



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**SUCCESSION CAUSE NO. 4 OF 2020**

**IN THE MATTER OF THE ESTATE OF GIOVANNI FORINO (DECEASED)**

GIOIA ANNA.....1<sup>ST</sup> PETITIONER

MICHELINA FORINO.....2<sup>ND</sup> PETITIONER

SALVATORE FORINO.....3<sup>RD</sup> PETITIONER

**VERSUS**

ALFONSO FORINO.....1<sup>ST</sup> OBJECTOR

CAROLINE WANGUI WANJUGU.....2<sup>ND</sup> OBJECTOR

**AND**

**REGISTRAR OF BIRTHS AND DEATHS –**

NATIONAL REGISTRY.....INTERESTED PARTY

JAMES KAMAU GATHOGO.....2<sup>ND</sup> INTERESTED PARTY

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Kimeto advocates for plaintiffs/applicants**

**Mr. Binyenya advocate for the Respondents**

**Mr. Atiang Advocate for the interested party**

**J U D G M E N T**

**Background**

The petitioner Gioia Anna, Michellina Forino and Salvatore Forino through their advocate Ms. Jackline Kimeto of Kimeto & Associate advocates filed for letters of administration over a part of the estate of the deceased in Malindi High Court Succession cause no. 4 of 2020.

Alfonso Forino as one of the persons entitled to a share of the estate was cited by the Deputy Registrar of the high court on 19<sup>th</sup> February 2020 to enter appearance within 15 days to accept or refuse letters of administration issued or show cause why the same should not be issued to Gioia Anna, Michellina Forino and Salvatore Forino. He entered appearance through his advocate Mr. Binyenya of Binyenya Thurania & Co Advocates on 2<sup>nd</sup> March 2020 and swore a replying affidavit which was filed in court on 3<sup>rd</sup> March 2020. In his affidavit, he asked that the citation be dismissed with costs as he had been awaiting gazettelement of the petition for him to object as per Rule 7 (4) and 17 of the Probate and Administration rules.

Ms. Kimeto counsel for the petitioners, filed a certificate of urgency and summons seeking orders that;

**a) THAT for reasons to be recorded and on grounds set out in the certificate of urgency service of this application be dispensed**

*with and certified as urgent and the application herewith be heard ex parte for purposes of prayers 1,2 and 3 hereof.*

*b) THAT pending the hearing and determination of this application this court do hereby order the receiver Manager Imperial Bank Limited (Under Receivership) to release the sum of Kshs. 5 Million from the deceased bank accounts Nos. Imperial Bank Account 7500004216, Malindi Branch and Imperial bank account No. 7500004134, Malindi branch to the petitioners.*

*c) THAT the said sums be hereby paid into NIC Bank account No. 1006106761, Malindi Branch in the name of Michellina Forino.*

*d) THAT this court be pleased to issue letters of administration (intestate) to the beneficiaries of the estate of the deceased namely Gioia Anna, Michellina Forino and Salvatore Forino in accordance with the petition filed before this court on 14<sup>th</sup> February 2020.*

*e) THAT this court be pleased to issue any other orders it deems fit to grant.*

*f) THAT the costs of this application be in the cause.*

The court on 31<sup>st</sup> March 2020 granted the following orders;

*a) THAT the court process server under the directions of the deputy registrar does serve the suit papers upon the respondent.*

*b) THAT the legal counsel representing the Respondents cited in the petition be served.*

*c) THAT service be effected upon the respondent by the court process server.*

*d) THAT directions be taken before the Deputy Registrar on how an interpartes hearing can be arrived on a priority basis.*

The Respondent Alfonso Forino filed a Preliminary Objection to the summons filed by the petitioners dated 18<sup>th</sup> May 2020 and the court rendered itself in the ruling dated 3<sup>rd</sup> June 2020. In the ruling, this court stopped all other proceedings and consolidated; **Malindi CMCC Succession Cause no. 3 of 2019 in the chief Magistrate's Court, Malindi CMCC succession Cause No. 6 of 2019 in the Chief magistrate's Court, Malindi High Court Succession Cause No. 6 of 2019, Malindi High Court Succession Cause No. 11 of 2019 and Malindi High Court succession no. 4 of 2020** which matters involve the parties herein. The proceedings were consolidated to **Malindi High Court Succession Cause No. 4 of 2020**. Further the ruling directed that Gioia Anna do apply for the grant of letters of administration intestate.

