



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION CAUSE NO. 200 OF 2015**

**IN THE MATTER OF ESTATE OF SALIM JUMA HAKEEM KITENDO (DECEASED)**

**BETWEEN**

**ROSE FAITH MWAWASI.....1<sup>ST</sup> PETITIONER**

**JUDITH MALELE MWAWASI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**FATUMA ATHMAN ABUD FARAJ.....OBJECTOR**

**MARLIN POWNALL.....INTERESTED PARTY**

**JUDGEMENT**

1. This matter pertains the estate of **SALIM JUMA HAKEEM KITENDO** who met his premature death and therefore died intestate on the 23<sup>rd</sup> February, 2015 in Tanzania. On 22<sup>nd</sup> May, 2015 the Petitioners herein petitioned for a grant of Letters of Administration Intestate of the deceased's estate. They described themselves as wife (1<sup>st</sup> Petitioner) and sister in law (2<sup>nd</sup> Petitioner). They listed the survivors of the deceased as Rose Faith Mwawasi (wife), Shawn (son-minor), L (daughter-minor), H (son-minor) and T (son-minor).

2. Among the assets listed as comprising the estate are;

- a) **Blue J petrol station Diani**
- b) **Plot no. 3729–Diani**
- c) **Plot no 12/III/MN-Kilifi**
- d) **Lorry regn. No.679S-Mitsubishi Fuso**
- e) **Barclays Bank Account No.xxxxxx**
- f) **Blue Jay Barclays Account No. xxxxxx**
- g) **Cooperative BankA/CNo.xxxxxx**
- h) **Imperial BankA/CNo.xxxxxx**

3. At the same time, on 20<sup>th</sup> May 2015, one Fatuma Athman Abud Faraju (objector)describing herself as a wife to the deceased filed another succession case in respect of the same estate before the kadhi's court being succession case no.92 of 2015 where she named herself and her children as the only beneficiaries.

4. Upon realizing that the there was a petition filed before the high court by the petitioners, **FATUMA ATHMAN ABUD FARAJ (hereinafter the objector) lodged** an objection dated 9<sup>th</sup> July 2015 opposing the making of a grant to the petitioners on grounds that they

were not beneficiaries to the estate. Subsequently, on 22<sup>nd</sup> September, she filed an Answer to petition for Grant and Petition by way of Cross-Petition for a Grant opposing the making of a Grant by **ROSE FAITH MWAWASI and JUDITH MALELE MWAWASI**, the Petitioners herein.

5. The Objector described herself as the legal wife of the deceased having been married vide Islamic law on 4<sup>th</sup> August, 2006 and that they were blessed with four children namely; **ALWY SALIM JUMA MWAKITENDO, ATHMAN SALIM JUMA MAWKITENDO, BAKHSHUAN SALIM JUMA MWAKITENDO** and **MARIAM SALIM JUMA MWAKITENDO**. She claimed that these were the rightful heirs to the estate of the deceased and that together with the deceased they owned the following assets:

1. **Apt 5 Block A on LR No. 209/20045**
2. **LR No. 8436 original No. 5939/10/I/MN**
3. **Kwale/Ukunda/3729**
4. **4 houses on Kwale/Ukunda/3 729**
5. **Kwale/Ukunda on Plot 3729 Blue Jay gas station**
6. **Kwale/Ukunda Plot 3673**
7. **2 houses Diani Msikitini**
8. **1 house on Plot 3673**
9. **Plot No. 12/III/MN Mtwapa Kilifi County together with kerosene tank**
10. **Kwale/Diani SS/2274**
11. **Kwale/Diani SS/2539**
12. **1/4N/111/2349 3 houses**
13. **Lorry Mitsubishi Fuso KBP 679 S**
14. **Toyota KBP 481 H**
15. **Cash and Carry Supplies business on Plot No. 12/III/MN Mtwapa.**
16. **Barclays account No xxxxxx under Blue Jay gas station**
17. **Barclays account xxxxx(xxxx local business account.**
18. **Barclays current account xxxxxx**
19. **First Community account xxxxxx**
20. **DTB 01 Blue gas station account No. xxxxxx Blue jay gas station**
21. **Imperial bank account xxxxxx for Salim and Son Investment account.**
22. **KCB account xxxxxx Salim Juma Mwakitendo**
23. **Barclays loan account xxxxxxxxxx**
24. **Barclays loan account xxxxxx**
25. **Cooperative bank account xxxxxx Executive current account**

**The Deceased had the following liabilities.**

1. **First Community Bank Kshs3,050,000/-**
2. **Barclays bank Kshs 29,000,000/-**

