



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

SUCCESSION CAUSE (P&A) NO. 37 OF 2015

CORAM HON. R.E. ABURILI, J

IN THE MATTER OF

THE ESTATE OF DOMINICUS ODHIAMBO (DECEASED)

AND

IN THE MATTER

BETWEEN

FREDRICK ODHIAMBO ODHIAMBO.....1ST OBJECTOR

CHRISCENSIA ATIENO ODHIAMBO.....2ND OBJECTOR

AND

JENIPHER ACHIENG ODHIAMBO.....1ST RESPONDENT

ALEX OMONDI ODHIAMBO.....2ND RESPONDENT

JUDGMENT

1. On 13th October 2015 the Petitioners herein **JENIPHER ACHIENG ODHIAMBO** and **ALEX OMONDI ODHIAMBO** filed a petition for grant of letters of administration of the estate of the deceased **DOMINICUS ODHIAMBO** who died intestate on 10th August 2015, at Bondo Sub County Hospital, in their capacities as widow and son to the deceased respectively.

2. Before the grant could issue, the objectors herein **FREDRICK ODHIAMBO ODHIAMBO** and **CHRISCENSIA ATIENO ODHIAMBO** filed objection dated 1st February 2016, objecting to the making of a grant of representation in the estate of the deceased to the respondents herein **JENIPHER ACHIENG ODHIAMBO** and **ALEX OMONDI ODHIAMBO**. They also filed a cross application for petition of grant to be issued in their favour.

3. It is the objectors' case that they are beneficiaries of the estate of the deceased **DOMINICUS ODHIAMBO**. The aforementioned objection is grounded on the following grounds;

- a) *That the respondents made an application for grant of letters of administration intestate without issuing notice to the objectors who are beneficiaries to the deceased's estate and have equal or prior right of grant of representation.*
- b) *That no consent was sought from the objectors by the respondents prior to their application for letters of administration.*
- c) *That the application for grant was made fraudulently as the applicant failed to disclose material information with regard to the full list of assets and liabilities of the deceased and surviving spouses and children of the deceased.*
- d) *That the respondents proceeded to administer the deceased's estate by receiving income from the estate without a grant place which amounts to intermeddling.*

e) *That the applicant denied the deceased's second wife, the 2nd objector herein, access to the deceased's estate and thus rendering her incapable of fending for herself as she is expectant and cannot go about her business of washing clothes.*

f) *That the respondents have disowned the 1st objector despite him being a son of the deceased, who had accepted him as a son.*

4. In response and opposition, the 1st respondent Jenipher Achieng Odhiambo swore an affidavit in reply to the objection filed by the objectors deposing that she was the only widow of the deceased having contracted a marriage under the African Christian Marriage and Divorce Act and as such other subsequent marriage were thus invalid unless her marriage to the deceased was legally dissolved.

5. The 1st respondent further deposed that there was no need to issue notice to the 2nd objector prior to applying for grant as she was not a beneficiary of the deceased and further that the 2nd objector was legally married to someone else.

6. Regarding the 1st objector's assertions, the 1st respondent deposed that he was not a beneficiary of the deceased's estate as he had parents who stayed in Nairobi.

7. The 1st respondent further deposed that when the deceased passed on, the family were in dire financial crisis which prompted them to seek a special grant to facilitate burial expenses and further offset the deceased's bank loan.

8. The 1st respondent further deposed that the assets of the deceased being Land Parcel No. South Sakwa/Barkowino/No. 4381 and South Sakwa/Barkowino/No. 3811 were sold to facilitate the deceased's burial and further offset his bank loan and that the succession regarding the whole estate of the deceased had not been done.

9. Both the objectors and the respondents called witnesses in support of their cases which was heard by way of *viva voce* [oral] evidence summarised below.

The Objectors' Case

10. The 1st Objector, Frederick Odhiambo Odhiambo testified on oath as OW1 and adopted his written statement as his evidence in chief. It was his testimony that he was the deceased's first son and he had been staying with his uncles from his maternal side since he was young. He further stated that he was prompted to start looking for his father sometime in the year 2004 following the mistreatment he received where he stayed and that his mother directed him to Angira Posho Mills in Bondo which she alleged belonged to his father, the deceased who also went by the alias 'Nyason.'

11. The 1st objector testified that he then started staying with the deceased and his stepmother the 1st Respondent herein and that he was well received in the family to the point that the deceased gave him his identification card number to use in his own application for an identification card.

12. He further stated that sometime on the 10th August 2015 after the deceased passed on, his stepmother, the 1st respondent, started disowning him despite the fact he was one of the witnesses to the selling of the deceased's land number South Sakwa/Barkowino/4381. He further stated that the deceased's land was sold as his stepmother was suspected to have killed the deceased and she refused to contribute to the deceased's burial so the family decided to sell the land to arrange the funeral of his father.

13. It was his evidence that the 1st respondent told him not to go back to the deceased's house thus raising his suspicion prompting him to move to court to ascertain the status of the deceased's estate in succession where he found that the 1st respondent had not included him in the succession process. In cross-examination, the 1st objector stated that he had not carried his identity card but his mother told him that he was born on 17/6/1988 thus making him 28 years. He further stated that his mother was married to David Ochieng in South Nyanza and they had four children namely: John Otieno, Kevin Onyango, Irene Akinyi and Kennedy Ochieng.

14. He further stated that his mother and her family stayed in Komarock where he sometimes visited. It was his testimony that on his part, he stayed with his Uncle Zaddock Odundo Ohono in Nairobi at Pumwani Estate.

15. The 1st objector further stated that he came to know his father in the year 2010 when he was 22years old and that prior to that he stayed with his maternal Uncle in Bondo next to Bondo Township Primary. He further stated that he knew the deceased's rural home but that the deceased had not built him a house. The 1st objector further stated that his mother was from Asembo but had bought land in Bondo.

16. It was his testimony in cross examination that in the year 2010, he decided to go to his father's home. He testified that his mother had abandoned him to stay with his uncle for 22 years as her husband did not welcome him to his home. He further stated that in May 2016 he was at his mother's husband's place and that his said step father worked in Industrial Area.

17. The 1st objector further stated that he started looking for his father in 2010 but that his written statement stated that he started looking for his father in 2014. He further testified that when he met the deceased, he was welcomed and despite the deceased calling the 1st objector's mother to confirm the same, she never came. He further stated that the deceased gave him his identity card to go and get an identity card. He stated that the deceased did not build him a house and neither did his mother's husband David Ochieng put up a house for him.

18. The 2nd Objector Chriscentia Achieng Odhiambo testified as OW2 and adopted her witness statement filed in court on the 4th October 2015 in which she stated that she was a wife to the deceased and that they had been blessed with two children, Dominic Okoth and

Dominicus Odhiambo. She further stated that the deceased had passed on and left properties which the 1st respondent, her co-wife had taken leaving her with nothing.