On 23<sup>rd</sup> November 2020, Alfonso Forino filed an objection to making of a grant dated same day. The objections is premised on the following grounds;

*i. That he entered appearance to the undated petition by Gioia Anna, Michellina Forino and Salvatore Forino on 2<sup>nd</sup> March 2020*

*ii. Gioia Anna did not append her signature to both the undated petition and the affidavit in support.*

*iii. The citation by the petitioners is still pending determination by this honourable court*

*iv. That this court directed that Gioia Anna to apply for the grant of letters of administration intestate which she is yet to file.*

*v. That Gioia Anna through her advocates caused to be published a Gazette Notice No. 7724 dated 2<sup>nd</sup> October 2020.*

*vi. That the deceased had a son named Liam Kamau Forino who is a minor with Caroline Wangui Wanjugu a fact well known by the petitioners and that they have been excluded from the petition.*

*vii. That during the lifetime of the deceased he took parental responsibility of the minor. On 25<sup>th</sup> august 2017 the deceased had placed a standing order of Kshs. 35,231 a month in Gio-Fo Limited's bank account no. 1003953994 at NIC bank for the benefit of the minor. Further, between 25<sup>th</sup> august 2017 and 25<sup>th</sup> September 2018, the deceased had expended a sum of Kshs. 593,003 on the minor which he had irregularly and without the authority of Gio-Fo Limited. The said sum of Kshs. 35,231 had been the subject of a counterclaim in Malindi High Court Civil case No. 9 of 2018 which was subsequently settled by way of a consent which was adopted as an order of the court on 1<sup>st</sup> November 2018.*

*viii. That on 19<sup>th</sup> November 2018, Michellina Forino being an attorney of the deceased placed a standing order of Kshs. 35,000 a month in favour of the minor on the deceased personal account number 1003805723 at NIC bank a fact that the petitioners are well aware of.*

*ix. Kenya commercial bank account no. 1179012593 does not belong to the deceased rather it is the clients' account for the Objector's advocates on record Binyenya Thurairana & Co advocates and as such should not form part of the deceased's estate.*

x. That tile number Chembe/Kibabamshe/405 does not belong to the deceased. It is the property of Gio-Fo Limited thus should not be included in the undated petition.

xi. That at the time of his death, the deceased did not hold 999 shares in Gio-Fo Limited as he had transferred his 999 shares in Gio-Fo to the objector on 8<sup>th</sup> November 2012. Further the registration of the transfer was done on 24<sup>th</sup> October 2018 and as such should not be included in the undated petition.

xii. That at the time of his death, the deceased owned apartment nos. 3 and 4 situate on portion no. 5496 Malindi. Further, on 23<sup>rd</sup> January 2020 Michelina Forino as an attorney of the deceased, intermeddled and fraudulently transferred the said apartments to, Salvatore Forino allegedly at a consideration of Kshs. 800,000 and a lease dated 23<sup>rd</sup> January 2019 in respect of the apartments was registered at the Land Titles Registry at Mombasa on 31<sup>st</sup> January 2019. These apartments should be included in the undated petition.

xiii. That at the time of his death the deceased had a total of Kshs. 39,109,317.63 in his account numbers 7500004216 and 7500004134 at imperial Bank limited, a total of Kshs. 11,000,000 in his account number 0281915055 at DTB and a total of Kshs. 150,711.73 in his account number 1003805723 at NIC Bank Kenya limited which account Michelina Forino is a signatory.

xiv. That on 22<sup>nd</sup> January 2019, when the deceased passed on in Italy, the following bank transactions were irregularly and illegally done:

a) Internal transfer of Kshs. 400,000 from account number 0281915055 DTB reference number 011FTRQ190220002 to Salvatore Forino.

b) Cash withdrawal by cheque reference no. 011CQWL190220013 account no. 0281915055 DTB Kshs. 150,000.

c) Cash withdrawal by cheque reference no. 011CQWL190220016 account no. 0281915055 DTB Kshs. 2,322,000.

d) Transfer of Kshs. 8,890,000 reference no. 011FTRQ190220001 account no. 0281915055 DTB.

e) Motor vehicles listed under Paragraph 6 serialized a-k in the undated petition do not belong to the deceased and should not be included in the undated petition.

