share in the distribution of the estate.

27. 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”.

28. 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.”

29. Regarding “equality” in distribution as mentioned in Section 40 above, 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...”



30. 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.”

31. However, in the case of *Esther Wanjiku Burugu v 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.
32. Similarly, in another Court of Appeal case, namely, *Mary Rono vs Jane Rono & Another* [2005] eKLR, while concurring with the Judgment of Waki JJ, 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.”



33. 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.
34. In this instant case, as aforesaid, it is agreed amongst the parties that the parcels of land left behind by the deceased as being available for distribution amongst the beneficiaries are 3, namely, Kakamega/Lumakanda/3004, Kakamega/Lumakanda/2755 and Kakamega/Lumakanda/2752. It is also agreed that during his lifetime, and before his demise, the deceased had sold portions of the said properties to third parties. The Survey Report commissioned by the parties by consent has then established that the acreage now remaining or available for distribution amongst the beneficiaries is 3.7 acres spread over the 3 properties mentioned above. Identity of the estate properties is therefore not seriously in contention. Although in her testimony, the Petitioner stated that she does not agree fully with the findings contained in the Survey Report and that the same was conducted in her absence, she conceded that she never commissioned her own independent Survey and that as such, only the Report on record is in existence. In the circumstances, I find that the Court has no reason to ignore the Report and shall accordingly be guided by it.
35. Regarding the identity of the beneficiaries, the same is also not seriously in contention. This is because the parties agree that by the time of his demise, 2 of the widows (Petitioner and the 4th wife) and 12 children were alive. There were therefore 14 automatic beneficiaries. Although the Petitioner has since also died, having died after the deceased, none of the parties has indicated that her estate should cease being a beneficiary. On her part, the Petitioner stated that she never met the 1st widow and whose children (including the Objector) she claimed were born out of wedlock, but that nevertheless, she accepted the children as legitimate beneficiaries of the estate. There is therefore also no serious challenge on the identity of the survivors eligible as beneficiaries.
36. The Petitioner has however in her proposed mode of distribution, included two persons, namely, Sammy Sebi and Michael Magutu in the list of proposed beneficiaries. She claims to have included the two because allegedly they are the children of one “Joyce” and that they are grandsons of the deceased. She claims further that the two were living with the deceased and were therefore his dependents. The Petitioner has however not presented any evidence to support the allegations. She has not given sufficient details of the two persons, not even their age or their status or any other such particulars that would assist the Court to make a determination on the allegation.
37. In any case, the deceased having died in the year 2003, more than 20 years ago, and the two persons having been alive by the time of the death of the deceased, it means they are definitely way past 20 years of age and adults capable of “standing on their own feet”. Further, being above the age of capacity of 18 years, it is not clear why the two could not by themselves either move the Court in their own capacity or why, at least, they were not even called as witnesses or swore Affidavits of their own. There is therefore nothing before the Court to even demonstrate that the two even gave the Petitioner the authority to argue their case or include them in the list of beneficiaries.
38. In any case, the Objector has vehemently refuted the claim that the two are grandsons of the deceased. He has strongly denied that the alleged mother of the two - Joyce – was his sister or a daughter of the deceased. Even the legitimacy of the two persons as being grandsons of the deceased is therefore in



contention. In the circumstances, I am unable to accept the Petitioner’s proposal that the said Sammy Sebi and Michael Magutu be included in the list of beneficiaries of the estate herein.

39. Regarding the Petitioner’s proposed mode of distribution, the Survey Report having established that the acreage now remaining is 3.7 acres, the Petitioner’s proposal that she alone be allocated 3.7 acres is untenable since this is, in fact, the entire acreage available to be shared out amongst all the beneficiaries.
40. Further, a casual computation of the mode of distribution proposed by the Petitioner reveals that the total acreage presumed by the Petitioner to be available is 6.7 acres (3.7 acres to herself and only 3 acres to be shared amongst the rest of the other 15 beneficiaries listed by her). Again, this proposal is untenable for the same reason as above, namely, the Survey Report on record established that the acreage remaining or available for distribution amongst the beneficiaries is only 3.7 acres. It is therefore clear that the additional 3 acres proposed by the Petitioner to be shared among the rest of the beneficiaries is non-existent in the first place.
41. It is not clear to me whether the Petitioner’s irregular proposed mode of distribution is by design or the Petitioner simply chose to ignore the contents of the Survey Report on record. Either way, as already found, the same is untenable and cannot be accepted.
42. Regarding the Petitioner’s proposal that she be awarded a larger share of the property, she argued that she should get more because she contributed in acquisition of the properties with the deceased as she was working as a nurse from 1965, that they bought the land with the assistance of her mother since the deceased did not have money when the properties were available for sale, and that the 3rd and 4th widows had not been married by then.
43. The Petitioner also denied that she had been divorced by the deceased as she was never summoned for any divorce case hearing. The Objector however produced a copy of the Judgment delivered on 26/09/1997 by B.K. Tanui J in Kakamega High Court Divorce Cause No. 2 of 1997 indicating that indeed that the Petitioner was divorced by the deceased about 6 years before he died in the year 2003. I note the Judge made findings as follows:

“On 26th April 1997 the Petitioner lodged this Petition in this Court in which he averred that he got married to the Respondent in 1967 under Luhya customary law and that thereafter cohabited at Turbo in Uasin Gishu. The Petitioner further averred that in 1973 he sent the Respondent to a clinical medicine course at Kisii and in 1974 they registered their marriage at the office of the District Commissioner Eldoret. The Petitioner stated that they have six adult children with the Respondent and that in 1979 the Respondent deserted the matrimonial home and had not come back since then. The Petitioner considered that the marriage had irretrievably broken down. The Petitioner was served with the Petition but she never made any response and at the request of the Petitioner an interlocutory judgment was entered on 18th June 1997.

.....

I have perused the record of the Petition and have heard the Petitioner when he testified before me and I am satisfied that the said marriage is irretrievably broken down since the Respondent has been in desertion since 1979, a period of 18 years. The marriage is therefore dissolved.”

44. Although the Petitioner stated that she is not aware of the said Judgment, in the absence of any challenge to its authenticity, the Judgment remains a valid legal declaration which this Court is bound to abide by. I also note that the Petitioner admitted that when the deceased died, they were not living



together. She also admitted that the 4th wife upon getting married, took over her (Petitioner's) marital house. These facts corroborate the contents of the said Judgment. In light of the foregoing, I am satisfied that although the Petitioner and the deceased began living together as a couple sometime in the year 1967, the Petitioner left the matrimonial home way back sometime in the year 1979, about 12 years later.

45. I am aware that various Judges have in the past lamented about the injustice meted out to 1st wives in polygamous marriages as a result of the provisions of Section 40 of the [Law of Succession Act](#) aforesaid. The complaint is that in practice, 1st wives toil and sacrifice a lot for the husband and the family and in the process, assist in acquisition of property, mostly registered in the husband's name, but that after all this has been achieved, the husband brings in more wives who have no idea how the properties were acquired. This school of thought therefore opines that it is unjust to treat such 1st wife equally during distribution with the other newly married wives who have basically added no value to the family property. I have in mind, for instance, the decisions of Koome J (as she then was) in the case of [Estate of Mwangi Giture \(Deceased\)](#) 2004 eKLR, the decision of Makau J in Succession Cause No. 110 of 2010-[In the Matter of the Estate of Samwel Miriti \(Deceased\) M M M'M vs A I M](#) [2014] eKLR, the decision of Kimondo J in Probate and Administration Cause No. 244 of 2002-[Re Estate of Ephantus Githatu Waitbaka \(Deceased\) Esther Wanjiru Kiarie vs Mary Wanjiru Githatu](#) and also the decision of Mumbi Ngugi J (as she then was) in the case of In [re the Estate of the Late George Cheriho Chepkosiom \(Deceased\)](#) [2017] eKLR where she remarked as follows:

“ 33. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow's children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the basis of section 40 of the [Law of Succession Act](#) is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, the [Constitution](#). For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it.

34. However, there is yet another injustice that is manifest in the way the law treats women, and which is demonstrated in the decision of Kimondo J *in the Estate of Githatu Waitbaka case*: The first widow had to jump through hoops, as it were, to prove her entitlement to a share of the estate on the basis that she contributed to its acquisition. She had to file an application by way of originating summons in the succession cause, and tender evidence, in order to prove that she had contributed to the purchase of the property that was acquired between 1968 and 1984, and was therefore entitled to half of it.

35. She had to do this because the petitioner, who came to the picture in 1986, alleged that she had not contributed to the purchase of the properties. She had, in other words to, as it were, contend with the second wife, who came into her marriage almost twenty years after she was married, and two years after all but a few of the properties comprising the estate had been acquired, on whether or not she had made a contribution to the acquisition of the properties. A person



who, as Kimondo J reiterated, simply was not there during the acquisition of the property and therefore had no basis for challenging the objector's claim.