6. Meanwhile, vide a chamber summons dated 9th August 2016, one Marlin Coram Pownall claiming to be one of the deceased's wives sought to be enjoined as an interested party. At the same time, the objector filed an application dated 9th August 2016 seeking to have Marlin Coram enjoined as an interested party on grounds that she had intermeddled with the estate by transferring part of the assets into her name. On 16<sup>th</sup> August 2016, the court granted an order for joinder of Marline as an interested party.
7. To counter the proceedings before the Kadhi's court, the petitioners filed a chamber summons dated 26<sup>th</sup> August 2016 seeking to have the kadhi's court case withdrawn and then consolidated with the high court file. The same was subsequently allowed and the two were consolidated and the matter proceeded under this file.
8. However, on 15<sup>th</sup> February 2017, parties compromised their respective hard stance and had a temporary grant of letters of administration made to the 1<sup>st</sup> petitioner, objector and the interested party jointly and that each administrator to give an accurate account in respect of the assets under her control. From the record, it is not clear whether the grant was ever issued or not. Nevertheless, on 3<sup>rd</sup> April 2018, the objector filed an application seeking confirmation of the grant but fell short of suggesting on how the estate was to be shared out. After a prolonged battle of filing application and counter application, the matter proceeded to full hearing of the petition, objection, answer to petition and cross petition.
9. The Objection herein is anchored on grounds set out on the face of it and averments contained in the affidavit in support of the Objection to the petition for grant of representation to the estate. It was the objector's claim that she was the lawful wife to the deceased and that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners plus the Interested Party are strangers to the estate. She averred that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner did not seek her consent as required by law before petitioning for the letters of administration intestate.
10. The Objector further contended that the 1<sup>st</sup> Petitioner in the cause is not a wife to her late husband and that her children are also not heirs to the estate of **the deceased**. **She deposed that** the petitioner's children were born before the deceased officiated his alleged marriage with the 1<sup>st</sup> Petitioner, and therefore, under Islamic law, illegitimate children can not inherit the estate of their father. She stated that the said children can only inherit from their mother. It was her contention that the 1<sup>st</sup> Petitioner's allegations are marred with falsehoods and forgeries. According to the Objector, the 1<sup>st</sup> Petitioner was never married to the deceased as her alleged marriage before the Kadhi was verified to be null and void as the same was illegally procured.
11. The Objector further stated that one of the beneficiaries listed in the Petition is not a biological child of the deceased since investigations at Agha Khan hospital where the beneficiary was born on 14<sup>th</sup> July, 1998, revealed that the beneficiary's father is one **TM. That** it was also established that Shawn was not a student at [particulars withheld] Primary School, yet a school leaving certificate from [particulars withheld] primary school was used to apply for his birth certificate which was also issued on 15<sup>th</sup> April 2015 about two (2) months after the death of the deceased. It was also averred that the birth certificates for the other three children (L, H, and T) were issued based on a marriage certificate that was declared null and void by the Kadhi as per the Islamic law.
12. The Objector stated that the 1<sup>st</sup> Petitioner's conversion certificate indicates that she is Rubi Imani Mwawasi yet the marriage certificate she has attached to prove that she was married to the deceased is in the name of Warda Imani Mwawasi. According to her, the 1<sup>st</sup> Petitioner and Warda Imani Mwawasi do not refer to the same person and therefore since there is no marriage certificate in the name of Rubi Imani Mwawasi, then it can be concluded that the 1<sup>st</sup> Petitioner was never married to the deceased.
13. Further, the Objector stated that investigations by the C.I D established that the marriage certificate entry No. 204/96 serial B49718 between the deceased and the 1<sup>st</sup> Petitioner was confirmed by the Chief Kadhi in reply to the letter by the C.I.D to be null and void because it was a forgery as the said certificate belonged to Athman Dimba Mwambaru and Amina Tabu Kulewa. That the second Islamic Marriage 415/11 though genuine shows that the marriage was between Warda Imani Mwawasi and the deceased and not the 1<sup>st</sup> Petitioner herein. She deposed that the Kadhi who officiated the said marriage wrote a statement and stated that he was misled by the 1<sup>st</sup> Petitioner when she claimed she was Wards Imani Mwawasi instead of Rubi Imani Mwawasi as per the conversion certificate. It was her position that the Marriage certificate produced by the first petitioner is a forgery.
14. During the hearing, the objector (pw1) told the court that the 1<sup>st</sup> Petitioner's documents are all forgeries and that they were manufactured with a view to stealing the deceased's estate. She asserted that the prosecution of the 1<sup>st</sup> petitioner with 8 counts of forgery by the ODPP was sufficient proof that there is overwhelming evidence of forgery of documents relied on by the 1<sup>st</sup> petitioner in this case.
15. It is the Objector's contention that the Interested Party (**MARLINE CORAM POWNALL**) is not a rightful heir to the estate of the deceased since she was not legally married to the deceased given that she had submitted two marriage certificates in her list of documents which upon investigation by the police revealed that; she had contracted a marriage with the deceased under islamic law vide certificate no.25/13 in the names of Mariam Coram Pownall and Salim Juma Hakeen and a second one No. 030/2004 between **Marline Coram Pownal** and **Carlos De Pascal** which marriage was still valid and subsisting when she consummated the second marriage with the deceased hence null and void.
16. The Objector went further to state that the green card for Plot 2274 was in the name of the deceased before it was illegally transferred to the Interested Party using a forged ID and death certificate s/no.0654024 of the deceased allegedly issued on 1<sup>st</sup> August 2016 culminating to issuance of a title deed on 27<sup>th</sup> August 2015 long after the deceased had died and without a grant in place. That plot no 2539 Diani was similarly transferred from the deceased's name into the I/party's name on 26<sup>th</sup> August 2015 using a forged death certificate yet the lawful one was issued on 1<sup>st</sup> August 2016. It was further stated that Saumu Juma who obtained the forged death certificate was charged and pleaded guilty to obtaining a document through forgery.
17. The Objector also stated that the transfers of the plots were made using an Identity card that had since become invalid the deceased

having been issued with a new Identity Card with the name Salim Juma Hakeem on 23<sup>rd</sup> January, 2014 pursuant to a gazette notice dated 28<sup>th</sup> August 2012 after the deceased signed a deed poll in the year 2012 making the I.D issued in 2010 a forgery.

18. It is also averred that Hakeem Salim Juma Hakeem was not the deceased's child since the birth certificate entry no. xxxxxx is not genuine as the name of the father indicated therein is Salim Juma Hakeem Kitendo, yet at the time the birth certificate was issued the deceased's name was Mwakitendo and not Kitendo and that during the application of the birth certificate, the child's father ID was not produced on grounds that it was not there.

19. The Objector in conclusion stated that both the 1<sup>st</sup> Petitioner and the Interested Party and their children are not beneficiaries of the deceased's estate but mere busy bodies intending to steal the deceased's estate a fact which the DPP has noted and preferred criminal charges against them.

20. On cross-examination, the Objector confirmed that she was married to the deceased on 4<sup>th</sup> August, 2006 and they remained together until his death. She opined that she and the deceased owned properties in Mombasa and Nairobi. However, she could not confirm where the deceased stayed when he visited Nairobi. When referred to the children case 320 of 2014 at Tononoka, the Objector confirmed that she filed the case because she wanted her children to be maintained by the deceased since the deceased used to travel most of the time and she could not tell where he was disappearing to.

21. The Objector also confirmed that the birth certificates produced by the 1<sup>st</sup> Petitioner were investigated and found to be forgeries and as a result, the 1<sup>st</sup> Petitioner was charged. The Objector also confirmed that she objects to DNA testing of the Children of the 1<sup>st</sup> Petitioner and the deceased because paternity testing is outlawed in Islamic religion.

22. She asserted that she filed a divorce cause before the Kadhi court being Civil Suit No. 245 of 2013 because there was a misunderstanding between her and the deceased and the Kadhi Court was there to assist but their differences were resolved. Regarding the question of her divorce, she asserted that "talaka" is not a divorce, and that the case before the Kadhi was never concluded because she was unable to effect service upon the deceased.

23. On further cross-examination she confirmed that after conversion, Islamic laws govern the converted and that when contracting an Islamic marriage, both parties must first show their I.D Cards or Passports, and she was not aware whether the documents supporting the marriage between the Interested Party and the deceased were forgeries.

24. The Objector confirmed that it was the deceased who dealt with the house on Plot No. 8436/I/ MN, currently occupied by a tenant. However, she confirmed that she has never collected rent from the said property. The Objector stated that the 1<sup>st</sup> Petitioner never lived in the Nyali house on Plot No. 8436/I/ MN although she (1st Petitioner) is in control of a house in Kilifi 12/III/MN, Kilifi and another one in Nairobi on LR. No. 209/20045.

25. The Objector also confirmed on cross-examination that the sale agreement for plot 2539 was between Ramadhan Jumaa Dzitsai and Salim Juma Hakeem Kitendo, and the Interested Party as joint purchasers and that the transfer was issued in their joint names.

26. **CPL George Richard Murungi** who testified as Objector's witness 2 (OW2) stated that he investigated criminal case 2319 of 2016 wherein the 1<sup>st</sup> Petitioner is charged with the offences of obtaining registration by false pretences. However, on cross-examination, OW2 confirmed that he never recorded the statement of the deceased and that the criminal case has never started. OW2 also stated that he was also among the investigating officers in Criminal Case 515 of 2017 where the Interested Party was charged with the offence of bigamy.

27. He told the court that after his investigations, he established that all the birth certificates were late applications which although genuinely issued, were fraudulently obtained, using forged documents among them a leaving certificate from [particulars withheld] Primary School used to obtain Shawn's birth certificate, the marriage certificate entry no. 204/1996 between the 1<sup>st</sup> Petitioner and the deceased confirmed by the Chief Kadhi Mombasa in his letter dated 10<sup>th</sup> November, 2016 to have been between Athman Mwambura as the husband and Lamina Taamu Mlewa as the wife and not the 1<sup>st</sup> Petitioner and the deceased

28. Further, the witness stated that the affidavit supporting the application for the birth certificate was seeking to proceed with registration as the father of the children was working abroad and therefore, his documents were not available. The witness however stated that, a letter to the Director of immigration dated 26<sup>th</sup> November, 2018, which was replied to on the same day, confirmed that the deceased only travelled out of the country on 17<sup>th</sup> February, 2010 via flight KQ 762 from Nairobi to Johannesburg and came back on 23<sup>rd</sup> February 2010. That the deceased then remained in Kenya until 19<sup>th</sup> November, 2014 when he left Nairobi to Doha through JKIA

29. It was his testimony that a letter dated 9<sup>th</sup> November, 2016 to Agha Khan Hospital inquiring whether the 1<sup>st</sup> Petitioner delivered a male child in the hospital on 14<sup>th</sup> July, 1998 and issued with a birth notification xxxx was confirmed by the hospital which notified the Registrar of persons Mombasa and that a current birth certificate entry No. xxxxxx for Shawn Dhundi date of birth 14<sup>th</sup> July, 1998 was issued immediately after birth and the name of the father was Thomas Aruyu Mwambire.