19. She further stated that the 1st objector was a son of the deceased and further that she could not work as she had a little child and that the respondents applied for letters of grant without seeking her consent.

20. In cross-examination, OW2 stated that she had two children prior to getting married to the deceased namely, Eunice Atieno and Francisca Awuor. She testified that she did not know where Eunice's father was and that she begot Francisca while at her parents' home. She stated that the children were currently staying with her cousin Judith Achieng in Mombasa. She also stated that one of her children, Charly Okoth, passed away and was buried at her parents' home. She also stated that no one had paid dowry to her parents.

21. The 2nd objector testified further that she met the deceased Dominicus in February 2014, while with the 2 children and he accepted her with three children but that one passed away and that the deceased Dominicus Odhiambo died before building a house for her or paying dowry but that the deceased gave money to her mother and uncles and wrote and signed an agreement. She stated that when one is pregnant dowry is not paid.

22. She further testified that she took all documents to the deceased's elder brother and that she had a child born in March 2016, 6 months after the deceased passed on in August 2015. She stated that her first child with the deceased, Dominic Okoth was born in February 2015. She further testified that the deceased was sick and was not admitted in hospital for 6 months and that he died in his first wife's house in Bondo. She further testified that the deceased used to visit her at Nyamonyi and that she knew him in September 2013 and started staying with him in 2014, prior to his death in 2015.

23. She stated that she gave birth to Eunice in 2007, Florence in 2009; Charles Okoth in 2010, Dominic Okoth in 2015 February and Dominicus Odhiambo in March 2016. She further testified that the deceased took her to where he intended to build her a house, prior to his death but he could not build the house as she was pregnant. Further, that there was a case for maintenance of her children with Daniel Amollo, the father of Charles Okoth. She further stated that Amollo came and picked 2 cows and the money which he had paid as dowry which was given to him by her brother. She stated that she stayed with Daniel Amollo for 3 years from 2007 to 2010.

24. The 2nd objector further stated in cross examination that her father was not alive when the deceased went to her parents' home. She further stated that she would not be going back to Amollo's home as she was not married to Daniel Amollo. She further stated that she married the deceased under Luo Customary Law and that she used to sleep in the first wife's home.

25. In re-examination, OW2 stated that Daniel Amollo took back his cows in the month of April 2015 and that she had started staying with the deceased in February 2014. She further testified that the deceased was talking to her parents and this signified acceptance of marriage. She further stated that the deceased's money was accepted. The second Objector further testified that she stayed with the deceased who rented a house for her at Nyamonyi for which the deceased paid rent for 1½ years. She also stated that the deceased was already staying in the house. She also stated that she had 5 children with different fathers but only one (then) was the deceased's. She also stated that Daniel Amollo took away cows and money.

26. OW2 was recalled for cross-examination by the respondents' advocate and she stated that the deceased's burial programme was prepared by the deceased's first daughter. She further admitted that she did not know the person who took the photographs she had produced in court and that she did not have a house in the deceased's homestead.

27. OW2 was re-examined and stated that the deceased failed to construct a house for her as she was expectant and according to Luo customs, no house is constructed for an expectant wife. She further stated that her two daughters were not claiming to benefit from the deceased's estate, but that the two sons that she begot with the deceased were entitled to his Estate. (Court notes that as at the time of being re-cross-examined and re-examined, the 2nd objector had delivered a child baby boy).

28. OW3, **Joanes Owour Nyawir** testified as a witness to the two Objectors and adopted his statement filed on the 4th October 2015 in which he stated that the deceased was his brother and that his marriage to his first wife (Jennifer Achieng) was troubled when he, the deceased and their Uncle Charles Ombija went to the home of Ayaa the father of Chriscentia, the 2nd Objector, to pay dowry. He further testified that they paid Kshs. 10,000/= but because she was pregnant, cows could not be paid as it was against Luo customs to pay dowry in the form of cows for a pregnant wife. He stated that on arrival at the home of Chriscentia on the 13/8/2014, they handed over Kshs. 10,000/= as dowry and planned to take dowry (cows) the following year and that the 'dowry' was acknowledged in writing. He confirmed that Chriscentia was the wife to his deceased brother Dominicus Odhiambo.

29. **OW4, Fredrick Nyesi Manyala** testified that he knew Fredrick Odhiambo Odhiambo, the 1st objector as a son to his brother (deceased) whereas Chriscentia Atieno was the last wife of his nephew Dominicus Odhiambo, the deceased herein. He further testified that Jenipher Achieng Odhiambo was the first wife of the deceased and Alex Omondi Odhiambo was Jenipher's son with the deceased.

30. In cross-examination upon being recalled, he testified that the deceased was his nephew. He testified that prior to his death, the deceased had established a home by being led by Felix Odhiambo who was carrying an axe and a cock followed by the deceased's other children.

31. He further testified that he was aware that the deceased used to pay fees for his other son born out of marriage. He testified that he advised the deceased to get another younger lady and marry her after the deceased told him that his wife had left because he had young children. He testified that if he knew that the younger wife was married elsewhere and dowry was paid, he would not have advised the deceased to pay dowry for her but to let her divorce her husband first.

32. It was the testimony of the witness for the Objectors that he used to visit the deceased many times and that he was not aware if some of

the deceased's property had been taken by his sisters.

33. In re-examination, the witness stated that his testimony did not introduce another woman to disadvantage the 1st respondent but that before his death, the deceased had another wife whom he knew as 'Nyasembo'. He also stated that he did not advise the deceased to marry a particular woman who turned out to be married elsewhere.

34. OW5, Jenipher Akoth Nyawir testified that the deceased was her brother. She stated that Fredrick Odhiambo Odhiambo was the deceased's son whereas Chriscentia Atieno was the deceased's 2nd wife. She also stated that Jenipher Achieng Odhiambo was the deceased's first wife and they had a son Alex Omondi Odhiambo, the second Respondent herein.

35. She further stated that during the deceased's burial, Chriscentia Odhiambo spoke as the second wife to the deceased whereas Fredrick Odhiambo Odhiambo spoke as the deceased's son to her late brother. She also added that in the burial programme, Fredrick and Chriscentia were recognized as son and second wife to the deceased.

36. In cross-examination, OW5 stated that her relationship with the 1st respondent was good. She further testified that she had never occupied the deceased's property and further that she had received no letter over her alleged taking of the deceased's property. She also stated that Fredrick Odhiambo was the deceased's son but that she was unaware if the deceased paid his fees. She stated that Fredrick Odhiambo used to stay with his uncle.

