



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 917 OF 2013**

**IN THE MATTER OF THE ESTATE OF DORCAS OMENA BINAYO (DECEASED)**

**RULING**

1. The deceased herein, Dorcas Omena Binayo, died on 27<sup>th</sup> October 2013, according to the certificate of death dated 5<sup>th</sup> November 2013, serial number [particulars withheld]. The letter from the of Chief Shieywe Location, dated 6<sup>th</sup> December 2013, is completely unhelpful, in terms of disclosing the individuals who survived her, for it merely says that she came from the jurisdiction of the Chief who wrote the letter.
2. Representation to her estate was sought in intestacy, vide a petition lodged herein on 8<sup>th</sup> January 2014, by Esnas K. Mutie Kyungu, in her capacity as sister of the deceased. She is expressed to have had died possessed of Nyangori/Gamalenga/329, Butsotso/Shikoti/1680, Butsotso/Shikoti/3361 and Butsotso/Shikoti/6197, and to have been survived by three individuals, being a son, Geoffrey Anyira, a sister Esnas K. Mutie Kyungu, and two grandsons, Brian Mbatia and Evans Shilamala. Susan Jemiango and James Kuskei are named as liabilities. Attached to the petition is an undated document, which details the deceased's life history, her property, her family, and what is described as her will. I shall hereafter refer to Esnas K. Mutie Kyungu as the petitioner.
3. A notice of the filing of the petition was published in the *Kenya Gazette* of 28<sup>th</sup> March 2014, in Gazette Notice No. 2089, inviting objections within thirty days, as required by section 67 of the Law of Succession Act, Cap 160, Laws of Kenya.
4. A notice of objection to making of grant was lodged herein on 20<sup>th</sup> January 2014, ostensibly in response to Gazette Notice No. 2089 of 28<sup>th</sup> March 2014. It was at the instance of Geoffrey Muhuzani Anyira, who I shall refer hereafter as the objector, alleging that he was the only surviving child of the deceased, that petitioner was a sister of the deceased, that he had reported to the police about the alleged will of the deceased and that tests had confirmed that the will was forged.
5. The Deputy Registrar thereafter issued to the objector a notice, dated 3<sup>rd</sup> February 2014, requiring him to file an answer to the petition, a cross application and a supporting affidavit. He complied with those directions, for he filed the three documents on 17<sup>th</sup> February 2014.
6. In his answer to the petition, he avers that he is the only child and dependant of the deceased, while the petitioner was a sister of the deceased. He avers that the petitioner was fraudulent and had forged a will, he had reported the matter to the police, who had conducted investigations, which established that the will was forged. He further avers that some of the assets listed as belonging to the deceased did not exist. He asserts that the petitioner could not be trusted as an administrator for when she sought administration in her own mother's estate, in Kakamega HCSC No. 731 of 2007, in the matter of the estate of Esther Tamining Binayo, she had excluded her brother Dr. Francis Binayo as a survivor of the deceased in that cause. He has attached to the answer copy of a certificate of birth, which shows him as a biological child of the deceased. There is also a forensic document examination report by the Directorate of Criminal Investigations, dated 20<sup>th</sup> December 2013, showing that the alleged will was a forgery. There is also material which shows that two of the assets listed as estate property did not belong to the deceased.
7. In the petition by way of cross application, the objector states to be the only son of the deceased. In his affidavit in support of the petition, he avers that the deceased died intestate, and that he was the only surviving child of the deceased. He listed the assets making up her estate to be Nyangori/Gamalenga/329, Butsotso/Shikoti/1680, Butsotso/Shikoti/13790, money in two bank accounts and 3 grade cows. Liabilities are listed a portions of land out of Nyangori/Gamalenga/329 due to Susan Jemiango, James Koskei and Peter Otieno Kiwanuka. He has attached to his affidavit certificates of official searches in respect of Nyangori/Gamalenga/329, Butsotso/Shikoti/1680 and Butsotso/Shikoti/13790 to show that the said property belonged to the deceased.
8. The petitioner has responded to the objection through a replying affidavit that she swore on 6<sup>th</sup> April 2020. She avers to be a sister of the deceased. She avers further that the objector was a son of the deceased, and that there was another child named Eillen, who had passed on. The deceased was said to have had been married to the father of the objector, the marriage got estranged leading to divorce. Upon the estrangement and divorce, the objector went to live with his late father, and had a strained relationship with his deceased mother, and they had court battles from which orders were obtained restraining the objector permanently from accessing the deceased's assets. She asserts that the deceased had made a will, which had appointed her administrator of the estate and executrix of the will. The will was allegedly made on