On 8<sup>th</sup> December 2020, Alfonso Forino filed a petition by way of cross application for a grant seeking to be granted letters of administration intestate in respect of the estate of the deceased. The Petition is supported by his sworn affidavit which reiterates the averments in the objection. On the same day, he filed an answer to petition for a grant stating that Gioia Anna had not as directed by this court filed a petition for letters of administration intestate thus contravening the provisions of Rule 9 of the Probate and Administration Rules.

On 18<sup>th</sup> December 2020, one Caroline Wangui Wanjugu filed an objection to making of a grant under Rule 17 of the Probate and Administration Rules. This objection is premised on the following grounds;

i. The petition before court was filed on 14<sup>th</sup> February 2020 for temporary grant of letters.

ii. There existed P&A Cause No. 3 of 2019 and P&A cause no. 3 of 2019 and P&A cause No.11 which would be later consolidated and proceeded thus till sometime in the month of September 2019

iii. That this matter coming up before this court on 3<sup>rd</sup> June 2020, the judge upon finding out that Gioia Anna had not denounced her right to apply for grant did order the said Gioia Anna to apply for grant of letters of administration intestate.

iv. The court went ahead and directed that if the said Gioia Anna was unable to apply, then upon notification to the court of such inability; the honourable Deputy registrar of the court was directed to have the matter mentioned in a conference of all parties including the said Gioia Anna in the presence of a notary public in Italy for her to appoint whoever she pleases to represent her.

v. The said Gioia Anna has never filed the petition as directed by the court neither has she ever placed before the court sufficient if any a material to prove to the court of her inability to do so as to warrant an appointment of a representative.

vi. It would mean therefore that in terms of the directions of the court, the petitioners before this court are Michelina Forino and Salvatore Forino carefully excluding Gioia Anna.

vii. The objector Caroline Wangui Wanjugu is a surviving spouse entitled in the same manner as would be said Gioia Anna a position that the said petitioners have wanted to turn away from despite their vast knowledge of the objector's existence and their regular discussions over the same issue.

viii. The objector and the deceased cohabited as husband and wife from the year 2012 to 22<sup>nd</sup> January 2020 when the deceased died while in Italy a fact that the petitioners are well aware.

ix. During the lifetime of the deceased, the deceased made sure he introduced the objector to the said Gioia Anna, Michelina

*Forino, Alfonso Forino and Salvatore Forino and the former knew the objector as her co wife while the children hereinbefore mentioned knew the objector as their step-mother.*

*x. The petitioners are well aware that together with the deceased, the union was blessed with a singular issue by the name Liam Kamau Forino- minor who was also well known to the deceased's children and would from time to time refer to him as their brother.*

*xi. The objector and Michelina Forino upon being introduced by the deceased became close to the extent of becoming Facebook friends a relationship that has gone on for over six years now.*

*xii. The petitioners are well aware that like any other responsible husband and father, the deceased during his lifetime had placed a monthly standing order at NIC Account held by Gio-Fo limited account no. 100395394 in favour of their son Liam Kamau Forino of Kshs. 35,000.*

*xiii. Later on, owing to a court case in Malindi HCC 9 of 2018, the deceased would advise Michelina Forino 'her attorney' to place a standing order in favour of their son Liam from the deceased personal account at NIC Bank account number 1003805723 in the sum of Kshs. 35,000.*

*xiv. It is the deceased who used to cater for the minor's education before moving to Kiddie stars where the minor should be going to right now but he isn't because of lack of finance, the minor was enrolled at Great News Academy and it is the deceased that paid his school fees. In the year 2018, he wired the school account KES one hundred and thirty-five (Kshs. 135,000) in school fees. (Sic).*

*xv. Needless to say that on 28<sup>th</sup> September 2018, the deceased's last day in Kenya he chose to spend time with the minor hereinabove wherein he assured both the objector and the minor that their interest would be taken care of even if he will be in Italy.*

*xvi. The objector is disturbed that all this being known to the petitioners, she as the other surviving spouse has been left out in the petition for grant ,her consent has not been obtained nor herself cited in an effort not to leave out.*

*xvii. It is also disturbing that the child with whom the objector and the deceased bore is being left out of his father's estate without any singular justifiable legal anchorage given the fact that the objector and the minor depended wholly on the deceased for daily life and are currently dealing with health issues and hefty rental arrears.*

*xviii. It is very disturbing that in the petition, the petitioners have included Gio-Fo Limited as part of the estate of the deceased when in actual sense it is not. According to the objector herein, the shareholding was transferred to Mr. Alfonso Forino after a share transfer agreement which the objector is aware exists.*