30. OW2 also confirmed that he wrote a letter dated 13<sup>th</sup> March, 2019 to the Director National Registration Bureau Nairobi requesting the status of Salim Juma Hakeem Kitendo I.D No. xxxxxx, and it was confirmed that on 22<sup>nd</sup> November, 2010 the bearer of Identity card was Salim Juma Mwakitendo and that on 23<sup>rd</sup> January, 2014, the name changed to Salim Juma Hakeem Kitendo.

31. Regarding the offence of Bigamy, the officer told the court that charges of bigamy were preferred against the Interested Party when the Attorney general in his letter dated 15<sup>th</sup> March, 2017 confirmed that the marriage between CARLOS De Pascal and the Interested Party was

valid and genuine and the Kadhi through his statement dated 28<sup>th</sup> February, 2017 confirmed that the Interested Party and Salim Juma Hakeem solemnized an Islamic marriage and that they were issued with an Islamic Marriage Certificate No. 25/13.

32. On further cross-examination, OW2 confirmed that he was not aware that there were divorce proceedings between Carlo Pasquella and the Interested Party and that he did not know how long Carlos and the Interested Party stayed separated. He nevertheless stated that he did not know that Criminal Case No. 515 /17 was thrown out since he was transferred and inspector Charo took over.

33. **OW3 Jackson Mulandi Wambua**, a retired civil registrar formerly at Bima Towers testified and stated that all the contested certificates of birth were applications for late registration and they were genuine. He stated that regarding L, an application was made by the 1<sup>st</sup> Petitioner on 13<sup>th</sup> April, 2014. That she completed and enclosed photocopies of clinic cards showing that she was born at Tudor on 8<sup>th</sup> October 2003; produced an immunization card showing that the father was the deceased and the 1<sup>st</sup> Petitioner was the mother; an ID CARD for the mother; a marriage certificate of the mother from Chief Kadhi and an affidavit from Kipsang Advocate showing why the ID of the father could not be produced.

34. Regarding Shawn, OW3 stated that, he was not involved in the issuance of his birth certificate. Concerning Hakeem, the officer stated that the application dated 13<sup>th</sup> April 2012 was made by the 1<sup>st</sup> Petitioner after producing the following documents: a clinic card from Tudor district hospital date of birth 26<sup>th</sup> November 2006; parents were indicated as the deceased and the 1<sup>st</sup> Petitioner; an ID card belonging to the 1<sup>st</sup> Petitioner. A marriage certificate and an affidavit. Regarding T, OW3 testified that the application was made on 17<sup>th</sup> November, 2009 by Rashid Rafiki Kaingo who described himself as an uncle of the child who presented the following Documents; Passport of the father Salim Juma Kitendo; clinic card and the 1<sup>st</sup> Petitioner's Identity card.

35. OW4 Joseph Odhiambo Ndonga an employee of the Agha Khan hospital confirmed that the 1<sup>st</sup> petitioner delivered her first birth of a male child known as Shawn on 14<sup>th</sup> July, 1998 and was issued with a notification number xxxx. That the second child was born on 8<sup>th</sup> October 2003.

36. OW5 Mohamed Juma Mwakitendo, a younger brother to the deceased stated that the deceased had a wife (the Objector) and four children. On cross-examination, he stated that he was not aware that the deceased had any conflict with his wife Fatuma nor was the deceased married to another wife.

37. **OW6 Mohamed Hassan Omar** who claimed to be a close friend of the deceased testified and stated that the deceased lived with the Objector and their four children until his death. He also stated that it was the objector and the deceased who built and developed their properties together and that the deceased used to send him to the Objector to get money to pay construction workers. It was OW6' testimony that in Islam, illegitimate children cannot inherit their father's property and therefore the court should take action against people seeking to oppress the widow and orphans.

38. On cross-examination, he confirmed that there was nothing stopping the deceased from marrying another wife. In re-examination, he stated that there was no divorce between the Objectors as they had reconciled before the divorce could be finalised.

39. The 1<sup>st</sup> Petitioner opposed the objection by way of affidavit. She raised several arguments against the objection. She adopted her statement filed in court on 25<sup>th</sup> October 2016. She averred that she was the widow to the deceased having met him when she was 23 years old. That they could not get married since she was a Christian and the deceased was a Muslim. She stated that when her father died she started cohabiting with the deceased from the year 2000 thus culminating to a union which was blessed with four issues. She stated that she converted into Islam and was issued with a certificate of conversion on 12<sup>th</sup> July, 2011 hence acquired the name Rubi Imani Mwawasi.

40. That on 11th December, 2011, they solemnized an Islamic marriage where the marriage officer insisted that she be given a Swahili name and as a result she was given the name Warda Mwawasi by the deceased in the presence of her mother (Jully Wakesho), the 2<sup>nd</sup> Petitioner and one James Bosire as witnesses. That they were duly issued with a marriage certificate. She deponed that the presiding Kadhi did not declare the marriage certificate faulty and/or defective based on the confusion caused by her name.

41. The 1<sup>st</sup> Petitioner confirmed that the deceased used to go by the name Salim Juma Kitendo which later changed vide a deed poll dated 28<sup>th</sup> May, 2012 to Salim Juma Mwakitendo. The witness stated that the deceased and the Objector had divorced before the Kadhi's Court being civil suit No. 245 of 2013, and that in the said suit the Objector complained that the deceased travelled to Nairobi in the year 2011 and never returned to his family and as a result he had deserted his family. Further, she stated that the Objector in her own admission confirmed that she had received a "**talaka**" from the deceased on 6<sup>th</sup> November, 2013.

42. She claimed that during her marriage to the deceased, they moved to Nairobi and lived in Kileleshwa. That later on, they bought property in Mombasa L.R. 2019/20045 and a second property in Nyalı L.R. No. 8436/I/MN, which became their matrimonial property till the demise of the deceased after they moved out of the Kileleshwa home and put it up for rent.

43. It was testimony that it was her husband who processed all the birth certificates belonging to her four children before his demise and that evidence was not challenged since the commissioner of oaths who witnessed the affidavits of the application for birth certificate was never called to testify. Nevertheless, the 1<sup>st</sup> Petitioner confirmed that she had been charged with the offence of forgery before a magistrate court in Mombasa and that the case is still pending and no one has given evidence against the 1<sup>st</sup> Petitioner.

44. The 2<sup>nd</sup> Petitioner a sister to the 1<sup>st</sup> petitioner on the other hand told the court that other than the 1<sup>st</sup> Petitioner's four children, she did not know of any other child or wife to the deceased. She confirmed that she attended the wedding between the 1<sup>st</sup> Petitioner and the deceased conducted at Jamia mosque in Nairobi and that their mother and one Mr. Bosire witnessed the wedding and a marriage certificate was duly

issued.