8<sup>th</sup> April 1998 and was revised several times, before being finally witnessed by Mr. Fwaya, Advocate, on 18<sup>th</sup> October 2010. She avers that she had not been charge with forging a will, and that it was in fact the objector who faced a charged of forging the will, in Kakamega CMCCRC No. 941 of 2016. She asserts that there was a forensic report by the Directorate of Criminal Investigations which had upheld the signature on the alleged will as the genuine signature of the deceased. She states that the objector had concealed the fact that the deceased had another child, whose two children were under the care of the deceased. She accuses the objector of having moved into the estate and stated collecting rents, and was generally intermeddling with the estate. She avers that he had even defied court orders and faced contempt proceedings, through an application dated 17<sup>th</sup> July 2019. She asserts that the objector lived with his late father after the divorce, and did not care for the deceased. She further asserts that she was the one who took the deceased to hospital, and the objector did not assist at all, only showing up after the deceased had died. She avers that since he never cared for his mother during her lifetime, and was an irresponsible child, it can only mean that his intentions towards inheritance were malicious. She further avers that the objector was barred by court orders, obtained by the deceased, prior to her death, from trespassing on some of the assets of the estate. She states that the objector took out a grant of letters of administration *ad litem* in bad faith, and in total disregard of the instant succession proceedings, and against the decrees in force against him. She states that the objector has misused the limited grant, by evicting tenants and survivors of the deceased from estate property, and was benefiting exclusively from the property. She asserts that she was competent and able to administer the estate of the deceased, and to execute her will.

9. Attached to her replying affidavit are several documents designed to advance her case. There is copy of a decree in Kakamega CMCCC No. 322 of 2004, a suit between the deceased and the objector, dated 29<sup>th</sup> March 2007, where the deceased obtained orders to evict the objector from Butso/so/Shikoti/7223 and an order of permanent injunction restraining him from entering or occupying or interfering with the deceased's houses on Butso/so/Shikoti/7223. There are two copies of forensic reports of the alleged will, both signed by Chief Inspector Jacob M. Oduor, one dated 20<sup>th</sup> December 2013 and the other 21<sup>st</sup> February 2014, one stating the contested signature on the alleged will was indeed the genuine signature of the deceased, while the other states it was a forgery. The last document is a copy of a charge sheet in Kakamega CMCCRC No. 941 of 2016, where the objector faces several charges ranging from forcible entry into estate property, being Butso/so/Shikoti/13361, forcible detainer of the same property, stealing chattels belonging to the deceased, making a false document, being the disputed will, intermeddling with the estate, uttering a false document, being the alleged will, and giving malicious information to the police that the alleged will was forged.

10. While the petitioner was filing the instant cause, the objector lodged Kakamega HCP&AC No. 28 of 2014. I have not seen the original petition in Kakamega HCP&AC No. 28 of 2014, and therefore I cannot tell the grounds upon which it was founded, but it would appear that a grant of letters of administration *ad litem* were made to the objector on 11<sup>th</sup> April 2014, limited to the purpose of filing/defending suit pending further representation being made to the objector. An application was filed in Kakamega HCP&AC No. 28 of 2014, by the petitioner seeking to have the limited grant made to the objector revoked, on grounds that he had failed to disclose to the court the pendency of Kakamega HCSC No. 917 of 2014 and Kakamega CMCCRC No. 1086 of 2014, among others.

11. The petitioner filed another application in the instant cause on 11<sup>th</sup> April 2016, dated 8<sup>th</sup> April 2016, seeking consolidation of Kakamega HCP&AC No. 28 of 2014 with the instant cause. The said application was granted on 6<sup>th</sup> October 2016, meaning that the two causes were consolidated, that is to say Kakamega HCP&AC No. 28 of 2014 and Kakamega HCSC No. 917 of 2014, effective from that day.

12. Another application was lodged into the cause by Brian Mbat, in the cause, on 24<sup>th</sup> July 2017, dated 21<sup>st</sup> July 2017, seeking a variety of orders, the principal one being his joinder to the proceedings as an interested party, together with others, being Pamela Chepkemei Karani, Eunice Chepkemei and Evans Beyie Shilamala. There were also prayers that the interested parties be reinstated to the property from which they had been evicted, and to stop the objector from intermeddling with the estate. There was also a prayer that the objector avails a detailed list of all the assets of the estate to enable the petitioner administer and distribute the estate. There were several other prayers, including that a preservatory order issue for conservation of the estate and confirmation of the will of the deceased.