*xix. The petition is marred with numerous material non-disclosure of facts concerning the true and fair account of the estate's beneficiaries?*

On 28<sup>th</sup> December 2020, Ms. Kimeto filed summons for Confirmation of grant on behalf of Gioia Anna together with the affidavit in support of the summons sworn by Jackline Chepkemboi Kimeto pursuant to Section 8 of the Law of Succession Act Cap. 160 Laws of Kenya

On 3<sup>rd</sup> February 2021, Caroline Wangui Wanjugu filed a petition by way of cross application for grant. The petition is supported by an affidavit sworn by herself on 27<sup>th</sup> January 2021 which reiterates the averments set out in the objection. On the same day, she filed an answer to petition for grant which also reiterates the averments of the objection but adds that there being no petition filed by Gioia Anna, the petition before this court is not properly so and deserves to be struck out for failing to meet the provisions of Rule 9 of the P & A rules.

On 26<sup>th</sup> January 2021, Michelina Forino and Salvatore Forino in their capacity as daughter and son filed a petition for letters of administration ad litem on their own behalf and on behalf of the estate in Malindi High court Case no. 9 of 2020. This application is dated 24<sup>th</sup> December 2020

On 8<sup>th</sup> February 2021, Alfonso Forino filed a replying affidavit to the application dated 24<sup>th</sup> December 2020 contesting the averments of the Applicants and stating that Gio-Fo and the deceased are two separate distinct entities. That the Applicants have not given a full inventory of all the deceased's assets and liabilities.

On 15<sup>th</sup> March 2021, the Petitioners through their advocate, brought an application vide a summons seeking the following;

*a) Spent.*

*b) That the Registrar of births and deaths- central registry at Nairobi be enjoined to this suit as interested parties.*

*c) That the father of Liam Kamau known as James Kamau Gathogo be enjoined to the suit as interested party.*

*d) That the registrar of Births and Deaths –Central registry at Nairobi be and is hereby ordered to produce before this honourable court for scrutiny the Birth Register pertaining to Birth entry no. 057414920 together with the original notification*

*of birth of Liam Kamau.*

*e) That the child Liam Kamau together with James Kamau Gathogo and the known children of the deceased be subjected to DNA testing at the Kenya Medical Research Institute and Lancets Kenya to ascertain the paternity of the child.*

*f) That the court be pleased to issue any other orders it deems just and fit to grant.*

*g) Costs of this application be in the cause.*

The application is supported by the affidavit of Jackline Chepkemboi Kimeto who states that the objectors and cross petitioners have placed before this court different copies of a birth certificate of a child known as Liam Kamau.

This application was later withdrawn vide a notice of withdrawal dated 6<sup>th</sup> April 2021 and filed on 9<sup>th</sup> April 2021.

#### **Issues for determination**

*1. Who among the Applicants and objectors has priority in law to be granted with the letters of administration of the deceased's estate?*

*2. Whether the objections are frivolous and an abuse of the courts process.*

#### **Analysis and determination**

This court has previously delved into this issue while it rendered itself in the ruling dated 3<sup>rd</sup> June 2020. In its ruling, the court observed that the late Giovanni Forino had a wife, Mrs. Gioia Anna whom he married on the 16<sup>th</sup> May 1963. That it is also not in dispute that the deceased had three children with Gioia Anna; Michellina Forino, Alfonso Forino and Salvatore Forino. It is also alleged that he had a son Liam Kamau Forino whom he fathered with one Caroline Wangui Wanjugu who claims to have been his girlfriend.

In answering the above question, I will explore the relationship of the between the deceased and the Petitioners and the objectors.

Section 26, 27 and 28 of the Law of Succession Act Cap. 26 Laws of Kenya embodies the provisions for dependants not adequately provided for by will or on intestacy as follows;

*26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.*

*27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.*

*28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to -*

*(a) The nature and amount of the deceased's property;*

*(b) Any past, present or future capital or income from any source of the dependant;*

*(c) The existing and future means and needs of the dependant;*

*(d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;*

*(e) The conduct of the dependant in relation to the deceased;*

*(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*

*(g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant.*

Section 29 of the *Law of Succession Act* explains the meaning of the term 'dependant' as follows:

*For the purposes of this Part, "dependant" means—*

*(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

Section 2 of the Law of Succession Act defines the term personal representative as **"the executor or administrator of a deceased person"** and an administrator is defined as a person to whom a grant of letters of administration has been made under the Act.