45. The Interested Party Marlin Pownall adopted her Replying affidavit sworn on 23<sup>rd</sup> November, 2018 in response to the application for confirmation of grant filed by the objector and her statement dated 7<sup>th</sup> February, 2017 together with the annexed list of documents. It was her evidence that she was the deceased's third wife having started cohabiting in the year 2011 and lived together in Diani as husband and wife till 7<sup>th</sup> July, 2013 when she eventually converted to Islam and finally solemnized their marriage before the Kadhi. That their union was blessed with one issue by the name Hakeem Salim Juma Mwakitendo. She conceded that she was previously married to a foreigner, who left her after seven years. She further stated that the deceased had informed her that the 1<sup>st</sup> Petitioner was his wife and that the Objector was deceased.

46. It was her testimony that during the subsistence of her marriage with the deceased, she had a desire of buying land and since she was married to the deceased, she requested him to accede to owning property jointly. That initially her late husband resisted the idea of joint ownership of property but he later agreed and jointly they bought Kwale/Diani Settlement Scheme/2539 and 2274 from one Ramadhani Jumaa Dzitsai, with the deceased contributing a sum of Kshs. 1.9 million while she contributed a sum of 3 million towards the purchase. She claimed that she was the one who engaged a contractor to build her house using her own money.

47. The Interested Party testified that before the deceased's death, they used to run a petrol station in Ukunda known as Blue Jay, but the said petrol station stood as collateral security on a loan of Kshs. 20,000,000/= secured from the First Community Bank, and that at the time of the deceased's demise, there was an outstanding loan of Kshs. 3,050,000/= which had to be paid since the bank had issued an auction notice. That since there was no money to service the loan and the 1<sup>st</sup> Petitioner had retreated when she was required to furnish the loan, she leased out the petrol station to one Ben Okoth who has since repaid the loan in full and is recovering his money in the tune of Kshs. 100,000/= monthly before moving out.

48. On the aspect of being charged for bigamy, she admitted that she was charged vide Criminal Case No. 515 of 2017 but the Objector herein lost as the case was withdrawn. On cross-examination by the Objector in person, she confirmed that she was indeed married to a foreigner who abandoned her for seven years but the law allows her to remarry after seven years of disappearance of her husband. She further confirmed that she never officially dissolved her first marriage in court and that she was not aware of the divorce cause No. 34 of 2014 before the High Court in Mombasa, since she never participated in the said proceedings and that she does not know who instituted the same.

49. The Interested Party went further to state that her marriage to the deceased was legal and she jointly acquired property with the deceased. According to her, she did not know that the deceased had changed his name since the name of her husband in the agreement for sale entered into on 21<sup>st</sup> October 2013, is Salim Juma Hakeem Kitendo and that to transfer the property she used the deceased's Identity card and their marriage certificate. She further confirmed that it was her sister in law Saumu who processed the deceased's death certificate at the Kilifi registry and she is not aware whether Saumu was charged with forgery of a death certificate. The Interested Party confirmed that the transfer of the property in Kwale was done after the deceased had died.

50. She went further to state that Blue Jay petrol station was under the deceased but she was the one who salvaged the property by clearing the loan when the auctioneers came to view the property and the Objector had disappeared. The Interested Party also confirmed that the rent assisted in repaying the loan.

51. On whether the Interested Party's child was an illegitimate child, she conceded that her child was born on 19<sup>th</sup> December, 2013, which was six months after her marriage to the deceased. On re-examination, she stated that the Kwale plots were jointly owned and upon the death of the deceased, the properties vested upon her as the surviving proprietor

52. Mr. Swaleh Omar Mohamed (2<sup>nd</sup> interested party's witness) who is an Assistant Registrar Islamic marriage and divorce stated that he officiated the marriage between the Interested Party and the deceased on the 7<sup>th</sup> July, 2013 and issued them with a marriage certificate. On cross-examination, Mr. Swaleh confirmed that he was not informed of the Interested Party's former marriage and that he did not know the foreigner who was her husband.

53. Mr. Mohamed Mbwana (3<sup>rd</sup> interested party's witness) who is a Sheikh stated that he was a witness to the marriage between the deceased and the Interested Party and that his signature was on the marriage certificate. On cross-examination, he confirmed that when somebody converts to Islamic religion, her former civil marriage is dissolved and that he knew that the Interested Party was formerly a Christian.

54. Upon conclusion of the hearing, parties agreed to file submissions. The Objector appearing in person filed written submissions on 3<sup>rd</sup> May, 2021, and further written submissions on 16<sup>th</sup> June 2021. The Petitioners filed their written submissions through the firm of Muniyitha and Co Advocates on 28<sup>th</sup> May, 2021, while the Interested Party's written submissions were filed on 14<sup>th</sup> June, 2021 through the firm of Magiya advocates.

55. Inevitably, given the lengthy written submissions, and the authorities cited, I will make reference to the parties' respective submissions as I consider each issue for determination.

### **Analysis and determination**

56. I have given careful consideration to the substantive petition as well as the Answer to the petition for Grant and Petition by way of Cross-Petition for a Grant of Petition, objection filed on 9<sup>th</sup> July 2015 by the Objector and summons for confirmation of grant filed by the Objector on 3<sup>rd</sup> April 2018. I have also keenly considered the *viva voce* evidence adduced by the parties and their respective witnesses as well as the documents they relied on plus their well-researched and articulated written submissions.

57. I will proceed to consider the objection application with a view to determining the following issues:

- 1) *What is the applicable law to all the parties pertaining to the estate of the deceased.*
  - 2) *Who are the widows to the deceased*
  - 3) *Who are the bona fide beneficiaries of the estate of the deceased*
  - 4) *Whether the deceased had any dependant and what are their rights.*
  - 5) *What entails or forms part of the estate of the deceased*
  - 6) *Distribution of the estate*
  - 7) *Whether the estate has any outstanding Liabilities*
- 1) *What is the applicable law to all the parties pertaining to the estate of the deceased.*

58. There is no dispute that the deceased was a Muslim hence the applicable law is the Islamic law pursuant to Article 170(5) of the constitution. Ordinarily, the kadhi's court has jurisdiction under the kadhi's Act where all parties submit to Islamic religion. However, parties have a choice to approach the high court directly. Since some of the issues raised revolve around the question whether the 1<sup>st</sup> petitioner ever converted to Islamic religion, the high court is the right forum.

59. **Touching on the same question, Mr. Muniyithya** learned counsel for the Petitioner was of the same view. In support of that position, counsel cited the case of **R.B & R.G.O v H.S.B & A.S.B [2014] eKLR** where the Court held that in filing the two petitions, P&A 301 and 395 of 2014, in the High Court, rather than filing a plaint in the Kadhi's Court, the Petitioner had declined to **submit**, within the meaning of Article 170 (5) of the Constitution, to the jurisdiction of the Kadhi's Court to hear and determine the matter of the inheritance of the Estate of the deceased.

60. The Objector appearing in person, on the other hand cited the case of ***Re the Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009*** delivered on 5<sup>th</sup> December 2013, which upheld the choice of Muslim parties to submit to the Kadhi's Court or to file succession proceedings in the High Court. In this decision Githinji, JA., Koome JA (as was then) and Okwengu, JJA concurred by holding that;

**“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the LSA [Law of Succession Act]. However, by Section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi's Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of Section 2(3) [of the Law of Succession Act], the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. As an example, disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares of each will be determined in accordance with Muslim law. In Saifudean Mohamedali Noorbhai v. Shehnaz Abdehussein Adamji, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:**

**‘Kenya Courts have held in past judgments that every litigant of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi's Court’**

61. In view of the above cited authorities, this court assumes jurisdiction on the dispute before it. It is worth noting that by virtue of Section 2(3) of the Succession Act, the applicable law in the High Court relating to the devolution of the estate is the Muslim Law and not the Law of succession Act, so long as the said Muslim Law is not repugnant to justice and morality.