13. The applicant, Brian Mbat, was a grandchild of the deceased, being a son of a late daughter of the deceased, whose name is not disclosed. He confirmed that the objector was his uncle, and also a beneficiary under the impugned will. It is not clear from the averments how Pamela Chepkemei Karani and Eunice Chepkemei were related to the deceased, the only clear information being that they lived with her during her lifetime. He averred that his late mother was not married and lived with the deceased, and gave birth to both him and Evans Beyie Shilamala during that time. The deceased was also said to have had lived with and cared for Pamela Chepkemei Karani and Eunice Chepkemei from a tender age, and that the two were also provided for in the impugned will. He avers that his mother contributed to the development and improvement of the property owned by the deceased. He asserts that he also, upon attaining adulthood, contributed to the improvement and development of the subject assets. He states that the objector established his home at his late father's home, after his father died, and that that succession excluded the deceased. He asserts that the estate that the objector was claiming exclusively had been developed by his late mother to the exclusion of the objector. He asserts that when his late mother and the deceased died, they were buried within the estate, and the objector did not contribute in any way to their funerals, and he had for all practical purposes abandoned them. He contends that when the deceased was raising them, the objector did not protest, and it was now malicious for him to raise any issues now after his mother and the deceased were both dead. He states that prior to the deceased's death, the objector had been barred from the property by court order. He also mentions that the objector was facing charges in court, of forging a will. He is accused of intermeddling with the estate, by selling part of the estate to unsuspecting buyers, collecting rent, wasting the estate and vandalism of projects in the deceased home. He also mentions that the objector had obtained a limited grant of administration and was using the said grant to sell land and collect rent unjustifiably.

14. Attached to that affidavit are several documents. There is a copy of the impugned will. There is also copy of the decree in Kakamega CMCCC No. 322 of 2004, dated 29<sup>th</sup> March 2007, with respect to Butso/so/Shikoti/7223. There are copies of proceedings in Kakamega CMCCC No. 521 "B" of 2003, over Isukha/Ileho/574, which culminated in a judgment delivered 8<sup>th</sup> July 2004, where the court held that the land in question belonged to the deceased and the objector was not entitled to place a caution on it. There are copies of the charge sheet in Kakamega CMCCRC No. 941 of 2016, where the objector was charged with various offences, the forensic report dated 21<sup>st</sup> February 2014 and the limited grant *ad litem* issued on 11<sup>th</sup> April 2014 in Kakamega HCP&A No. 28 of 2014.

15. From the record before me, it is not clear what became of the application dated 21<sup>st</sup> July 2017. There is nothing on record to indicate

whether the same was ever placed before a Judge, and whether any directions were ever given on its disposal. I shall assume that the same is still pending.

16. The file of papers before indicates that a Motion dated 27<sup>th</sup> February 2018 was placed before Njagi J, on 28<sup>th</sup> February 2018, and interim orders were granted, ordering the reinstatement of the applicant and his siblings to the property they had been evicted from. Subsequently another application dated 11<sup>th</sup> April 2018 was placed before Njagi J on 12<sup>th</sup> April 2018, seeking setting aside of the interim orders made on 28<sup>th</sup> February 2018. The application dated 5<sup>th</sup> June 2018 was argued on 5<sup>th</sup> June 2018, and a ruling was delivered on 25<sup>th</sup> June 2018, dismissing the application dated 11<sup>th</sup> April 2018.

17. The application dated 27<sup>th</sup> February 2018 is still pending. It was placed before Njagi J on 23<sup>rd</sup> October 2018, and the advocates present for petitioner and the applicant/interested party indicated that they had agreed to dispose of the application by way of written submissions. No directions were given for filing of written submissions, but the court directed them to serve the advocate for the objector. The said application was mentioned again on 7<sup>th</sup> March 2018, when Njagi J noted that the objector had not been served. The matter was mentioned again on 18<sup>th</sup> September 2019, the issue of service of the objector was not adverted to. What was coming up for hearing was the application dated 28<sup>th</sup> February 2018, but the advocate for the objector addressed the court on the contempt application dated 17<sup>th</sup> July 2019, which was due for hearing on 29<sup>th</sup> October 2019, and urged that the said date be converted to a pretrial to enable the case proceed.