I am further guided by the provisions of section 66 Law of Succession Act which states that;

**"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 vest interest of all concerned, be made, but shall, without prejudice, to the discretion, accept as a general guide, the following order of preference-surviving spouse or spouses with or without association of other beneficiaries; other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by part V; The Public Trustee; and Creditors."**

Section 56 of the Law of Succession Act provides as follows:-

"56 (1) No grant of representation shall be made-

**a. to any person who is a minor or of unsound mind or a bankrupt, or**

**b. to more than four persons in respect of the same property**

Mrs. Gioia Anna, Michellina Forino, Alfonso Forino and Salvatore Forino have been recognized as dependants under the meaning of Section 29, as read together with section 36, 37 & 38 of the Law of Succession Act and thus provided for adequately within the purposeful interpretation of these provisions.

Ms. Caroline Wangui Wanjugu alleges to have been married to the deceased and had a child (minor) and that the deceased had been providing for them. She claims that she has equal rights same as those enjoyed by the Mrs. Gioia. The crux however, is that there is no evidence that has been tendered for proof of the existence of the marriage between her and the deceased. The onus of proving the alleged marriage to the deceased by Ms. Caroline rests entirely on her as is set out under Section 107 (1) of the Evidence Act:

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

Further, in **Britstone Ptl Ltd v Smith & Associate Far East Ltd 2007 4 SLR 855** the court held:

**"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms 'proved', 'disapproved' and 'not proved' are statutory definitions contained in the Evidence Act Cap 97, (1997 Rev. Edition): The term proof wherever it appears in the Evidence act and unless the context otherwise suggests, means the burden to satisfy the court of the existence or non-existence of some fact, that is the legal burden of proof."**

It is incumbent upon the objector to prove on a balance of probability that she was married to the deceased and during the subsistence of such marriage they were blessed with the minor who is a subject of these proceedings. On consideration of the entire affidavit evidence there are such glaring gaps that logical conclusions cannot be drawn without testing such evidence in the scheme of cross examination. It cannot be gainsaid that the burden of proof is vested with the party who alleges existence or non existence of a fact in issue as stipulated under section 107 of the Evidence Act. The allegations made in the objection to the making of the grant as of necessity calls for the court to hear the evidence which proves the facts pleaded sufficient enough to establish the queried marriage and the product of it having been the minor L.K.

It is an arguable point for purposes of this intestate estate to render evidence on whether the objector was married to the deceased in the Kenyan legal system of marriage. That it is also true that the minor was born out of the exclusive union between the objector and the deceased. Whether the objector may be entitled to a share of the intestate property is a matter to be decided by the probate court duly constituted and a legal representative under section 83 of the Law of Succession Act.

Whereas an objection has been raised to the making of grant it runs in contravention of a court order that one Gioia Anna under section 66 and rule 73 (1) of the Law of the Succession Act be appointed as the grant holder to the estate of Giovanni Forino. Notwithstanding the provisions of section 68, 69 and 70 of the Act I hold a strong view that the interest being claimed by the objector is one which can be determined within the legality of dependency under section 29 of the same codified law. The invocation of section 66 was to entitle the parties to the estate of the deceased to present their legitimate interest prior to the confirmation of the certificate of grant. It is now settled that the jurisdiction exercisable by the court under section 66 is original and discretionary and for the objectors to succeed it must certify the twin guiding principles in section 80 and order 45 of the Civil Procedure Act and Rules.

In **Muyodi V Industrial and Commercial Development Corporations & Another (2006)1 EA 243**, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated a follows;

**“In *Nyamogo & Nyamogo V Kogo*[2001]EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”**

In *Paul Mwaniki V National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:

**“.....a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law misconstruing a statute or other provision of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

Implicit in this trial is the style of advocates from time to time filing avalanche that may have disastrous consequences in resolving the inheritance and distribution of the estate to the legal beneficiaries. Ideally, those applications and the conduct of the court proceedings remain quite unjustified in absence of appointment of a legal representative. This clash of adversaries as between opposing parties is not the most effective way to secure the interest of the litigating parties and ensure not only justice is done but be seen to be done in adjudication of the dispute.

