REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 217 OF 1998

IN THE MATTER OF THE ESTATE OF DAUDI KIPSEREM SEREM (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT

BETWEEN

CLARA J. KEMBOI.................................APPLICANT

AND

ROSALINE JEMISIK SEREM...........RESPONDENT

JUDGMENT

[1] By a Petition for Letters of Administration Intestate filed herein on **20 October 1998**, the petitioner/respondent, **Rosaline Jemisik Serem** sought to be made the sole administrator of the estate of her deceased husband, **Daudi Kipserem Serem**. The deceased passed away on **1 January 1994** while domiciled in Kenya; leaving behind a widow (the respondent) as well as sons and daughters. In terms of assets, the respondent averred that the deceased's only free disposable asset was **Sergoit/Karuna Block 2 (Sergoit)/65** whose estimated value was said to be **Kshs. 4,000,000/=.**

[2] The petition was duly processed and a Grant of Letters of Administration Intestate issued to the respondent on **3 September 2002.** The petition was supported by a Consent to the Making of a Grant, **Form 38,** which was duly signed by the 6 persons named in the Supporting Affidavit as the beneficiaries of the deceased, namely:

[a] Richard Kiprotich Kemboi – son

[b] Joseph Kiprotich Kemboi – son

[c] Stephen Kiplagat Kemboi – son

[d] Jeremiah K. Serem – son

[e] Jackson K. Sang' – brother

[f] Mary Jeptum – sister

[3] There is a Certificate of Confirmation of Grant on the file issued on **18 March 2004** showing that the said Grant of Letters of Administration issued to the respondent was confirmed pursuant to the provisions of **Section 71(1) and (3)** of the **Law of Succession Act, Chapter 160** of **the Laws of Kenya**. The Certificate further shows that the estate property was to be shared amongst the beneficiaries as follows:

[a] Rosaline J. Serem – Sergoit/Karuna Block 2(Sergoit) 63 – 40 acres

[b] Jeremiah K. Serem - Sergoit/Karuna Block 2(Sergoit) 63 – 10 acres

[c] Jackson K. Sang - Sergoit/Karuna Block 2(Sergoit) 63 – 10 acres

[d] Mary Jeptum – Sergoit/Karuna Block 2(Sergoit) 63 – 10 acres

[4] The record further shows that the respondent filed two sets of Consents to the proposed mode of distribution, one signed by all the 7 persons named as beneficiaries in the Affidavit in Support of the Petition, **Form P&A 5**, and the other by the 4 proposed recipients of portions of the estate**.** In these primary documents, no mention was made by the respondent of the applicant, **Clara Jelagat Kemboi**, who is one of the daughters-in-law to the deceased, and the wife of the deceased's eldest son by his first wife. All indications are that, the applicant was unaware of the succession proceedings and was, in the meanwhile, pursuing a stake in the estate through the local administration and the Land Disputes Tribunal. It was not until **21 September 2004,** well after the Certificate of Confirmation of Grant was issued, that the applicant filed the instant application for revocation, contending that:

[a] the Grant was obtained fraudulently by the making of a false statement and by concealment from the Court of something material to the case;

[b] the proceedings to obtain the Grant were defective in substance;

[c] a full inventory of the deceased's assets was not disclosed;

[d] the person to whom the Grant was made had failed, after due notice and without reasonable cause, to proceed diligently with the administration of the estate;

[e] the person to whom the Grant was made had mismanaged the estate and disposed of part of the estate before the Grant was confirmed;

[f] the person to whom the Grant was made had closed out some of the beneficiaries completely and had failed to account for the estate;

[g] the petitioner falsely stated that all persons entitled to the estate had signed Form 38;

[h] the petitioner had fraudulently obtained the Certificate of Confirmation of Grant by concealing the fact that the applicant, **Clara Jelagat Kemboi,** was entitled to half-share of the estate.