18. Come 29<sup>th</sup> October 2019, the court directed that the parties file written submissions on the applications dated 27<sup>th</sup> February 2018 and 17<sup>th</sup> July 2019. Those directions changed on 10<sup>th</sup> March 2020, after the advocate for the applicant/interested party informed the court that she had filed written submissions on the application dated 17<sup>th</sup> July 2019 and another dated 6<sup>th</sup> January 2014, whereupon the court directed the objector to file submissions on the application dated 6<sup>th</sup> January 2014. Never mind that there is no application on record dated 6<sup>th</sup> January 2014. What is being referred to as an application dated 6<sup>th</sup> January 2014 is the notice of objection to the making of grant, in Form 76(r. 17(1)), filed herein on 20<sup>th</sup> January 2014, dated 6<sup>th</sup> January 2014. Objection proceedings are not founded on applications, but on substantive pleadings, being the petition, the answer to the petition and the petition by way of cross-application. Advocates who come on record midstream should make an effort to peruse the court file before they file any documents, and familiarize themselves with the filings on record, to obviate filing process which makes inaccurate or incorrect references to the filings on record. Be that as it may, the directions on record are to the effect that the parties were to file written submissions on the applications dated 27<sup>th</sup> February 2018 and 17<sup>th</sup> July 2019, and on the objection proceedings. Thereafter the file was directed to me following the transfer of Njagi J, hence it now falls on me to prepare the ruling on the applications the subject to the directions of 29<sup>th</sup> October 2019 and 10<sup>th</sup> March 2020.

19. I have scrupulously perused through the papers before me. I have noted the petitioner did not comply with the directions to file written submissions on the two applications and the objection proceedings. The objector has filed written submissions on the application dated 17<sup>th</sup> July 2019, but not on that dated 27<sup>th</sup> February 2018. He has also filed written submissions on the objection. Similarly, the applicant/interested party has filed written submissions on the application dated 17<sup>th</sup> July 2019, but not on that dated 27<sup>th</sup> February 2018. He has also filed written submissions on the objection. Parties ought to remain faithful to the directions by the court, especially where such directions are given at the prompting of the parties. It should never be up to the parties to decide on what to file written submissions on and what not to submit on, after wasting the court's time asking for directions to be made one way or the other.

20. The application dated 17<sup>th</sup> July 2019, is against the objector, and it seeks that the objector be cited for contempt of court, and for restraining orders and an award of general damages to the survivors of the deceased who had allegedly suffered as a result of disobedience of court orders that had been made on 28<sup>th</sup> February 2018, based on the application dated 27<sup>th</sup> February 2018. I have indicated that the papers relating to the application dated 27<sup>th</sup> February 2018 are not before me. The orders recorded on 28<sup>th</sup> February 2018, are to the effect that that application was granted in terms of prayers 2, 3, 4, 6 and 7 of the said application. I have not seen copy of a formal order extracted from those orders, and, therefore, I cannot tell what prayers 2, 3, 4, 6 and 7 were all about. The applicant has not exhibited that order in his application. The order was made *ex parte*, and, therefore, it ought to have been extracted, and served on the objector and an affidavit of service filed, as evidence of that service. There ought to be some evidence that the application was served personally on the objector, that he was aware of its purport, and being nevertheless chose to ignore or disobey the order. It is also required that the extracted order should carry a penal notice. Without evidence that a formal order was extracted and formally served, there can be no evidence that the penal consequences were ever brought to the attention of the objector. Am alive to the fact that the objector filed an application dated 11<sup>th</sup> April 2018, which was heard and dismissed on 26<sup>th</sup> June 2018. A copy of that application is not in the file before me, so I cannot tell what the objector had averred in his affidavit in support of the application, that is as to whether he had been served with the said orders or not. Secondly, the ruling of 26<sup>th</sup> June 2018 is silent on whether the *ex parte* orders were extracted and served on the objector. The law on contempt of court is very clear. The order said to have been disobeyed must be brought to the attention of the person who is said to have disobeyed it. Secondly, the said order must bear a penal notice, bringing to his attention the consequences of not complying with title order. Thirdly, an affidavit of service must be filed to provide proof that the said had been brought to the attention of the party required to obey it. A party moving the court for an order for citation of another for contempt of court must be alive to those facts. In the absence of the same, the application would be premature. Consequently, without a copy of the application dated 27<sup>th</sup> February 2018, I am hamstrung, in terms of being unable to assess whether or not the objector was in contempt of the orders of the orders of 28<sup>th</sup> February 2018. I shall therefore make no orders at all on the contempt application.

21. Let me now advert to the objection proceedings. The deceased herein died in 2013, that was long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. His estate, therefore, fell for distribution in accordance with the provisions of the said law. Objections to making of grants are addressed in section 68 and 69 of the Law of Succession Act, and Rule 17 of the Probate and Administration Rules. For avoidance of doubt I shall here below set out the provisions in the Act, which state:

“68. *Objections to application*

(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

#### 69. Procedure after notice and objections

(1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.”

22. The above provisions require the filing of a notice of objection, followed by an answer to the petition and a petition by way of cross-application. Therefore, what should constitute the objection is the combination of the notice of objection, the answer to petition and the petition by way of cross-application. Where the objector files a notice of objection but does not file the answer and the cross-petition, the objection pleadings would be incomplete, and the court ought to disregard the notice of objection and proceed to make a grant to the petitioner. Under section 69(2), the objection proceedings should only be heard after an answer and cross-application are filed under section 68 (2) of the Act. Under section 69(1) of the Act, where a notice of objection is filed but no answer or cross-application has been filed, as required by section 68(1) of the Act, the court ought to make the grant in accordance with the petition.