The key requirement which tends to be more contentious in this subject of intestate litigation is the challenge on locus standi. It is trite that a litigant has to show some legal right or recognize interest at stake. The right or interest may be direct or possibly indirect or personal. A party seeking a remedy in intestate proceedings could not succeed in being heard unless the criteria of appointment of a legal representative with specific instrument authorizing him or her to administer the estate of the deceased has been issued by the Court of law. At best the litigant could be described as being populist on the issues of the relief requested with no legal representative commissioned by the Court capable of being sued or capacity to sue on behalf of the estate. The principle that parties to this suit needed to have sustained legal representation as a precondition to *locus standi* in bringing their respective applications is an affront to the provisions of the Succession Act.

In the instant case it will not be fair in the circumstances to permit proceedings to be initiated without first showing evidence of an appointed legal representative. On a careful review of the record there is no dispute Gioia Anna remains to be the undisputed widow of the deceased. It is also clear Michelina Forino, Salvatore Forino, Alfonso Forino are surviving children of the deceased under section 38 of the Law of the Succession Act. However Caroline Wangui Wanjugu has approached this Court to entitle her a benefit to the estate under section 40 of the aforesaid Act. Consequently, the Court is enjoined to determine with sufficient weight whether she falls within the system of marriage recognized in our jurisdiction. On the other factor that is to be taken into account is whether the intestate of the deceased left a surviving child in the name of L.K. In the court’s view the objector and her child are seeking to be enjoined as heirs to the estate of the deceased. The canons of the dependency are expressly provided for under section 29 of the Law of the Succession Act. A complete scheme of succession is set forth in this statute covering both reality and personality. The inquiry as to what particular species of property descends to the heirs of the intestate and what passes to each one of them is a matter of much controversy. The law in respect to these classes of heirs as well as in respect to adopted children is clearly vested in section 29 of the Act.

In computing the degree of relationship the parentelic scheme reckons upwards and downwards in this protracted litigation. These series of applications attest to that legal landscape which a probate court must navigate to determine the rightful heirs to the intestate estate. In this case the objector will only be considered as a spouse upon proof of existence of a marriage. Fundamentally to that whether the deceased estate can be disposed of and assigned to her as a spouse. In addition to be clear and complete is to determine whether L.K is a child of the deceased.

As regards this aspect there are counter accusations on the presentation by the parties over their respective positions over the dispute on spousal relationship of the objector with the deceased and the legitimacy of the minor L.K as a son born of that union. The Court does not think of the somewhat unusual facts in this case that conflicting affidavit evidence can dissolve the dispute at hand. The Court is given wider discretion under Civil Procedure Rules, the evidence Act and rule 73 (1) of the Succession Act to model this trial in a way not likely to prejudice any of the parties. On review of the evidence certain essential features emerge which demand third parties be allowed to exercise their right to *viva voce* evidence with a rider to cross examination.

This court gave directions in the ruling dated 3<sup>rd</sup> June 2020 if Mrs. Gioia Anna was unable to apply for the grant of letters, the same would be notified to the court and the honorable registrar of the court was directed to have the matter mentioned in conference of all parties including Mrs. Gioia Anna in the presence of a notary public in Italy for her to appoint whoever she pleases to represent her. To date Mrs. Gioia Anna has not complied with these directions. The same directions have not been vacated or varied. I uphold the directions that this court gave on 3<sup>rd</sup> June 2020.

## **2. Whether the objections are frivolous and an abuse of the courts process.**

The Objector’s objection is brought pursuant to **Section 68 of the Law of Succession Act** which provides: -

**“(68). (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 the notice, or such longer period as the court may allow”**

Rule 17 (1) (2) of the Probate and Administration Rules sets out the procedure for making objections as follows;

**“17. (1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7 (4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.**

**(2) A request by an intending objector for an extension under section 68 (1) of the Act of the period specified in the notice under rule 7 (4) shall be made to the registry at which the application for a grant was made or by which the notice was issued, as the case may be, by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant.”**

What comes from the foregoing is that this Court must move away from entertaining any litigation by giving effect to the strict interpretation of *locus standi* rule in intestate succession litigation. Even on the important issues establishing who gets what from the estate property the basis of it all is on legal representation. Finding a balance between the competing interests, their needs and interests of different family members is anchored in the legal representative for the dead speaketh through the legal representative or executor in the case of probate succession. Succession on death subject matter of this litigation signifies the devolution of property to a living person or persons upon the death of its owner.