## 2. *Who are the widows to the deceased?*

62. It is common ground that the deceased herein, **Salim Juma Hakeem Kitendo**, died intestate on 23<sup>rd</sup> February, 2015 in Tanzania. It is also not in dispute that the Objector and the deceased were married at some point and their union was blessed with four issues who are the beneficiaries of the estate of the deceased.

63. The Objector submitted that she got married to the deceased under Islamic law on 4<sup>th</sup> August 2006 as evidenced by her marriage certificate number 390/2006 and at no time had the deceased divorced her or issued a “talaqa”.

64. Counsel for the 1<sup>st</sup> Petitioner submitted that there was no evidence that the Objector ever lived with the deceased in Nairobi. It was also submitted that the Objector produced a copy of a plaint and other documents filed before the Kadhi's court being Civil Suit No. 245 of 2013 wherein at paragraph 3, the Objector accused the deceased of having travelled to Nairobi in the year 2011, and never returned to his family and therefore, the deceased had abandoned his family. Counsel further submitted that the Objector at paragraph 9 of her supporting affidavit confirmed that she had received “talaqa” from the deceased on 6/11/2012. It is therefore the 1<sup>st</sup> Petitioner's conclusion that the “talaqa” issued in the year 2013 ended the marriage between the Objector and the deceased.

65. Counsel for the Interested Party submitted that the Objector in her own pleadings confirmed that she was long divorced, moved out of their matrimonial home and subsequently she filed divorce proceedings in Kadhi's Court Case 245 of 2013 where she claimed at paragraph 5 of the petition for divorce that; her marriage was a bondage and unworkable; she was given a Talaka, and currently she was a divorcee and not living with her husband. Counsel cited the finding in **re Estate of Jecinter Njoki Okoth(Deceased)(2020) eKLR to buttress the point that divorce pertains to the intentions of parties and actual dissolution of marriage in court**

66. It was submitted that the Objector also filed an affidavit in Children Case No. 240 of 2014 Tononoka claiming that some properties belonging to the deceased be transferred onto the children's names. Learned counsel opined that if at all there was credible reconciliation as alleged by the Objector or a reunion, the Objector would have returned to the matrimonial home and withdrawn all the cases she had filed against the deceased.

67. In her rejoinder, the Objector submitted that there was reconciliation between her and the deceased and the same was corroborated by the testimony of OW5 **Mohamed Juma Kitendo**, OW6 **Mohamed Hassan Omar** and a letter produced in evidence without any objection.

68. I have considered the arguments by the parties herein on the issue of the Objector having been divorced by the deceased before his demise. There is no doubt that the burden of proof in this instance is on the 1<sup>st</sup> Petitioner and the Interested Party to prove their allegations that the objector was divorced.

69. Section 107 (1) of the **Evidence Act**, Cap 80 Laws of Kenya provides that:

***Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.***

Sections 109 and 112 of the same Act also thus provide that:

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.***

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.***

70. Evidence has been led to demonstrate that indeed the Objector filed a divorce cause civil case No. 245 of 2013 before the Kadhi's court. Be that as it may, when the burden of proof shifted to the Objector, she averred that the divorce was never finalized since there was reconciliation and her averments are corroborated by an apology written to her and produced in evidence by OW6 **Mohamed Hassan Omar**. It is noteworthy that the production of the said letter of apology was never controverted. Consequently, in the absence of a divorce decree between the Objector and the deceased, I find and hold that the Objector is a widow to the deceased since the divorce between her and the deceased was never finalised.

71. Therefore, in the absence of any divorce certificate or any witness in accordance with the Islamic law to confirm the divorce between the deceased and the objector, the allegations of divorce remain unsubstantiated. I have no doubt that the deceased did not complete any divorce proceedings against the objector and that by the time the deceased died, he was still lawfully married to the deceased. Consequently, the objector is for all purposes and intents a widow to the deceased and therefore a beneficiary to the deceased's estate.

### **The 1<sup>st</sup> petitioner's marriage**

72. It was the 1<sup>st</sup> petitioner's evidence that she started cohabiting with the deceased the year 2000 but solemnized the marriage the year 2011. That out of their relationship four children were born. Her testimony was corroborated by the 2<sup>nd</sup> Petitioner that the 1<sup>st</sup> Petitioner and the deceased were involved in a long cohabitation relationship in Nairobi from the year 2000, which resulted to the birth of four issues.

73. According to the conversion certificate dated, 12/7/2011, the 1<sup>st</sup> Petitioner converted into Islam, and on 11<sup>th</sup> December, 2011, the deceased and 1<sup>st</sup> Petitioner underwent an Islamic Marriage at Jamia Mosque Nairobi and were, issued with a Marriage Certificate in the presence of the 2<sup>nd</sup> Petitioner. The Marriage Certificate was indeed produced as an exhibit by both the Objector and the 1<sup>st</sup> Petitioner. The allegation that the marriage certificate was forged was not proved by calling the celebrating officer to confirm that there was no marriage celebrated between the deceased and 1<sup>st</sup> petitioner.

74. Counsel submitted that the 1<sup>st</sup> Petitioner proved to the required standard that there existed a marriage which was as a result of long cohabitation between the 1<sup>st</sup> Petitioner and the deceased, and that the Objector did not disprove the issue of existence of long cohabitation in Nairobi. Further, it was submitted that sufficient explanation had been given on the different names on the marriage certificate No. B18838, which was confirmed by the Objector's own witness the Kadhi who confirmed that indeed he officiated the wedding but he was misled as to the names of the bride, and nowhere in the Kadhi's testimony is it averred that the marriage between the 1<sup>st</sup> Petitioner and the deceased was defective.

75. It was also submitted that since the deceased was a Muslim, he was allowed to marry more than one wife. That as at the year 2011, the deceased had the capacity to marry the 1<sup>st</sup> Petitioner and the marriage ceremony was presided over by a Kadhi. In counsel' view, the marriage between the 1<sup>st</sup> Petitioner and the deceased was a valid Islamic Marriage. Counsel Cited the case of **SMK V RHH (2015) eKLR** where the court held that the essential ingredients of a valid Islamic marriage include parties to a marriage contract be of sound mind; proposal and acceptance being made by the consenting parties in the hearing and presence of two or more mature and prudent witnesses all of which were met.

76. The Objector in her submission submitted that the marriage certificate number B. 18838 entries which indicated Salim Juma Kitendo as the husband and Rose Faith Mwawasi (Warda Mwawasi) as the wife is contrary to the 1<sup>st</sup> petitioner's conversion certificate, where the 1<sup>st</sup> Petitioner had adopted the name "**Rubi**". Consequently, the Objector argued that the 1<sup>st</sup> Petitioner was never married to the deceased, and that the person appearing on the marriage certificate by the name of **Warda Mwawasi** is a complete stranger to the instant proceedings.