23. The language of sections 68 and 69 is clear, that objection proceedings are founded on principal pleadings, not on interlocutory applications nor affidavits, but on petitions and answers to petitions. Petitions, like complaints, are meant to be disposed of on the basis of oral evidence, unless the matter is founded purely on documents, which are fairly self-explanatory.

24. The record before me is clear that the objector filed a notice of objection, dated 6<sup>th</sup> January 2014, in keeping with section 68(1) of the Act. He followed that up with an answer to the petition and a petition by way of cross-application. He has complied with section 68(2) of the Act, and there is an objection that could be heard by the court.

25. The primary objective of objection proceedings should determination of the question whether or not the person who has petitioned for representation is qualified to be appointed as personal representative, or, if qualified, he or she is competent to administer the estate, or if qualified and competent, whether he or she is suitable for appointment. Qualification is dependent on the relationship between the deceased and the person seeking authority to administer the estate. In testacy, that person should be that appointed by the deceased under the terms of his will as executor, unless he has renounced executorship, as per the provisions of sections 59, 60 and 61 of the Law of Succession Act. Where there is no executor to prove the will, for whatever reason, then sections 63, 64 and 65 of the Law of Succession Act would apply, and those who qualify for appointment ought to be the persons named in the will as beneficiaries. In intestacy, the persons who qualify would be the immediate survivors of the deceased as spelt out in Part V and section 66 of the Act.

26. Competence is about ability of the persons who qualify for appointment to administer the estate. Their competence may be compromised by either being too old, and, therefore, raising questions of senility; or too young, and, therefore, suggesting immaturity. Illiteracy, by itself, does not amount to incompetence, unless the estate is vast or comprises of complex forms of property, which may require involvement of persons who are more enlightened and exposed to management of such property. See *In re Estate of Wamira* (2002) KLR 12. Suitability looks at the circumstances of the proposed personal representative, who is otherwise qualified and competent, but perhaps is not available because he or she lives abroad, or is still too busy in school or college to afford time for the affairs of the estate, or is not so closely related to the deceased person in comparison with other survivors, or for any other reason. See *Chelang'a vs. Juma* (2002) 1 KLR 339.

27. To assist the court assess the circumstances to determine whether or not the petitioner is qualified or competent or suitable, evidence would be required. Affidavit evidence is not usually suitable in highly contested matters such as the instant one. Oral evidence would be the best evidence to resolve the outstanding questions once and for all, by affording each of the parties their day in court. Rule 17 of the Probate and Administration Rules, which deals generally with objections, envisages hearing of the objection, but is silent on the nature of the hearing. However, the language in Rule 17(15) of the Probate and Administration Rules, alludes to cross-examination of witnesses, which suggests that such proceedings ought to be by way of *viva voce* evidence.

28. No directions were ever taken on disposal of the objection proceedings, in terms of whether they were to be disposed of by way of *viva voce* evidence. I have, though, seen on the record before me documents that were filed by the petitioner and the applicant/interested party, in apparent preparation for an oral or *viva voce* hearing. The petitioner filed a list of witnesses dated 23<sup>rd</sup> January 2020, on 28<sup>th</sup> January 2020 and 5<sup>th</sup> February 2020, complete with copies of their witness statements. She also filed on 28<sup>th</sup> January 2020, a list and bundle of documents, dated 23<sup>rd</sup> January 2020. I have also come across a list of witnesses and witness statements filed on 24<sup>th</sup> October 2019, of even date, by the applicant/interested party. He also filed a list and bundle of documents on the same day, of even date. It is not clear the circumstances under which the said papers were filed, as the record is silent on directions being given in that behalf by the court.

29. So the question I ask is whether the petitioner is qualified for appointment as administrator of the estate of the deceased. I talk about administrator because the petition that the petitioner filed herein on 8<sup>th</sup> January 2014 was in Form P&A 80, for letters of administration intestate. In the affidavit lodged simultaneously with the petition, sworn on 23<sup>rd</sup> November 2013, she swears, at paragraph 4, that the deceased died intestate. The petition that is before the court is in respect of a person who died intestate, for a grant of letters to administer her estate in intestacy. No effort has been made since January 2014 to amend the said petition, and, therefore, the orders that the court ought to grant in terms of the petition should be with respect to the intestacy of the deceased. The trite legal position is that a party is bound by its

pleadings, and the pleadings by the petitioner that are before me are to effect that the deceased died intestate and, therefore, a grant of letters of administration intestate is what is being sought.