37. She further stated that she was aware that Fredrick's mother was married in South Nyanza and that the deceased in his lifetime never built a house for Fredrick. She further testified that she did not stay with Fredrick but he used to visit her in her house at Nyangoma. She further stated that when the deceased died, the family refused to recognize Fredrick as part of the family but that Fredrick had been brought home prior to the deceased's passing.

38. She also stated that the deceased never left a Will but brought his children together and Fredrick was with the family of Dominicus before the latter died. It was her testimony that the deceased wanted to marry Doris-Fredrick's mother after impregnating her but their mother rejected because they come from the same clan.

39. In re-examination, OW5 stated that Fredrick used to visit her as his aunt. She further stated that the deceased died before building any house for any of his sons. She stated that she had a cordial relationship with his deceased brother who took care of her and that she used to see the deceased provide support to his son Fredrick. She further stated that the deceased brought together all his children including children of Chriscentia before he died.

40. **OW6 Doris Atieno** testified that she lived in Nairobi where she sold vegetables. She stated that she knew both Fredrick Odhiambo and Chriscentia Atieno Odhiambo. She stated that the latter was the wife to the deceased, Dominicus Odhiambo.

41. In cross-examination she testified that Fredrick was her son. She further testified that she met the deceased in 1987 when he was a single young man. She testified that she later got married to David Ochieng who was still alive and who did not take Fredrick as his son.

42. OW6 testified that for 24 years, Fredrick had no house at the deceased's home and that he lived alone in Nairobi. She testified that when Fredrick was young, he lived with her. She further testified that the deceased never married her and that he never lived with her son. She further testified that she raised her son until he was 18 years, that she got married in 1990 and that Fredrick was 3 years when she got married in Kendu Bay.

43. She further testified that the deceased never took Fredrick but that she did not tell Fredrick who his father was because she was married and that after she got married, the only relationship she had with the deceased was communication because of their son. She testified that the deceased had never stayed with her son.

44. It was her testimony that traditionally, Fredrick was David Ochieng's son because she married him. She also testified that the deceased never paid dowry for her son nor paid fees for him. She also stated that her son used to meet the deceased and that the deceased gave him the Birth Certificate. She further stated that it was her son who looked for the deceased. She further stated that if her husband David Ochieng died, Fredrick could not inherit his property because Fredrick has his father who was the deceased.

45. In re-examination OW6 stated that she was not interested in the property of the deceased who was the biological father of Fredrick Odhiambo. She further stated that Fredrick met his father Dominicus in 2010 and associated with him as his father.

46. **OW7 Roselyne Atieno** testified that the deceased was her brother and that Fredrick Odhiambo was his son. She further testified that Chriscentia Atieno was a widow to the deceased and that Jenipher Achieng was the first widow of the deceased whereas Alex Omondi Odhiambo was the deceased's son.

47. In cross-examination, she stated that she did not know that Chriscentia had children elsewhere. She added that the deceased and John went to the home of Chriscentia. She further stated that the deceased told her that Doris was his girlfriend but she was not aware if he took care of Fredrick.

48. She further stated that she heard that Doris got married in South Nyanza but did not visit her and that she did not know if Fredrick had built a house in South Nyanza. She further testified that she knew that Jenipher had a church wedding with the deceased and that they had borne 3 boys and 3 girls and they all lived in the deceased's home. She further stated that the deceased did not build a house for any of his sons. She further testified that she heard that Doris was related to her mother so the deceased could not marry her.

49. She further testified that she jointly owned Plot No. 30 in Bondo with the deceased with her owning plot 30A and the deceased owning plot 30B. She further stated that she had not barred the deceased's family from collecting rent from his portion and that she had never received a demand letter from an advocate neither had she chased the 1st respondent from the plot. She further stated that she was with the deceased the Sunday before he passed on and that the deceased never constructed a house for Chriscentia.

50. In re-examination, she testified that the deceased told her that he had a son with Doris-Nyar Odundo and that he had 2 other children apart from the 1st respondent's children.

The Respondents'/Petitioners' Case

51. **Alex Omondi Odhiambo** testified as PW1 and adopted his written statement dated 6th December 2018 as his evidence in chief. In the aforementioned statement PW1 stated that regarding the clothes worn at the funeral, the same were designer clothes which he had bought for his siblings but not uniform as alleged by the 1st Objector and further that the objectors were not included in the funeral program as they were at the funeral for their own selfish agenda, which was, to be recognized as part of the deceased's family.

52. He further stated that the agreement to marry produced by the 2nd Objector dated 13th August 2014 and the certificate of translation were forged with the intent to defraud the deceased's estate as the deceased's signature on the alleged agreement was different from his signature that the deceased had signed.

53. He further stated that the 2nd Objector had been married to another person with whom they had sired children and even lost a child and that if the deceased would have acknowledged the child as his, that child would have been buried in the deceased's home.

54. He further testified that despite the fact that the deceased was very secretive, he was married to one wife in church with three daughters and three sons that he neither divorced nor separated from his mother. PW1 also testified that he knew Fredrick Odhiambo who was introduced to him by his uncles after his father's death.

55. He further admitted knowing Chriscentia Atieno Odhiambo in business stating that she used to guarantee him loans. He further testified that Chriscentia was not his father's wife and that he only attended her son's burial but the deceased never attended that burial.

56. In cross-examination PW1 testified that it was true that his father was very secretive in finances. He further stated that he was aware that during his father's funeral, a burial programme was prepared and a handwritten eulogy was read. He further testified that they had a uniform for funeral with the sons of the deceased wearing black T-shirts first but on reaching Kisumu they changed.

57. He stated that he wore a maroon designer shirt and a brown trouser. He further identified in a photograph 4 similarly dressed gentlemen who were similarly dressed namely; Vincent Masiga, Victor Kevin Odhiambo and Fredrick the 1st Objector herein. He further stated that the ladies also wore same colours - blue.

58. In re-examination he stated that the agreed clothing for all of the deceased's relatives was black T-shirts with the deceased's portrait but they changed the same as a result of hot weather in Kisumu. He further stated that the clothes they wore were not uniforms but designer clothes from China and that they were not made for sons of the deceased.

59. **Jenipher Achieng Odhiambo** testified on oath as PW2 and stated that he got married to the deceased Dominicus Odhiambo in 1987 but they wedded in church in 1991 and were issued with a Marriage Certificate which was filed and produced as an exhibit. She adopted her written statement as her evidence in chief in which she stated that the objectors were not beneficiaries of the deceased's estate and as such, there was no need to make a notice to the objectors before filing for succession.

60. She further stated that during the subsistence of their marriage, they acquired some properties together but could not recall the title numbers. She stated that she sold Land Parcel numbers South Sakwa/Barkowino-4381 and 3811 to cater for bank a loan and children's fees as the deceased's relatives never assisted her. She further stated that no one objected to the sale of the aforementioned plots.