The upshot of the above is that there cannot be more than one grant and different sets of administrators in respect to the same estate. Therefore, I find that the objection applications were frivolous and an abuse of the court process at this stage. I think and most importantly nothing could have been legally acceptable than to allow any objection *in situ* making of the confirmation of grant of letters of administration. The criteria of appointing a legal representative is that of equal among others to perform the duties under section 83 of the Law of the Succession Act as an essential attribute of the law. Apparently the spouse Gioia Anna is a senior ranking member to the deceased estate. Any grievance the objector might have the Law of Succession does provide a remedy but not limited to objecting to the making of the grant of representation. The objection remains moot.

Generally, one thing that clearly comes out in the submissions by counsels is a conduct that defies authority and dignity of this Court and a true departure on procedural jurisdiction to determine the cause of action. The point I am making is first the universal principle on legal presentation must be in a sense be addressed before any particular litigant makes a move. As stated in my previous rulings all grant of letters of administration issued to either Michelina Forino, Salvatore Forino and Alfonso Forino were all revoked and annulled under section 76 of the Law of the Succession Act for being an abuse of the court process. Therefore, none of these heirs has a *locus standi* to initiate, commence, prosecute or defend any proceedings in the matter of the **GIOVANNI FORINO** the deceased.

Looking at the stature of these proceedings one gets concerned it might generate into a status of anarchy. All I can say may this conflict be resolved by not putting the court to the test and placing a yoke on its shoulders in going to the root of the issues at hand. Sometimes **Michellina Forino and Salvatore Forino** have felt cheated because of the sparked war, because of the alleged transfer of the shares in the disputed company. This is where I say be eager to maintain the unity of the spirit in the bond of peace as the Court exercises its judicial duty to determine the inheritance.

In abundance of caution I am of the opinion that with regard to the issues being taken up by the parties by way of multiplicity of applications the so called access to justice ought to be curtailed in a *suo moto* to give the resolution of the primary dispute a chance. The framework upon such pathway elected by court is in consonant with section 1 (a) on overriding objective and section 3 (a) on inherent jurisdiction. The extent of inherent powers was succinctly stated by the learned authors of *Halsbury's Laws of England, 4<sup>th</sup> Edition. Vol 37 para 14* as follows;

***The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”*** See also **Meshallum Waweru Wanguku** (*supra*).

*Such is the context in which the Court must take to enforce and crystalize the rights of the parties without unnecessary delay concerning matters attended to these proceedings.*

For the reasons I have set out above, I make the following orders;

- 1. The application dated 15<sup>th</sup> March, 2021 is a matter as of necessity vested with the applicant which absolutely are restrictive to be discerned during the pretrial conference.**
- 2. Invariably parties have been litigating collaterally to the extent the fundamentals of the succession cause is lost.**
- 3. The applicant cannot therefore call in aid of the court to assist in being part of the burden of proof as to any particular fact lies on him or her to discharge it at the trial.**

4. *Issues such as whether L.K was fathered by a different man besides he deceased is a matter of the weight of the evidence.*
5. *It will be intolerable for a court to delve into these matters regarding the nature of evidence when prima facie the suit is a nonstarter for lack of standing.*
6. *For avoidance of doubt Mrs Gioia Anna as the surviving spouse shall be issued with grant of letters of Administration to the estate of Giovanni Forino.*
7. *The Schedule of the assets of the deceased shall be provided by the administrator at the time of confirming the grant and shall exclude all the property that is contested.*
8. *Whether the minor L.K or the objector Caroline Wangui Wanjugu are entitled as direct heirs to the estate or under section 26 of the Law of the Succession Act is a matter to be determined at the time of confirming the grant.*
9. *Unless the Order of the Court is sought for the intended interlocutory applications an interim conservatory order is issued against the applicants, respondents or objectors to allocate themselves the liberty of filing plethora of applications under the guise of seeking a remedy over the intestate proceedings.*
10. *This being a succession dispute, each party shall bear their own costs.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29<sup>TH</sup> DAY OF JUNE, 2021

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**R. NYAKUNDI**

**JUDGE**

**In the presence of: -**

1. Kimetto for the Petitioners
2. Binyenya for the 1<sup>st</sup> Respondent
3. Michelina Forino
4. Salvatore Forino

([atiangadvocates@gmail.com](mailto:atiangadvocates@gmail.com),[lawconradd@gmail.com](mailto:lawconradd@gmail.com),[jacklinekimeto@lpolegal.com](mailto:jacklinekimeto@lpolegal.com),[wasigeb@gmail.com](mailto:wasigeb@gmail.com))