77. The Objector submitted that at the time of the alleged marriage between the 1<sup>st</sup> Petitioner and the deceased, the deceased used to go by the name of "Salim Juma Mwakitendo" as opposed to "Salim Juma Kitendo" which name was adopted vide gazette notice number 12758 dated 7<sup>th</sup> September, 2012. Consequently, it was the Objector's submission that at the time of the marriage between the 1<sup>st</sup> Petitioner and the deceased, in 2011, the person named "Salim Juma Kitendo" was a non-existent person.

78. It was further submitted that the 1<sup>st</sup> Petitioner failed to prove that she had converted to Islam from Christianity since the person on the conversion certificate, which is on record is **Rubi Iman Mwawasi**, while the alleged marriage was between the deceased and **Warda Mwawasi** who is not in these proceedings. Consequently, it is the Objector's submission that the 1<sup>st</sup> Petitioner failed to prove that she was the deceased's wife for the purposes of succession.

79. The Objector also submitted that in a replying affidavit sworn on 22<sup>nd</sup> June, 2015 in Kadhi succession case No. 92 of 2015, the 1<sup>st</sup> Petitioner averred that she was not a Muslim and therefore, she could not submit to the jurisdiction of the Kadhi.

80. I have considered the submissions by parties on whether the 1<sup>st</sup> Petitioner was a wife. It is a fact that the deceased as a Muslim man, he was allowed to be in a polygamous arrangement of not more than four wives. Therefore, the deceased had capacity to contract a marriage with the 1<sup>st</sup> Petitioner as there is no adverse evidence that the deceased was insane and or did not consent to the said marriage. Consequently, the marriage contracted between the deceased and the 1<sup>st</sup> Petitioner was a valid marriage under the Islamic law the discrepancy in names which was satisfactorily explained notwithstanding.

81. Does long cohabitation between the deceased and the 1<sup>st</sup> petitioner between the year 2000 and 2011 imply that there was marriage between the two during that period? It is trite that presumption of marriage as a concept is unknown in Islamic Sharia. Any cohabitation outside marriage is considered and condemned as illicit, and the woman involved in it, is punishable for Zina (fornication). See Dr (Mrs) Nishi Patel 1995 CTS publication Cap XIII at page 251: "LAW OF PARENTAGE;

82. Nevertheless, I find and hold that in the instant case, the discrepancy in names of the contracting parties to the marriage celebrated on 11<sup>th</sup> December, 2011, did not in any way alter the true wishes of the 1<sup>st</sup> Petitioner and the deceased, which was to enter into an Islamic marriage and the evidence is demonstrated by a marriage certificate issued albeit with such errors on names which was reasonably explained.

83. The discrepancy in names was occasioned by the marriage officiating Kadhi who demanded that the 1<sup>st</sup> petitioner adopt a Muslim name and the change of name of the deceased which explanations are convincing and sustainable. The discrepancy in names is a mere technicality which cannot compromise the course of justice under Article 159(2) (d) of the constitution. Consequently, it is my finding that the 1<sup>st</sup> Petitioner was a wife to the deceased having been married on 11<sup>th</sup> December, 2011 hence legally entitled to a share to the estate as a widow.

#### **The Interested Party' marriage**

84. The Objector submitted that the marriage between the Interested Party and the deceased entered into on 7<sup>th</sup> July, 2013 was void ab-initio pursuant to Section 11(1) (c) of the Marriage Act, since the Interested Party had no legal capacity to enter into a marriage contract with the deceased because she was already in a subsisting valid civil marriage with one Carlos De Pasquale having been issued with a marriage certificate No. 081341. That divorce proceedings initiated on 14<sup>th</sup> May, 2014, was after the Interested Party had already converted to Islam and married the deceased. That the minor HSJH was born, while the Interested Party was still married to Carlos De Pasquale hence an illegitimate child.

85. It was submitted that the Kadhi who allegedly conducted the marriage between the Interested Party and the deceased testified in court and stated that had he known the Interested Party was still married to Carlos De Pasquale, he would not have officiated the marriage between the Interested Party and the deceased.

86. The Objector also submitted that the principle of long cohabitation is not applicable in the instant case since the Interested Party lacked the capacity to marry. In support of that submission, the Objector cited the Court of Appeal finding in **Joseis Wanjiru vs Kabui Ndegwa Kabui and another [2014] eKLR**, where the court held that a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. She however added that in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.

87. Counsel for the Petitioners submitted that the Interested Party converted to Islam, and married the deceased while her divorce from Carlo De Pasquale was pending. It was his submission that the Interested Party had no capacity to enter into a new marriage. In support of this submission, Counsel cited the case of **Estate of Late Peter Kamau Ng'ang'a (Deceased) [2018] eKLR** where the Court stated that the Marriage Act 2014 provides at Section 11 that a union is not a marriage if at the time of the making of the union either party is incompetent to marry by reason of a subsisting marriage.

88. Counsel for the Interested Party submitted that the Interested Party's husband having deserted his wife for 10yrs and the interested party having embraced the doctrines of Islamic religion, was at liberty to enter into another marriage. Reliance was on the finding in **re Estate of Jecinter Njoki Okoth(Deceased) [supra] eKLR** where Nyakundi J held that;

**“...divorce is not the procedure of filing for a decree nisi in court per se. On a much broader perspective, divorce pertains to the intention and conduct of parties. If parties in a marriage shows an intention not to continue with their marriage or conduct themselves unmarried persons, then the same should be treated as such. The law cannot attach obligations upon persons who have decided to part ways but fail to formalize the same, because that is not the true reflection of what they want. In that regard the Objector stopped being the deceased’s husband when they separated and moved on”.**

89. There is no dispute that the interested party was engaged in a valid civil monogamous marriage before she allegedly converted to Islamic religion and proceeded to marry the deceased under Islamic law. I must emphasize that, conversion to Islamic religion is not a process through which dissolution of a statutory marriage is executed. The interested party ought to have dissolved her statutory marriage before contracting another marriage. What the interested party committed was an act of bigamy which this court cannot perpetuate. Mere intention or contemplation of divorce is not synonymous to divorcing. To allow such scenario will be akin to inviting anarchy and confusion in the marriage institution.

90. In **Civil suit no 2 of 2014 Mombasa High court between James Shugars Yhap v Eric Okeno & others** the court had this to say;

**“Given that the deceased was still married to Charles Ayodele when she commenced cohabitation with the respondent in 2000, she did not have the legal capacity to marry the plaintiff or any other person for that matter”**

91. Similar position was held in the case of **Phylis Njoki Karanja & two others v Rosemary Mueni Karanja & another (2009) Eklr** where the court of appeal Madan J stated that;

**“The concept of presumption of marriage is not new in Kenya. It was recognized by the former court of appeal in Hortensiah Wanjiku v public trustee in civil no 13 of 1976 and by this court in Mbithi Mulu & another v Mitwa Mutunga in Civil Application Number Nai.17 of 1983”**

**This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so-see (supra). We consider that the deceased and the 1<sup>st</sup> respondent in this appeal had capacity to marry while the deceased was married to the 2<sup>nd</sup> appellant under Kikuyu customary law but this was not a bar to him marrying any other woman since customary law of marriages under kikuyu customs are potentially polygamous”**

92. Having held that the deceased and the interested party had no capacity to marry and that the doctrine of presumption of marriage does not apply where one has no capacity to marry, I will hold that the deceased and the interested party’s purported marriage was null and void. If the marriage act was illegal, then it is void ab initio. See **Macfoy v United Africa company ltd (1961) 3ALL E.R 1169** where the court held that where an act is void then it is in law a nullity.