61. She also testified that after the deceased's demise, the funeral was arranged for his burial and that during the funeral, Fredrick Odhiambo was present as her in-law and not as the deceased's son as alleged. She also stated that she could not discern whether Chriscentia was at the funeral as she was not in the photos produced as OWEx 3(b). She also stated that she had never separated from the deceased since their marriage and that the objectors were opportunists.

62. In cross-examination she stated that to her, her husband was not secretive and could tell her anything as they loved each other. She stated that the deceased never slapped her and that they lived together until his death when he was murdered. She stated that she came to know Fredrick two days after the deceased passed on.

63. She also stated that Fredrick was a witness to the agreement dated 20/8/2015 because the lawyer asked her to avail a non-relative to be a witness. She further stated that when she filed the Succession Cause, she only disclosed 2 parcels of land because she did not have money to file for all property. She further stated that she also filed another Succession Cause No. 162/2016 at Bondo where she only disclosed one property.

64. The Second Respondent further admitted that the deceased had more properties but that she only wanted succession for 2 parcels because she wanted to use the parcels. She denied a suggestion that her husband was estranged to her or that he had another wife with whom they had 2 children. She testified that her sister in-law's testimony in court was false and stated that her sister in law had beaten her up in 1991 forcing her (the second respondent) to report at Bondo Police Station.

65. She further testified that she and Johannes Nyawir were not in good terms as he demanded for her husband's property after his death. She further stated that all her deceased's family members did not talk to her as they claimed that she killed him.
66. In re-examination, PW2 testified that she was not divorced or separated from the deceased and further that she could not tell whether her sons were the only people who wore the same clothing. She further stated that she was told that the deceased and Fredrick Odhiambo were cousins and that the lady dressed in white in Ex OW3 (a) was not her husband's wife.
67. She further testified that her feud with the deceased's relatives started after his demise and that Joanes Nyawir disagreed with her because they influenced her tenants not to pay to her the rent from houses after the deceased's passing, claiming that the property belonged to the family.
68. **PW3 Charles Otieno Ombija** took oath and adopted his witness statement filed in court on the 17/11/2016. It was his testimony that the deceased was his sister's son and was married to only one wife, Jenipher Achieng Odhiambo. He further testified that the first objector herein Fredrick Odhiambo was his grandson. He admitted knowing Chriscentia Atieno Odhiambo. It was his testimony that before his passing, the deceased approached him and informed him that he had met a certain lady whom he wanted to marry and wanted to know her people.
69. PW3 further testified that they went to Chriscentia (2nd Objector's) home, sat with her parents but were informed that Chriscentia was already married in Kano to another man and that they were waiting for her husband from Kano to come and resolve the dispute as the two were separated but that before resolving the matter, his nephew died.
70. He further testified that he could not tell if the deceased had any child with Chriscentia and that they paid Kshs. 10,000/= to Chriscentia parents as a token. He stated that they did not carry along any cattle and thus there was no marriage between Chriscentia and Dominicus. He testified that after the deceased's passing, his relatives started feuds with Jenipher.
71. PW3 further stated that he knew Doris who hailed from Asembo Kanyigoro, the same clan he hailed from and was thus, not only his relative but also the deceased's relative as their mothers were from the same clan.
72. In cross-examination, PW3 stated that the deceased invited him to accompany him to his in-laws to-be as he wanted to marry Chriscentia. He further stated that the deceased was sickly so he had disagreements with Jenipher and thus looked for another companion. He further stated that at the time, the deceased and Jenipher stayed apart with the deceased living in Nyamonyi while his wife Jenipher lived in Bondo.
73. He further testified that he was in the company of John Nyawir when they visited Chriscentia home but that as they discussed dowry, he did not know that Chriscentia was pregnant. He stated that they paid Kshs. 10,000/= as a token not bride price.
74. In re-examination, PW3 stated that when he accompanied the deceased to the home of Chriscentia, the deceased told him that he had found a lady that he wanted to marry. He further stated that the issue of pregnancy of Chriscentia did not arise. He further stated that the family of Chriscentia said the marriage between the deceased and Chriscentia could only proceed after Chriscentia marriage to her former husband was dissolved and that the Kshs. 10,000/= was a token to her parents.
75. The parties closed their respective cases and were granted leave to file written submissions.

Objectors Submissions

76. On behalf of the objectors, it was submitted that the main issue for determination (from submissions dated 20th August 2019) is: whether the petitioners are guilty of non-disclosure of the existence of the objectors herein as son and wife and therefore beneficiaries of the estate of the late Dominicus Odhiambo.
77. It was submitted on behalf of the Objectors that the respondents/petitioners were guilty of non-disclosure or concealment of material facts in their Petition for letters of grant.
78. The objectors further submitted that the 1st objector is the biological son of the deceased as he was born out of a relationship between the deceased and one Doris Atieno and further, that the 1st objector participated in the funeral arrangements and proceedings of the deceased where he was recognised him as a son of the deceased.
79. It was further submitted that the 1st respondent had failed to disclose the nature of the relation that the deceased had with the 1st objector despite alleging that they were relatives.
80. Regarding the 2nd objector, it was submitted in concession that the deceased was incapable of contracting or entering into a subsequent marriage with the 2nd objector by virtue of his first statutory marriage to the 1st respondent. However, counsel for the objectors submitted that the 2nd objector proved that the deceased provided for her upkeep during his lifetime as they cohabited and stayed together as husband and wife and thus provided for under section 26 of the Law of Succession Act.
81. It was further submitted that as a result of their union, the deceased and the 2nd objector were blessed with two children with the 2nd child being born 9 months after the deceased passed on and was thus protected by section 118 of the Evidence Act.
82. It was submitted that the grant of representation issued to the petitioners should be revoked as the petitioners not only concealed the fact

of the relation of the deceased to the objectors but that they also sought to take out succession proceedings in Bondo Law Courts in Bondo Succession Cause No. 162 of 2017, which court lacked jurisdiction to handle the same.

83. It was submitted that the 1st respondent attempted to mislead the court that she lived with the deceased prior to his death a falsehood that was debunked by PW3, Charles Otieno Ombija who confirmed that the deceased and the 1st respondent were estranged prior to his demise.

84. It was submitted that having filed a cross petition, which was filed on the 2/2/2016, the court ought to order the objectors and respondents be appointed joint administrators of the deceased's estate.