30. Section 66 of the Law of Succession Act sets out an order of preference to guide the court when it comes to appointment of administrators in intestacy. Priority is given to surviving spouses, followed by surviving children. Siblings of a deceased person, where she is survived by a spouse or children, come way down the list. The provision says:

*“66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors ...”*

31. Clearly, therefore, from the language of section 66, the surviving spouse and children of the deceased have prior right or entitlement in intestacy to administration over the estate of their deceased relative over other relatives. Other relatives of the deceased have a lesser right to administration, and, ideally, they ought not jostle for position with the surviving spouse or the children.

32. Rule 7 of the Probate and Administration Rules sets out the procedure for applications for grants of representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitioner to apply for representation. The said provisions state as follows:

*“7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*

*a) renounced his right generally to apply for grant; or*

*b) consented in writing to the making of the grant to the applicant; or*

*c) been issued with a citation calling upon him to renounce such right or to apply for a grant.”*

33. Section 66 of the Act should also be read together with Rule 26 of the Probate and Administration Rules. Rule 26 requires that where the person petitioning for representation in intestacy has a lesser or equal right or entitlement to administration, he should either get the persons with superior or equal right or entitlement to renounce their right or to consent to him applying or cause citations to issue to them to apply for representation. These provisions are in mandatory terms. Rules 26 of the Probate and Administration Rules says as follows:

*“26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*

*(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”*

34. From the material in the record before me, I can see that the petitioner is a sister to the deceased. The deceased had been survived by children and grandchildren. It is common ground that the deceased had only two children, the objector and the mother of the applicant/interested party. Going by the above provisions, the objector and the children of his late sister, that is to say the applicant/interested party and his brother, have prior right to administration over the petitioner in intestacy. That required her to comply with Rule 26 of the Probate and Administration Rules, by doing those things that Rule 26 requires. She did not do any of the things envisaged in that provision. The objector and applicant/interested party's right or entitlement to administration was superior to that of the petitioner. She should have consulted them. She should have obtained their consents. She should have caused citations to issue for service upon them. I have closely perused the record before me and it is clear that the petitioner did not file any consents in either Forms 38 or 39, duly executed by the objector and the applicant/interested party. Neither I have seen any citations that the petitioner caused to be issued to the objector and the applicant/interested party before she filed her petition. Neither have I seen any renunciation by either the objector or the applicant/interested party of their right or entitlement to administration to pave way for the petition by the petitioner.

35. Section 66 of the Law of Succession Act should also be read together with section 51(2)(g), the persons with priority to administration would also be immediate family members as listed in section 51(2)(g), in the order set out in that provision. The persons entitled to administer the estate of the deceased person herein should be members of the family of the deceased, as per the priority list in section 66 of

the Law of Succession Act, or as the family itself may choose. There was no surviving spouse, and the deceased was survived by a child and grandchildren. According to section 66, the objector, being a son of the deceased, had priority of entitlement to administration over the applicant/interested party, a grandson. However, the mother of the applicant, who was a daughter of the deceased, was dead, and, therefore, according to sections 41 and 51(2)(g) of the Law of Succession Act, the applicant/interested party, by fact of the decease of his mother, was standing at the same level with the objector, and he had equal entitlement to administration with the objector. The two had prior right to administration over the petitioner. The petitioner plays second fiddle. She is on the second tier after the objector and the applicant/interested party.

36. Section 41 says as follows:

*“Property devolving upon child to be held in trust*

*Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”*

37. Section 39(1)(c) of the Law of Succession Act is in the same spirit. It provides as follows:

*“Where intestate has left no surviving spouse or children*

*(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—*

*(a) father; or if dead*

*(b) mother; or if dead*

*(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none*

*(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none*

*(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.*

*(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund. 40. Where intestate was polygamous.”*

38. In the instant case, the petitioner does not have prior right to administration of the estate of her deceased sister over the surviving son and surviving grandsons of the deceased. She should, therefore, have obtained their consent before moving to court to file her petition. So purely looking at this matter from the perspective of intestacy, the petitioner cannot contend with the objector over who is qualified to apply for representation. She can only apply where the objector and the other descendants of the deceased were not competent or suitable.

39. As noted above, even though the petition is filed in intestacy, the petitioner asserts that the deceased died testate, for she had allegedly made a will, which named the petitioner as executrix. Without prejudice to what I have discussed above, and assuming, for the sake of argument, that the alleged will was valid, does the petitioner qualify to apply for probate of the alleged will?