46. While I generally agree with the reasoning, concerns and logic advanced in the said cases, I find the scenario in this instant case to be quite different. The fact that in this case the Petitioner left the matrimonial home way back in 1979 and was eventually formally divorced in 1997 on the ground of desertion greatly diminishes the strength of her argument that she should be awarded a larger share. The long desertion weakens her claims that her contribution to the acquisition and development of the estate was more than that of the other widows or houses. There is no evidence that she contributed more to the family status than the contributions of the widows who came later but stayed on with the deceased until his death, Since the divorce was in 1997 and the deceased died 6 years later in 2003, the Petitioner had the opportunity to go to Court to seek a declaration of her entitlement to the matrimonial property. This she never did. In the circumstances, I find her current claim for entitlement to a larger share of the estate than the rest of the other beneficiaries to be suspect and I swiftly reject it.
47. Coming to the Objector's proposed mode of distribution, he has urged that each of the 4 houses be each allocated $\frac{3}{4}$ acres of the total available 3.7 acres. Since this will eat up 3 acres, it means that the remainder would be 0.7 acres although for some reason, the Objector has referred to 0.73 acres. He has stated that this 0.7 or 0.73 acres comprises the family homestead and proposed that the same be left aside as a common residential area. It is not clear what he means by "common residential area" but I would rather leave this to the family to discuss and agree.
48. From the provisions of law and authorities cited above, property in a polygamous marriage ought to be divided among houses according to the number of children in each house. However, having considered the whole matter in general, I am of the view that although the estate should be distributed equally, in this case, the same need not necessarily be on the basis of the 4 houses as proposed by the Objector, but generally, among the 14 beneficiaries, including the 2 widows, without necessarily confining them within their individual houses. I believe this will be the just and fair mode of distribution.
49. I reach the above verdict partly because although the parties are agreed that the deceased married 4 wives in his lifetime, in the Objector's Affidavit, apparently one of the beneficiaries, Linet Lihanda is seemingly attributed to being the daughter of one Grace Wekesa whose name however does not seem to have featured in this case as being among the wives or widows of the deceased. In the Affidavit, said Linet Lihanda is proposed to share in the portion to be given to the 3rd house. The Affidavit does not however give any explanation, particulars or details on this proposal. In the circumstances, this Court is uncertain as to which house to place the said Linet Lihanda. Because of this uncertainty, distributing the estate among the houses may prove to be a challenge. Since however the parties are in agreement that Linet Lihanda is a legitimate beneficiary, I find that distributing the estate individually among the beneficiaries would be the best option.
50. I have also considered that all the beneficiaries are full adults who are long past the age of dependency and schooling. There are therefore no minors or any beneficiary with any special reason to be allocated bigger portions than others.

Final Orders

51. In the end, I rule, order and declare as follows:
 - i. Factoring the portions of properties sold by the deceased before his demise, the properties comprising the estate of the deceased and now remaining or available for distribution amongst the beneficiaries is as per the conclusion made in the Survey Report made by the District Surveyor, Kakamega, dated 9/10/2008 and filed in Court on 13/10/2008, as follows:



Kakamega/Lumakanda/3004	1 Acre
Kakamega/Lumakanda/2755	1 Acre
Kakamega/Lumakanda/2752	1.7 Acres
Total	3.7 Acres

- ii. The beneficiaries of the estate are 14 in number, as listed at Paragraph 7 of the Replying sworn by the Objector on 23/15/2015 and filed herein on 23/02/2015, as follows:

Family of Sarah Kangahi (1 st house)	1. Kennedy Esabu Lihanda (Objector)
	2. George Oyieri Lihanda
Family of Truphosa Kageha Lihanda (Petitioner)	3. Estate of Truphosa Kageha Lihanda
	4. Judith Vihenda Lihanda
	5. Emily Kasandi Lihanda
	6. Jane Angano Lihanda
	7. Jesca Mudola Lihanda
	8. Gerald Binayo
Agneta Mwenesi Anyasi	9. Joseph Binayo Lihanda
Mary Namukhulu Lihanda	10. Mary Namukhulu Lihanda
	11. Inviolata Kahenza Binayo
	12. Duncan Binayo
	13. Edith Taming Binayo
House not clearly specified	14. Linet Lihanda

- iii. The 3.7 acres of the parcels of land being the remainder of the estate available for distribution as identified in (i) above shall be shared out equally amongst the 14 beneficiaries in equal shares.
- iv. The parties are however at liberty to discuss and agree on whether the 0.73 acres stated to comprise the family homestead may be left aside as a common residential area for the family as proposed at Paragraph 8 of the Objector's Replying Affidavit sworn on 23/02/2015 and filed herein on the same date. Should this be agreed and adopted, unless the parties mutually agree otherwise, the remainder of the acreage shall still be distributed on equal share basis amongst the 14 beneficiaries.



- v. The persons described as Sammy Sebi and Michael Magutu and named as proposed beneficiaries at Paragraph 7 of the Petitioner’s Affidavit sworn by the Petitioner on 23/07/2014 and filed herein on 24/07/2014 in support of the Summons for Confirmation of Grant dated 23/07/2014, are not beneficiaries nor proven dependents of the estate of the deceased and they are therefore not entitled to a share thereof.
- vi. During the confirmation of Grant hearing, the third party purchasers of the portions of land sold by the deceased, if well identified, shall be included in the mode of distribution, their respective portions identified and provided for in the list of distribution so as to appear in the Certificate of Confirmation to be issued by the Court.
- vii. A duly signed Grant of Letters of Administration Interstate, if none had been issued, shall now be so issued to the Petitioners.
- viii. The parties are now referred to Court annexed mediation for the purposes of negotiating and agreeing on a conclusive and appropriate mode of distribution amongst the 14 beneficiaries to be adopted by this Court and such negotiations and agreement shall be on the basis of the directions, declarations and orders made hereinabove.
- ix. This matter shall be then mentioned before this Court upon lapse of sixty (60) days from the date hereof.
- x. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024

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WANANDA J.R. ANURO
JUDGE

Delivered in the Presence of:
Ms. Jeruto h/b for Mwetich
N/A for Objector