Respondents/Petitioners Submissions

85. On behalf of the Respondents/Petitioners, the following issues were framed for determination as filed on 28th October 2018:

- a) ***Whether the first objector is a biological son of Dominic Odhiambo-deceased and therefore a beneficiary of the estate in accordance with the Law of Succession Act;***
- b) ***Whether Dominic Odhiambo –deceased was capable of contracting a valid marriage, if any with the 2nd objector having contracted a first marriage with the first Respondent under African Christian Marriage and Divorce Act Cap 150 Laws of Kenya which had not been dissolved at the time of the alleged marriage?***
- c) ***Whether the 2nd objector is a wife as envisioned under the Marriage Act 2014 or a wife for purposes of the Succession in accordance with the Law of Succession Act?***
- d) ***Whether the 2nd Objector having already married someone else was capable of contracting a subsequent valid marriage with Dominic Odhiambo-deceased before dissolving the first marriage?***
- e) ***Who is to bear costs of this suit?***

86. In the written submissions dated 29th September 2019, it was submitted that the 1st respondent was the only surviving widow of the deceased having contracted a marriage under the African Christian Marriage and Divorce Act and as such, was the one with the right to apply for letters of administration. Accordingly, it was submitted that the respondents were under no duty to seek the objectors consent prior to making the application for letters of grant. The respondents placed their reliance on this proposition on Section 66 of the Law of Succession Act and Rule 26 (1) and (2) of the Probate and Administration Rules as well as the decision in **Nairobi Succession Cause No. 2015 of 2012, In the Matter of the Estate of Joshua Orwa Ojode (Deceased)** where it was held inter alia that ***where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share of the intestate estate of such person. That the spouse and children are entitled to the estate to the exclusion of all others relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.***

87. It was submitted that being the only surviving spouse in law, the 2nd petitioner was the only person who was entitled to administer the estate of the deceased had no obligation to seek consent of any other person or to include the objectors as heirs since they were not.

88. On whether "the grant issued" to the respondents should be revoked it was submitted that section 66 of the Law of Succession Act provides preference to be given to persons entitled to administer the deceased's estate where he died intestate whilst giving the court final discretion as to who to issue the grant of letters of administration, in the best interest of all concerned and accordingly, the respondents included all the beneficiaries entitled to the estate thus complying with the requirements of section 51 (2) (g) of the Act and thus the application for revocation lacked merit.

89. The Respondents urged this court to dismiss the objection and cross petition for grant as filed by the Objectors.

Analysis & Determination

90. I have considered the objections and cross petition for grant by the Objectors herein. I have given equal consideration to the affidavits tendered by both parties in support of and in opposition to the objections and cross petition for grant, as well as the written submissions and judicial precedents and the statutory enactments as amended from time to time. In my humble view, the following issues flow for determination:

1) Whether the 1st Objector is the son to the deceased Dominic Odhiambo and therefore a dependant and beneficiary of the estate of the deceased

91. The 1st objector asserted that he is a legitimate son of the deceased and as such he is a beneficiary of the deceased's estate. He further states that he sought out the deceased from 2010 after his mother revealed the deceased as his father. He stated that the deceased recognized him and accepted him as his son and even gave him his identity card when he-the 1st objector wanted to apply for his own identity card.

92. On her part Doris Atieno, the 1st objector's mother testified that she was impregnated by the deceased when her and the deceased were still young but that the relationship could not be sustained upon learning of their close relations, i.e. that the mother to the deceased hailed from her clan and so they parted ways and both got into subsequent relationships. She testified that once the 1st objector reached 18 years he started inquiring of his parentage leading her to reveal the deceased as his father. She testified that she and the deceased used to communicate

regarding the 1st objector's welfare.

93. Jenipher Akoth Nyawir and Roselyne Atieno both sisters of the deceased testified that the 1st objector was the deceased's son from a relationship between the deceased and Doris, which relationship was not sustainable once their mother revealed to the deceased that they hailed from the same clan with Doris and as such they could not get married. Roselyne testified that the deceased revealed to her that Doris had been his girlfriend.

94. Jenipher Achieng on her part testified that the 1st objector was recognized as the deceased's son during the burial programme by being allowed to speak.

95. In a rejoinder, the 1st respondent stated that the 1st objector is not the deceased's son but a relative though she could not with certainty tell what sort of relative he was to her late husband. She however conceded that the 1st objector was one of the witnesses to an agreement where she was selling the deceased's land and on being asked why the 1st Objector had to sign a sale agreement where she was the seller, she stated that he signed as a non-relative. On being questioned on the first Objector's relation and participation at the deceased's funeral she stated that he was an in law. She termed the 1st objector as one who sought to unjustly benefit from the deceased's estate.

96. The 2nd respondent, Alex Omondi, denied that Fredrick was his brother and maintained that the 1st objector together with the 2nd Objector sought to unjustly benefit from the deceased's estate.

97. The 2nd objector on the other hand testified that she had two children with the deceased, one born in 2015 and the other was born within 6 months after the demise of the deceased Dominicus Odhiambo.

98. From the above evidence on record, it is clear that the deceased Dominicus Odhiambo was, prior to marrying the 1st respondent engaged in a relationship with Doris Atieno, which relationship resulted in the birth of Fredrick, the 1st Objector. However, the said relationship was not sustainable once both parties learnt of their close blood relation.

99. The fact that the deceased provided Fredrick with shelter after Fredrick located him and the evidence that the deceased gave Fredrick his identity card to enable the latter apply for his own identity card, outweigh, in my humble view, claims by the two Respondents that the 1st Objector was just an unknown relative and or an imposter who sought to benefit unjustly from the deceased's estate.

100. The deceased's own siblings testified that his relationship with Doris produced an issue, Fredrick, but the relationship was deemed unsustainable due to the parties' close relations. In addition, it was not in dispute, from the evidence on record that the 1st objector lived with his mother who got married elsewhere and once he was 18 years he pestered her to let him know who his father was which she did. It is also not in dispute that at the time that the deceased died, the 1st Respondent was living with the Respondents herein in the same home as one family.

101. **In Re: Carey Kihagi Muriuki [2000] eKLR** it was held as follows regarding illegitimate children:

“Children of a void or voidable marriage are illegitimate but by Section 3 (5), if their mother went through a customary marriage, the children would be deemed legitimate and would be dependants under section 29 (a) LSA.