#### **Who are the bonafide beneficiaries of the estate of the deceased**

93. It is common ground that all the Objector’s children are the biological children of the deceased and their status as legitimate children has not been challenged. I have also held that the 1<sup>st</sup> petitioner and the objector are widows to the deceased and therefore qualified to inherit the deceased’s estate. The cause of disagreement is the legitimacy of the 1<sup>st</sup> Petitioner’s children and the Interested Party’s child.

94. Under Islamic law, one is entitled to inheritance by blood or marital relationship and religion as provided in Qur'an: 4:11, 12 and 176 and Sunnah. In **re estate of CCBH (deceased) (2018) eKLR, Succession Case No. 46 of 2004, CKC & CC v ANC, M. Thande, J, cited with approval The principles of Mohammedan law, Dr, (Mrs.) Nishi Patel, 1995, CTS Publication, Cap XIII at pp 251, states:**

**“The law of parentage which includes paternity and maternity is the result of the institution of marriage. Mohammedan marriage is a contract which confers the status of husband and wife on the parties and of legitimacy to the children...”**

95. In **re Estate of Ramadhan Hassan (Deceased) [2014] eKLR**, it was held that:

**“In Islamic Law, paternity of a child is confirmed by any of the three (3) ways viz;**

- **Marriage**
- **Acknowledgement**
- **Evidence**

**The first is the most important. From the marriage there comes the offspring. It presupposes that the child had parent from the valid marriage. Paternity of a child therefore under sharia is quite important. A child without traceable father does not command respect and honor from the eyes of the public. He suffers psychological debasement in the society for not just fault of his...**

...

**It follows from the above Hadith, therefore, that if a child is born outside wedlock is not considered legitimate. But if the**

illicit relationship is established appropriate sanctions on the parties involved are given.

However, when a child is born in wedlock the delivery must have been within the generally acceptable period of gestation, being the minimum or maximum. The general view of majority of Islamic jurist is that a period of six months less five days, after consummation of the marriage or possibility of consummation of marriage, is regarded to be the minimum period of gestation.

Imam Malik, Shafi and Ibn Hanbal agree to this view. Imam Hanifah on the other hand considers the child legitimate six months after the conclusion of the marriage contract not necessary consummation of the marriage.

See Ad-Dasuki's Hashiyat ala al sharh al Kabir vol. 2 page 459 and Ibn Rushd's Bidayat al Mujtahd wa Nnihayat al Muqtasid vol. 2 pg 352."

96. Further, in the case of In the matter of Ismail Chelanga deceased(2002)e KLR, Etyang J had this to say

**“Under Islamic law no non-Muslim is permitted to inherit the estate of Muslim. This was ably verified in this court by the Kadhi of Nairobi Mr. Hamad Mohammed Kassim. It follows therefore that Chebet, who had conceded that she is a catholic, cannot inherit a share of her deceased father. The reason for this can be found in the principles of mohammedan law by Dr (Mrs) Nishi Patel 1995CTS publication Cap XIII at page 251;**

97. From the above cited authorities, it is clear that under Islamic law, a child born out of wedlock is categorized as an illegitimate child hence not capable of inheriting as a heir to a deceased Muslim parent. Taking into account this position, one would be left asking acritical question regarding the position, status or right of a child who is biologically sired by a rogue Muslim father who engages in a prolonged extra marital love relationship with another woman whether Muslim or non -Muslim and a child is born out of wedlock.

98. In my view, where it is proven that a deceased Muslim while a life sired a child out of wedlock, that child should for purposes of reasonable provision be treated as a dependant under Section 29 of the law of succession Act. This is because, the child is innocent and should not be left to suffer out of his or her parents' mistakes. Indeed, choices have consequences and the prudent and inevitable thing a court of equity must do to uphold justice for all is, to recognize such a child as a dependant hence a beneficiary of the estate to the extent allowable under sharia law. See Quran Sura 4:8 which recognizes that, “if other near of kin orphans and needy are present at the time of division of inheritance give them something of it and speak to them kindly”. It is therefore clear from the Quran that such cases of dependants are also entitled to part of the inheritance.

99. In the instant case, there are four children born by the 1<sup>st</sup> petitioner and one by the interested party whose paternity is in question given that they were all born before their respective mothers celebrated their Marriage with the deceased.

#### **The interested party's child**

100. The Interested Party was married to the deceased on the 7<sup>th</sup> July, 2013 and as earlier held the said marriage was null and void. The birth certificate belonging to one Hakeem found at page 62 of the Interested Party's bundle of documents confirms that the child was born on the 19<sup>th</sup> December 2013, which implies that the child was born five (5) month and twelve (12) days after the marriage between the Interested Party and the deceased.

101. Taking into account the general view of the majority of the Islamic Jurists, where a child is born in a legal wedlock but under a period of six lunar months less five days from the date of marriage then the child cannot be attached to that husband. The authority of this statement is to be found in the Jawahir al ikhil in pg 381.

**“Under no circumstance shall pregnancy or child (of marriage) be allowed where the wife delivers complete baby within a period lesser than six months five or six days less, from date of the marriage contract. In that situation, paternity can be denied without the necessity of having resource to lian (Mutual imprecation) as there exists a legal barrier (between the child and its suspected father)”.**

102. However, the mother claimed that she had cohabited with the deceased prior to getting married. She produced a birth certificate dated 20.12.13 for baby Hakeem son of Salim Juma Hakeen kitendo as the father. The objector claimed the certificate was forged as the deceased's name was mwakitendo and not Kitendo as appearing in the said birth certificate. Further, that the deceased did not apply for the birth certificate nor was his ID card used. Given this allegations of forgery and the persistence by the interested party that the deceased was the biological father, there is need to balance justice by both parties so that no one suffers and more particularly the child who may end up being rendered destitute. In that regard an order for DNA will suffice.

#### **The 1<sup>st</sup> petitioner's children**

103. The 1<sup>st</sup> petitioner has presented four children namely; S, L, H, and T. It is the petitioner's claim that all the four were children sired by the deceased. According to the 1<sup>st</sup> petitioner, she started cohabiting with the deceased the year 2000 and solemnized their marriage 2011. From the evidence of Joseph Odhiambo (OW4) hospital administrator Agakhan hospital, S was born at Agakhan hospital on 14<sup>th</sup> July 1998. He produced a birth notification to that effect. This evidence was corroborated by the objector and OW2 the investigating officer. To that extent, Shawn cannot by any stretch of imagination be said to have been sired by the deceased nor was any evidence tendered to show that the deceased had accepted him as his child for purposes of Section 3(2) and 29 of the law of succession on dependency. To that extent, S cannot inherit the deceased's estate as he was not only born out of wedlock but also not sired by the deceased nor was he a dependant to the

deceased.

104. The 1<sup>st</sup> Petitioner's second child one **L** according to the evidence on record and the produced birth certificates, she was born on 8<sup>th</sup> October 2003. The third child one **H** was born on 26<sup>th</sup> November, 2006, while the last born one **T** was born on 12<sup>th</sup> September 2007. From the foregoing, it is safe to conclude that all the children were born before the 1<sup>st</sup> Petitioner and the deceased were married under the Islamic Sharia, and also before the 1<sup>st</sup> Petitioner had converted into Islam.

105. However, the 1<sup>st</sup> petitioner is claiming that she cohabited with the deceased from the year 2000. She claimed the children were sired by the deceased although out of wedlock. Allegations of forgery of birth certificates were made against the 1<sup>st</sup> petitioner and criminal charges with regard to forgery of documents used to secure late birth registration preferred against her and one Saumu. It is the criminal court which will determine appropriately the element of forgery. Whether forgery is there or not, the question of paternity still remains for purposes of inheritance as a dependant. In the interest of Justice, I am inclined to order for DNA using the samples of the objector's undisputed children for Comparative analysis with those from the disputed children in default the disputed children be deemed to have been sired by the deceased hence dependants to the deceased prior to his death.