40. Under sections 53(a), 59 and 60, where a will has appointed executors, the persons who qualify to apply for probate of the will, or to prove the will, are the persons named as executors, unless they have renounced probate. The said provisions state as follows:

*“53. A court may –*

*(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –*

*i) probate of the will to one or more of the executors named therein; or*

*ii) ...*

*59. A person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for grant of probate of that will.*

*60. When several executors are appointed, probate may be granted to them all simultaneously, or at different times.”*

41. All the combatants in the matter are all not agreed on what is alleged to be the will of the deceased. The petitioner and the applicant/interested party claim it is valid, while the objector claims it is not. I have very closely perused through, pored over, scoured and scrutinized the said documents, and I have been unable to find a provision which purports to appoint the petitioner executrix of the alleged will. Since she is not appointed executrix under the alleged will, she cannot possibly be qualified to apply for grant of probate to the purported will.

42. For avoidance of doubt, it should be stated that executors are appointed under the will, and not otherwise. Section 6 of the Law of Succession Act provides:

*“A person may, by will, appoint an executor or executors.”*

43. Where the will does not appoint executors or there are no executors capable of proving the will, sections 53(a)(ii), 63, 64 and 65 of the Law of Succession Act apply. They set out the persons who would qualify to prove the will, and to apply for a grant of letters of administration with the will annexed. In the instant case, the purported will did not appoint an executor, and, therefore, the persons who qualify under it, to petition to prove the will should have applied for a grant of letters of administration with the will attached, and not in intestacy.

44. Sections 53(a)(ii), 63, 64 and 65 of the Law of Succession Act state as follows:

*“53. A court may –*

*a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –*

*(i)...*

*(ii) if there is no proving executor, letters of administration with the will annexed ...*

*63. When a deceased has made a will, but –*

*(a) has not appointed an executor; or ...*

*a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole of the estate, or of so much thereof as may be unadministered.*

*64. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative shall have the same right to administration with the will annexed as the residuary legatee.*

*65. When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.”*

45. The purport of these provisions is that where there is no proving executor, the next in line should be any universal or residuary legatee, that is the beneficiary entitled to the residue of the estate under the will. Where there is no universal or residuary legatee the next in line would be the persons entitled to the estate if the testator had died intestate, followed by the Public Trustee and creditors.

46. My perusal of the purported will reveals that there is no gift of the residue, and, therefore, there is no universal or residuary legatee under the said will. That would mean that no one would qualify under sections 63 and 64 of the Law of Succession Act for appointment to prove the will under that band. In the absence of a universal or residuary legatee, the next in line would be the persons entitled in intestacy. I have dwelt with that above, and held that the persons who would qualify in intestacy to administer the estate of the deceased in intestacy would be the objector and the applicant/interested party, and that the petitioner's right to administration or qualification to prove the will under section 65 would be secondary to that of the objector and the applicant/interested party.

47. So, either way, the petitioner would play second fiddle to the objector and the applicant/interested party, in terms of right and qualification to prove the will of the deceased and to apply for grant of probate or of letters of administration with will annexed.

48. Let me consider next the matter of competence to administer the estate. With respect to competence, I only need to consider the case of those qualified to administer the estate. I have found above that the persons who qualify to administer the estate of the deceased herein, whether she died testate or intestate, would be her descendants, in this case her son and two grandsons. The petitioner's qualification is remote so long as the son and the grandsons are alive, and willing to take up their roles. None of the parties have pointed out any factors that would make the objector or the applicant/interested party incompetent to administer the estate. Competence is about ability and capacity to administer the estate. no one has brought out evidence that would suggest that they are too old or too young, or physically or mentally incapacitated in any manner as to be rendered incapable of managing the estate. The factors set out in section 56 are also disqualifying factors, minority of the petitioner, unsoundness of mind and bankruptcy. It has not been established that the objector, or the applicant/interested party, was below age of majority, or was of unsound mind or had been adjudged bankrupt.

49. Suitability is the next consideration. That is to say persons who qualify for appointment and are competent, but are not suitable for

appointment for one reason or other. The petitioner and the applicant/interested party have brought out factors that, in their view, they consider to be sufficient for having the objector considered unsuitable, even though he was qualified and competent for appointment.

50. The first was the fact that the objector and the deceased did not get on well. They had suits at the Kakamega Chief Magistrate's courts, some of which ended with orders being made against the objector with respect to two of the assets. They traced the bad blood to the fact that when the deceased divorced her husband, the objector followed his father and for all practical purposes abandoned the deceased. Secondly, it is argued that the objector moved into the estate property and forced imposed himself as administrator, and evicted tenants and some of the beneficiaries of the estate under the will, including the applicant/interested party. Thirdly, it is submitted that he had criminal cases pending relating to the estate, which included forcible entry into property and detainer, intermeddling, uttering a false will, among others.