But there are other classes of illegitimate children as distinct from illegitimate children born out of an invalid marriage. They could be issues of a relationship of a man and woman who do not eventually marry. Those children would NOT qualify as dependants unless the father had recognized or accepted them as children of his own or he had voluntarily assumed permanent responsibility over them

102. The above decision was made before the promulgation of the **Constitution of Kenya 2010 whose Articles 27(1) and (4) and 53 (1) (e)** prescribes nondiscrimination on the basis of birth and that each child is entitled to provision from the father and mother whether married or not. The provisions provide as follows:

“27. (1) every person is equal before the law and has the right to equal protection and equal benefit of the law.....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

53. (1) every child has the right—

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;”

103. It is worth noting that this court asked the parties to have a DNA test carried out to settle the issue of paternity of the 1st objector and children whom the 2nd objector asserted on oath that they were children sired by the deceased Dominicus Odhiambo, but the respondents rejected the *suo motu* suggestion by the court. Therefore, it is my humble view that cumulatively, save for DNA testing, the evidence on record establishes on a balance of probabilities that the 1st Objector is the deceased's son. The deceased undertook activities to integrate the 1st objector with his family and with the 1st respondent to the point of assisting him acquire an identity card, the recognition received from

the deceased's siblings who acknowledged Fredrick as the deceased's son and explained the circumstances under which he was conceived and why his parent's relationship failed and finally from the recognition the 1st objector was granted as is evidenced in the burial programme annexed to the affidavits and produced as exhibits. In the said funeral programme the 1st objector Fredrick Odhiambo is named as one of the sons of the deceased. The Respondents were in charge of the funeral programme. The question is, how did the name of the 1st objector whom the respondents in their testimonies claim was a non-relative for purposes of sale of the deceased's land by the 1st Respondent in an agreement for sale of land dated 20th August 2015 (PWEx 3) or merely a relative of the deceased find its way into the funeral programme OWEx2 where he is listed as the third child after Mary Adhiambo (Mammy) and the 2nd Respondent? These pieces of evidence are sufficient to establish that the 1st objector was the son and dependant of the deceased, even if there was no photograph as the photographs were not produced in accordance with the rules regarding photographic evidence as stipulated in section 106B of the Evidence Act.

104. It follows that from the evidence on record, whether or not there was marriage between the deceased and 1st Objector's mother, such marriage is not a prerequisite under the Law of Succession, to determine the status of the child and in this case, the question of whether the 1st Objector was or was not a son of the deceased Dominicus Odhiambo.

105. In addition, whether the Objector was illegitimate, again it is not relevant now by virtue of Article 27 of the **Constitution of Kenya 2010**.

106. For the above reasons, I am satisfied that the 1st Objector has proved on a balance of probability that he is the son and dependant to the deceased Dominicus Odhiambo, born out of wedlock of Doris Atieno and was therefore a beneficiary of the estate with equal rights as those of the 2nd Respondent and is siblings born of the 1st Respondent.

2) Whether the 2nd objector Chriscentia and her two minor children (sons) are "wife" and children or dependents of the deceased Dominicus Odhiambo

107. Chriscentia, the 2nd Objector testified that she was a wife of the deceased having cohabited with him for some period of time from 2014 and settled in with him in 2015 until his demise. Further, that she even bore the deceased two children with the second being born 6 months after the deceased passed on.

108. This position was disputed by the 1st respondent who testified that the deceased was incapable of procuring a second marriage as he had already married her under the African Christian Marriage and Divorce Act and as such all alleged subsequent marriages would be illegitimate. The advocates on record for the objectors conceded as much in their submission when they stated that despite the fact that the deceased was incapable of contracting a subsequent marriage with the 2nd objector by virtue of his first marriage to the 1st respondent, the 2nd objector proved that the deceased provided for her upkeep during his lifetime as they cohabited and stayed together as husband and wife and thus provided for under section 26 of the Law of Succession Act.

109. Joanes Nyawir a brother to the deceased testified that the deceased and the 1st respondent encountered some troubles in their marriage which prompted the deceased to enter into a relationship with the 2nd objector. This evidence was corroborated by the deceased's uncle Fredrick Nyesi Manyala who testified for the Respondents and stated that the deceased was sickly and that he informed his uncle that that his wife, the 1st respondent left him and so he subsequently sought another woman.

110. Joanes further testified that the deceased was so determined to marry Chriscentia that he engaged an uncle Charles Otieno Ombija in a journey to Chriscentia's home to pay dowry but that the same could not be paid as Chriscentia was by then pregnant and paying dowry at the time would be against Luo customs. This testimony was corroborated by Charles Ombija who was called as a witness for the Respondents and testified that indeed the deceased and the 1st respondent had been separated for some time during which the deceased stayed with Chriscentia and further that the deceased was eager to marry Chriscentia but could not as it emerged that Chriscentia was yet to be divorced from her first husband.

111. According to the 2nd objector and the evidence by the siblings of the deceased and that of his uncle who testified for the Respondents, the deceased lived with the second objector as his wife. I have examined OWEx2 the funeral programme and it clearly discloses that:

"The deceased was married to the 1st Respondent in 1987 and that they tied their knot at a colorful wedding Ceremony at St Andrews Bondo Catholic Church and that later he married Cretenia Aya in 2014 and he was blessed with a son, (then), Dominic Okoth Junior. The deceased was described in the Eulogy as a very loving and caring husband to the wives and children and that he gave his family a very strong foundation on which they stand."

112. The Respondents did not claim that the funeral programme was prepared by the objectors or by unknown people and it emerged that it was the deceased's family lead by his first born daughter who prepared the said funeral programme, acknowledging the status of the objectors herein as wife and child as well as acknowledging the paternity of the 2nd objector's child Dominic Okoth. The question that follows is whether **Chriscentia** the 2nd Objector herein, is a wife for the purposes of succession and therefore entitled to share in the estate of the deceased, and whether her two children, Dominic Okoth and the child who was born six months after the demise of the deceased is a beneficiary of his estate.

113. On whether the 2nd objector is a wife or widow of the deceased Dominicus Odhiambo, legally, it is not in dispute that the deceased was married to the 1st Respondent under Cap 151 Laws of Kenya and therefore this being a statutory monogamous marriage, the deceased was incapable during his lifetime, from contracting another marriage.

114. However, Section 3(5) of the Law of Succession Act provides:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

115. In *M N M v D N M K & 13 Others* (2017) eKLR it was held:

“This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E based on cohabitation and the parties holding themselves out to society as husband and wife. In Mbogoh v. Muthoni & Another [2006] 1 KLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the Court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also Kimani v. Kimani & 2 Others [2006] 2 KLR 272).”

116. That the concept of presumption of marriage exists in our jurisdiction is no longer in doubt. In fact, that concept has a statutory underpinning and this was recognized by the Court of Appeal in *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* Civil Appeal No. 20 of 2009 [2010] 1 KLR 159 where it was held:

“There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the Evidence Act, Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

117. In *Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another* [1996] eKLR, Omolo, Tunoi, & Bosire JJ A held:

“Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved at the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba Customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy...

...Josephine was, nevertheless, a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act.[emphasis added].

In the appeal before us, we have said we do not know whether the first respondent and the deceased ever went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances. In the absence of such evidence, we are unable to say whether she could qualify as a ‘wife’ under the provisions of section 3(5) of the Law of Succession Act.”