#### **4. What entails or forms part of the estate of the deceased**

106. Parties adopted the list of properties listed in the Chamber Summons of the Objector dated 3<sup>rd</sup> April 2018 and filed on the same day, save for Kwale/Diani SS/2274 and Kwale/Diani SS/2539 which the Interested Party claims are personal properties which do not form part of the estate and that Blue Jay STATION ON Plot No. Kwale 3729 to the extent of the monies she specifically paid to first community bank to rescue the said Blue Jay from auction having been charged by the deceased.

107. The Interested Party produced a sale agreement dated 1<sup>st</sup> March, 2013 for Kwale/Diani SS/2274 and Kwale/Diani SS/2539 in support of her claim that the said plots were strictly bought by herself but she opted to include the deceased as a joint proprietor hence creating a joint tenancy.

108. The Objector on the other hand submitted that parcel Nos. Kwale/Diani SS/2274 and Kwale/Diani SS/2539 were in the name of the deceased as confirmed by the seller one **Ramadhan Juma Dzitsai** who has since died before they were illegally transferred to the Interested Party using a death certificate that had been forged by the deceased's sister who was charged and found guilty of forgery of a death certificate. Further, the Objector contended that the transfer of the subject properties was done before issuance of a death certificate and that currently, the Interested Party has been charged in Criminal Case No. 403 of 2017 for illegally transferring the two-subject properties to herself.

109. From the evidence adduced, it is apparent that the said properties were registered in the names of the Interested Party and the deceased. To support the registration of parcel no. Kwale/ SS/2274, a copy of a letter of consent from the Msambweni Land Control Board dated 21<sup>st</sup> August, 2013 in the name of Ramadhani Jumaa Dzitsai (seller) and the Interested Party and the deceased as buyers was produced. Also, the transfer documents registered on 20<sup>th</sup> September, 2013 of parcel no. Kwale SS/2274 shows that the said property was registered in the names of the Interested Party and the deceased. Equally, the title deed issued on 20<sup>th</sup> September, 2013 is in the names of the Interested Party and the deceased. In relation to parcel no. Kwale/SS/2539, similar process was applied.

110. From the foregoing, it is evidently clear that the ownership of Kwale/Diani SS/2274 and Kwale/Diani SS/2539 is a joint tenancy hence a dispute over land ownership which should be determined before the Environment and Land Court (ELC). In the circumstances, the two properties are excluded from the list of assets for distribution. Upon conclusion of the ELC case, parties shall be at liberty to seek inclusion of the portion that the ECL may award to the estate.

#### **Liabilities of the estate**

111. The interested party claimed that the deceased left a debt of about three million shillings which has since been recovered through leasing Ajay petrol station. However, the Objector claimed that there was a debt of over 29m owed to Barclays Bank. No proof was furnished by adduction of current bank statements. To that extent, I do not find any liability against the estate.

#### **Mode of distribution of the deceased estate**

112. On the mode of distribution, the Holy Quran cap 4 verse 11 and 12 as follows:-

*“Allah commands you regarding your children – for the male a share equivalent to that of two females....”*

*“And for them (your wives) one fourth of what you leave behind, if you did not have a child but if you have a child then for them one-eighth of what you leave behind.”*

113. The above verse does specify that a daughter should inherit half of the amount her male siblings get or inherits. It also specifies that a widow who has children is entitled to one eighth of the estate.

114. In the circumstances of this case, I will direct that the estate be shared out in accordance with the Islamic sharia law with the specific details being worked on by the chief Kadhi after the DNA results are submitted. Accordingly, the application for confirmation is allowed and grant of letters of administration made but not issued to the three administrators and later the public Trustee confirmed. I wish to add that a fresh grant shall issue jointly to the objector and 1<sup>st</sup> Petitioner as joint administrators and final distribution of assets to await DNA results

and kadhi's distribution list.

115. Having held as above, I am inclined to make the following declarations and orders;

- 1. That it is hereby declared and ordered that the objector and the first petitioner are widows of the deceased and therefore beneficiaries entitled to a share of the estate in accordance with Islamic sharia law**
- 2. That the interested party's marriage to the deceased is null and void for lack of capacity to get married to the deceased hence not a widow to the deceased and therefore not a beneficiary.**
- 3. The children of the objector known as Alwy Salim Juma Mwakitendo(Son), Athman Salim Juma Mwakitendo(Son), Bakhshuan Salim Juma Mwakitendo(Son) and Mariam Salim Juma Mwakitendo(Daughter) being children born within wedlock are heirs hence beneficiaries to the estate entitled to a share in accordance with the Islamic sharia law**
- 4. The child known as Shawn Salim Juma Hakeem Kitendo is not a beneficiary of the estate herein as he is not a recognized heir nor was he a dependant**
- 5. The fate of the three children sired by the 1<sup>st</sup> petitioner and the interested party whose paternity is in dispute shall be subjected to a DNA test after extracting samples from their bodies and compared with those extracted from the bodies of at least two of the objector's children whose paternity is not in dispute**
- 6. For avoidance of doubt, the children to be subjected to DNA test are H SJ HK (child to the interested party), LSk, TSa K and H K (children of the 1<sup>st</sup> petitioner)**
- 7. Properties comprising the estate and subject to distribution in accordance to Islamic sharia law include**
  - a) Apt 5 Block A on LR No. 209/20045**
  - b) LR No. 8436 original No. 5939/10/I/MN**
  - c) Kwale/Ukunda/3729**
  - d) 4 houses on Kwale/Ukunda/3 729**
  - e) Kwale/Ukunda on Plot 3729 Blue Jay gas station**
  - f) Kwale/Ukunda Plot 3673 and 2 houses Diani Msikitini**
  - g) 1 house on Plot 3673**
  - h) Plot No. 12/III/MN Mtwapa Kilifi County together with kerosene tank**
  - i) 1\4N/111/2349 3 houses**
  - j) Lorry Mitsubishi Fuso KBP 679 S**
  - k) Toyota KBP 481 H**
  - l) Cash and Carry Supplies business on Plot No. 12/III/MN Mtwapa.**
  - m) Barclays account No xxxxxx under Blue lay gas station**
  - n) Barclays account xxxx(3047 local business account.**
  - o) Barclays current account xxxxxx**
  - p) First Community account xxxxxx**
  - q) DTB 01 Blue gas station account No xxxxxx Blue jay gas station**
  - r) Imperial bank account xxxxxx for Salim and Son Investment account.**
  - s) KCB account xxxxxx Salim Juma Mwakitende**
  - x. Cooperative bank account xxxxxx Executive current account**

8. Parties to agree on which of the two children of the objector will donate DNA samples for Examination before a mutually agreed laboratory
9. Grant of letters of administration intestate made in favour of the objector, 1<sup>st</sup> petitioner and the interested party jointly and later to the public trustee is confirmed and a fresh grant do issue to the first petitioner and objector jointly.
10. Parties to pursue the claim over ownership dispute in respect of plot numbers Kwale/Diani SS/2539 and 2274 before ELC
11. This being a family matter each party to bear own costs
12. Mention on 3<sup>rd</sup> May 2022 for confirmation on compliance with order (8) above and further directions.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MACH, 2022

J.N. ONYIEGO

JUDGE