51. All the issues raised by the objector and the applicant/interested party, with regard to suitability of the objector for appointment as administrator of the estate are relevant. In my view, however, these are issues that ought to be dealt with in an oral hearing where the objector would have an opportunity to face his accusers. The allegations are very serious, for they go into the credibility, character and integrity of the objector. Some of the allegations against him border on criminality. He is entitled to defend himself, in proper proceedings, where cross-examination of his accusers should be part of the process. The objector has not been accorded that opportunity.

52. The central issue in these proceedings is the validity of the will that the petitioner alleges the deceased had made. Never mind that she did not petition for grant of probate or of letters of administration with will annexed, but applied for a grant in intestacy. Her petition and the contents of her other filings are at odds. That, however, should not blind the court to the fact that both sides are aware of the alleged will, and the issue ought to be resolved first. The court will have to determine whether the document that is alleged to be the will of the deceased qualified to be a will. The principal contest is the authenticity of the signature of the testatrix. It will have to be determined whether the said signature was made by the deceased, or whether it was forged. Both sides have placed before me a report by the same forensics expert, one claiming that the signature was forged and the other alleging that it was genuine. The said expert, Jacob M. Oduor, has not sworn any affidavit to state which of the two reports was genuine. I cannot possibly make that determination without such affidavit, or oral testimony where the said expert is confronted with both reports. I note that both the petitioner and the objector both faced or still face criminal proceedings relating to the alleged forgery of the impugned will. These criminal cases appear, to me, to be efforts by either side to steal a march over the other. The validity or otherwise of a will ought not be determined in criminal proceedings, but by a probate court in proceedings such as the instant one. Either party is using criminal proceedings to intimidate the other. Criminal courts are not designed to resolve probate matters, and the earlier the parties desisted from using criminal proceedings to settle scores the better, for that would be the easiest way of getting a way forward out of the quagmire that they currently find themselves in. The deceased died in 2013, this cause was initiated in 2014, and to date, seven years down the line, representation is yet to be granted, as the parties are engaged in needless litigation.

53. I have indicated above that the reports by the handwriting expert or document examiner are useless for now, until he takes to the witness stand and breathes life to his document or documents. In any case, case law has established that such reports are not binding on the court. They are mere opinions, which the court considers alongside other evidence. Some of that other evidence would be testimony of the attesting witnesses. They allegedly witnessed or they witnessed the testator sign the alleged will so that in the event of the authenticity of the testator's signature being contested, they could provide evidence of what transpired on the material day. The names that appear in the alleged will as the attesting witnesses are of Betty M. Chirimi and Isaac Otieno Opudo/Opondo. Curiously, when the petitioner listed her witnesses, she did mention the two, yet they are the most critical witnesses in terms of proving whether the deceased herein appended her signature to the impugned will or not. The applicant/interested party also roots for the said will, but he has equally not listed them as witnesses.

54. I believe that I have said enough. I do not have enough evidence from which I can find whether or not the impugned will was genuine or not. A full trial will have to be conducted, where the attesting witnesses are availed to lead evidence on what they witnessed when it is alleged the deceased signed the will. The handwriting expert/document examiner should also be called to give life to his two reports that are on record.

55. It is now more than six years since the deceased died. Her estate is still without an administrator. The matter is highly contested. An administrator ought to be appointed to take charge of the administration of the estate pending determination of the validity of the will. Since the matter is so highly contested, it would be imprudent to appoint any of the contending sides as administrators, and a neutral administrator ought to be appointed. The Public Trustee is an administrator of last resort, and should be appointed herein pending suit.

56. The final orders that I make in the circumstances are as follows:

**(a) That I am unable to determine the contempt applications for the reasons given above, let the parties place the relevant applications on the record, the matter can thereafter be mentioned so that I can give directions on the said applications;**

**(b) That the issue as to the validity of the alleged will of the deceased shall be subjected to a full trial, where the parties shall lead evidence on the circumstances of the execution of the alleged will, by calling the attesting witnesses and the document examiner/handwriting expert, and other relevant witnesses;**

**(c) That oral evidence should also be led as to lack of suitability of the objector for appointment as administrator of the estate of the deceased;**

**(d) That pending resolution of the dispute on the validity of the alleged will, I hereby appoint the Public Trustee, administrator of the estate, and a grant of letters of administration limited *pendete lite* shall issue in accordance with Rule 10 of the Fifth Schedule;**

**(e) That the Deputy Registrar shall allocate a date for hearing in terms of (b) above;**

**(f) That any party aggrieved by the outcome of these proceedings has leave of twenty-eight (21) days to move the Court of Appeal appropriately; and**

(g) That each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF MARCH 2021.

W. MUSYOKA

JUDGE