118. In *M N M v D N M K & 13 Others* (supra) it was held:

“The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example Hortensia Wanjiku Yawe v. Public Trustee, CA No. 13 of 1976). In MWG vs. EWK [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact.”

119. That the said presumption of a marriage is not dependent upon the existence of a marriage was affirmed in *M N M v D N M K & 13 Others* (supra) where the Court held:

“As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the Hortensia Wanjiku Yawe v. Public Trustee (supra), Wambuzi, P. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.”

120. This rationale was articulated by Madan, JA (as he then was) in *Njoki v Mutheru* [2008] 1 KLR (G&F) 288 as follows:

“...is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the ‘husband’, or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of ‘wife’ upon the woman to enable her to qualify for maintenance or a share in

the estate of her deceased 'husband'.

121. In **Mary Wanjiru Githatu v Esther Wanjiru Kiarie** (supra) it was further held:

“The cases of Machani and Njoki above were based on the old thinking and it is noteworthy that Parliament realized that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnize the union and by Act No. 10 of 1981, Parliament added section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya to the effect that “notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.”

122. Thus, once it is proved that there was long cohabitation between the deceased and the person claiming to be the wife, it was further held in **M N M vs. D N M K & 13 Others** (supra) that:

*“The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (**Mbogoh v. Muthoni & Another**, (supra). Mustapha, JA added in **Hortensia Wanjiku Yawe v. Public Trustee** (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also **Kimani v. Kimani & 2 Others** (supra).”*

123. In **re Estate of Wilfred Kihara Kariuki** (deceased) [2018] eKLR the court held:

‘On the first issue as to marriage, the 1st Administrator asserted that the deceased lacked the capacity to contract another marriage during the subsistence of his earlier marriage. The Petitioner presented a certificate of marriage no. 296271 which indicates that she and the deceased contracted a marriage under the African Christian Marriage and Divorce Act (CAP. 151) on the 8th Of November, 1975. The Act has since been repealed by the Marriage Act No. 4 of 2014...Under section 6(2) of the Marriage Act, a Christian, Hindu or civil marriage is monogamous. Section 6(3) of the Act provides that a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. A marriage under CAP. 151 is a Christian marriage by virtue of its section 3(1) which states that the Act applies to marriages of Africans, one or both of whom profess the Christian religion. Section 9(3) stipulates that such a marriage can only be dissolved by a valid judgment of divorce and if one illegally contracts another marriage while it remains undissolved, they shall be guilty of bigamy.

124. In **re Estate of Lihasi Bidali** (Deceased) [2019] eKLR, Musyoka J stated, quoting extensively from the decisions of the Court of Appeal:

“The evidence presented before the court clearly demonstrates that the deceased lacked the capacity to contract a marriage having contracted a monogamous union with Tabitha Waitira, the 1st Administrator herein. With this finding, the issue of presumption of marriage dissipates ... M/s Nyambura for the 1st Protester submitted that the 1st Protester is a wife for the purposes of succession and cited section 3(5) of the Law of Succession Act which provides thus:

49. The evidence presented before this court demonstrates that both Lilian and her children depended on the deceased when he lived. While this court has found that Lilian does not qualify as a wife, she nonetheless qualifies as a beneficiary entitled to share in the deceased's estate. Lilian and her children are therefore entitled to share in the estate of the deceased as dependants. [emphasis added]

125. In this case, it was averred by the 2nd Objector that she cohabited with the deceased Dominicus Odhiambo who rented for her a house at Nyamonye where they lived whereas his legal wife the 1st objector herein lived at Bondo, and by the time of the death of the deceased, he had sired 2 children with the 2nd Objector, one who was born 6 months after the deceased passed on, while the other was born in 2015, after the 2nd objector and the deceased started staying together. As earlier discussed herein, this evidence and assertion was corroborated by the evidence adduced by the deceased's brother and uncles one of whom was called as a witness by the respondents. There is no evidence that the respondent raised any issue with the said relationship between the 2nd objector and the deceased during the deceased's lifetime. The Petitioners'/Respondents' own witness was clear in his testimony that the 1st Respondent had disagreements with the deceased and that the deceased looked for another woman, the 2nd objector herein whom he lived with as his wife and even send a delegation to her home and gave some gift of Kshs 10,000 as the issue of dowry could not be discussed since the 2nd objector was expectant.

126. In **Re Estate of Fredrick Clavence Kittany** [2002] eKLR, it was held:

‘That the 1st objector who claims to be a widow of the deceased married under customary law is not a widow as shown by the law and the legal principles cited to the court. She lacks capacity to marry a man whilst his marriage under the Act subsist. Even if there was a marriage which they still deny Sally was not properly married according to Kipsigis Customary Law as no dowry was paid and no ceremony conducted and if any ceremony was conducted they object to the same as the same was not proved and was not conducted in accordance with the laid down procedures and so it did not meet the required standards. None of the family members from either side attended the ceremony and none of the witnesses who allegedly attended the same came to give evidence to prove this fact ... I was also referred to the amendment to section 3 of the Law of Succession Act Cap 160 laws of Kenya where section 3(5) was introduced and whose wordings are:

“Notwithstanding the provisions of any other written law a woman married under a system of law which permits polygamy is where her husband has contracted a previous or subsequent monogamous marriage to another woman nonetheless a wife for the purposes of this Act and the particular sections 79 and 40 thereof and her children are accordingly children within the marriage of this Act.”

‘...In this court’s view the operative words “where her husband has contracted a previous or subsequent monogamous marriage to another woman.” This court’s interpretation of that amendment is that where it is proved that the deceased had previously contracted a valid customary law marriage and then subsequently contracted a subsequently statutory marriage both wives will inherit his estate. Likewise, where the deceased contracted a previous statutory marriage and then subsequently contracted a customary marriage for purposes of the Succession Act only both women are wives.’

127. In *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* (supra), the Court found that:

“Evidence was adduced in the court below that the petitioner and the deceased had three children and she was living with him at the time of his death. Evidence was adduced to the effect that the deceased was paying the rent for the house the petitioner was living in with her children. Besides, several witnesses testified that during the deceased’s lifetime he was living with and treating the petitioner for all intents and purposes as a wife. It is no wonder, therefore, that the deceased specifically told the objector that the children he had with the petitioner were his children and needed to be given a share of his estate. It is not in the common and natural course of human conduct to accept children he has fathered with another woman but reject their mother unless for good reason and on the contrary the evidence that the deceased and his family had no problem with the petitioner.” [emphasis added].

128. From the evidence on record supported by the above plethora of decisions, it is my humble view and I hold that albeit the 2nd objector was not legally married to the deceased Dominic Odhiambo prior to his demise as he had a subsisting statutory marriage, but that he lived with her and provided for her and her child who was born by the time that he died. He also rented for her a house at Nyamonye and paid rent and at the time of his demise she was expecting his second child with her, which child was born within six months of his demise. The deceased treated the 2nd objector as a husband would a wife. Their cohabitation resulted in the birth of two issues.

129. Having so found, section 3(5) of the *Law of Succession Act* comes into play and leads this court to declare the 2nd objector a wife for the purposes of the Law of Succession Act, and in particular, sections 29 and 40 thereof, and her two children with the deceased are accordingly the deceased’s children and beneficiaries of the deceased’s estate, within the meaning of the said Act.

3) Whether the grant should issue in favour of the Petitioners/ respondents or whether the same should be issued jointly in favour of both the Respondents and the Objectors as co-administrators

130. The Respondents’ Counsel framed an issue on whether the grant issued to the Respondents/ Petitioners should be revoked. However, my perusal of the court record does not reveal that any grant was issued in favour of the Respondents. The Respondents had petitioned for grant and before it was issued, the objectors herein filed the Objection to the making of grant and answer to Petition for grant. They also filed petition by way of a cross application for a grant. This court finds that the Objectors objected to the issuance of a grant of letters of administration intestate in favour of the Respondents/ Petitioners and also cross petitioned for the grant. They never sought for revocation of grant as none was issued capable of being revoked.

131. Nonetheless, the law on revocation of grants is **Section 76 of the Law of Succession Act** which provides:

“Section 76: A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate;

or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material

particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

132. A perusal of the pleadings and submissions reveals that the Objectors' borne of contention is that the Petition for grant was lodged by the Respondents' fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Specifically, the Objectors cited their exclusion from the proceedings as proof of the material non-disclosure. The Objectors further alleged that the Respondents had failed to obtain the relevant consents from them which draws the inference that the proceedings to obtain the grant were defective in substance.

133. The 1st respondent herself testified in cross-examination that the deceased had more properties than those she listed in her petition for letters of grant but she only disclosed 2 parcels of land because she did not have money to file for all property and further that she filed another Succession Cause No. 162/2016 at Bondo where she only disclosed one property.

134. **Section 51** of the Law of Succession Act deals with the information that should go into a petition for grant of representation. Under Section 51(2) (g) it is stated:

“51(2). An application shall include information as to ____...”

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased...”

135. For the purpose of the estate of the deceased in this cause, for one to comply with Section 51(2) (g) of the Act, the Respondents were bound to reveal the names of all the surviving spouses of the deceased, and all the dependants and children of the deceased including Fredrick and the two last minor children of the 2nd objector, and list or make full disclosure of all of the properties of the deceased.

136. There is no doubt that the respondents deliberately failed to include the Objectors as dependant and child/son and the 2nd objector's two minor children as well as to provide a list of all the deceased's property. Accordingly, I find that Section 51(2) (g) of the Act was not complied with. In **Nairobi HC Succession Cause No. 1642 of 2010 In re Estate of Laurent Ntirampeba (Deceased) [2017] eKLR** Achode J persuasively held:

“24. On the question of revocation of the grant issued, it is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. A duty is owed to the court to bring out all the facts and refrain from suppressing any material facts. If one is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right, but the duty to deny relief to such person. This was the expression of the court in R. v. Kensington Income Tax Commissioner [1979] 1 KB 486 by Viscount Reading, Chief Justice of the Divisional Court.”

137. **Rule 26** of the **Probate and Administration Rules** relates to the requirements attached to Grants of letters of administration as regards notifications and consents and states:

“(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 equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

138. The effect of failure to comply with Rule 26 of the Probate and Administration Rules was discussed in **Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another [2013] eKLR** where the court held:

“The Law of Succession by virtue of Rule 26 requires that any petition for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. The duty of a litigant is to make a full and fair disclosure of the material facts.”

139. Albeit there is no harm to the estate if the two Respondents/ Petitioners who are beneficiaries of the estate petitioned for grant, as the 1st objector is the legal wife of the deceased and therefore she could have petitioned for grant and administered the estate of the deceased in accordance with the law, in totality, the Respondents did not disclose to court that the deceased left other dependants, in this case the objectors, despite being well aware of their existence, and to provide a full list of all the deceased's assets and liabilities. It follows therefore that the Respondents were guilty of non-disclosure of material facts.

140. In the end, I find and hold that the requirements of Section 76 (a), (b) and (c) of the Law of Succession Act have been satisfied by the objectors and as such the grant sought by the petitioners cannot issue.

141. In **Succession Cause 720 of 2013 in Meru High Court in In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR, Gikonyo J** had this to say concerning non-disclosure of material facts and I concur.

“Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimaefidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

142. In addition, the other reason why this court would not issue a grant in respect of the petition for grant filed by the Two Respondents/ Petitioners herein is that, the affidavits sworn by the 1st petitioner on 13th October 2015 for proposed administrator and P & A 11 are fatally defective as they are allegedly sworn at Siaya but the advocate commissioning has appended a stamp and signature with an address of P.O. Box 883, Kisumu. This offends section 5 of the Oaths and statutory Declaration Act.

143. **Black’s Law Dictionary** defines an oath as:

“Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.”

144. Bearing that definition of what an oath is, the question I must answer is whether the 1st petitioner took an oath before a Commissioner for Oaths. Section 5 of the Oaths and Statutory Declarations Act provides:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.” (Emphasis added)”

145. In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) (d) of the Constitution. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits and the Petition for grant not being supported by the affidavit in question is no petition at all.

146. In addition, the petition filed in this court on 13th October 2015 which is signed by the 2nd petitioner alone and witnessed by Stephen Opiyo Anyango is not signed by the 1st petitioner herein. It is therefore fatally defective. Signature signifies authenticity and ownership of a document without which the document is no document at all. Albeit there is cross application for grant, the same cannot issue as it is predicated on a fatally defective Petition for grant.

147. Accordingly, the petition for letters of administration intestate filed on 13th October 2015 by the petitioners herein and the cross petition by the objectors cannot stand. The cross petition cannot stand on a fatally defective petition. They are both struck out.

148. The parties are directed to file fresh petition for grant of letters of administration intestate of the estate of the deceased Dominicus Odhiambo and include all the deceased’s dependants, beneficiaries and children and provide a list of all the assets and liabilities of the deceased. All properties registered in the name of the deceased whether sold or not as long as the property is still registered in the deceased’s name, for purposes of administration, must be listed as there is no authority to dispose of property of a deceased person without any grant of representation.

149. Each party to bear their own costs of these proceedings.

150. This file is accordingly closed.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 28th Day of July, 2020 vide Microsoft teams.

R.E. ABURILI

JUDGE