[5] The application was supported by the applicant's affidavit, sworn on **21 September 2004** along with the annexures thereto. The application has, quite unfortunately, been pending since. The court record shows that a consent order was recorded herein on **14 November 2006** in the presence of counsel for the parties in the following terms:

"By consent of the parties:

(1) Matter to proceed by *viva voce* evidence

(2) Objector be treated as the plaintiff. The petitioner as the defendant

(3) Each party has already filed a list of assets

(4) Each party be at liberty to file a list of documents and serve."

[6] Thereafter, on **5 February 2007**, a further consent was recorded, acknowledging the applicant as a beneficiary of the deceased, and therefore entitled to a share of his estate on account of her deceased husband, **Josphat Kimisoi**, who was the deceased's firstborn son by his first wife, **Esther Chebii.** The proceedings of that date is reproduced herein for full tenor and effect:

"5/2/2007

Coram – Kaburu Bauni – Judge

c/c - David

Mr. Ngala for the objector

Mr. Maundo for Respondent/Petitioner

Mr. Ngala – What is coming for hearing is objector's application dated 21/9/2004 for revocation of grant. Directions were given that we proceed by way of viva voce evidence. There are two lists of assets. One filled by petitioner dated 28/6/2006 and the other filled by the objector dated 3/10/2005. Both parties agree on the assets of the deceased.

Also parties have agreed that the objector was left out and should be included and the only issue remaining therefore is distribution.

Mr. Kamau – I confirm that is so. Only issue of distribution remains.

Mr. Kamau – We wish to be given time to discuss distribution. We ask for another hearing date to find out if there will be agreement.

Mr. Ngala – We agree.

Court – Hearing on 12/3/2007.

KABURU BAUNI, JUDGE"

[7] As the parties failed to agree on distribution, hearing commenced in earnest on **12 March 2007.** The same continued before different judges until conclusion on **17 June 2019.** The applicant testified as **PW1** and told the Court that the deceased, **Daudi Kipserem Serem** was the father of her late husband, **Josphat Kimisoi Kemboi**, who died on **22 April 1990**. She produced a Certificate of Death in proof thereof as her **Exhibit P1**. She also produced a Certificate of Marriage confirming that she got married to **Josphat Kimisoi** in a church ceremony held on **25 August 1984**; and added that she resided on the same farm with her deceased father in law, before and after the death of her husband; and that after the demise of her husband, it was the deceased who used to take care of her family and pay school fees for her children, since her salary, as a nursery school teacher was insufficient to cover all the needs of her family.

[8] It was further the testimony of the applicant that she was completely kept out of these succession proceedings and was never asked to give her consent as required by law. She also pointed out that when she became aware of the petition, she noted that the name of her husband had been excluded from the list of beneficiaries; and that a number of assets had been omitted form the list of assets of the deceased. The applicant therefore furnished a list of all the assets of the deceased as hereunder:

[a] **Kirondio Farm, LR No. 4972/02** measuring 50 acres

[b] **Sergoit/Karuna Block 2(Sergoit)65**

[c] **Nandi Hills/Kosoiywo 1/772** measuring 1.1 Ha

[d] **Nandi Hills/Kosoiywo 1/773** measuring 1.14 Ha

[e] **Nandi Hills/Kosoiywo 1/774** measuring 0.115 Ha

[f] **Chebarus Farm** measuring 11 acres

[g] **Motor vehicle Reg. Number KSE 781 Chevrolet**

[h] **Peugeot 504 saloon**

[i] **Datsun 1200 pick up Reg. No. KAG 755D**

[j] **Ford Tractor Reg. No. KZU 337**; and

[k] **Motor cycle Reg. No. KLR 113**

[l] **money in cash being proceeds of tea sales**

[9] The applicant also explained that the deceased was married to two wives, the first wife being **Esther Chebii**, her mother in law; and the respondent; and that her husband, **Josphat Kimisoi,** was the only child of **Esther Chebii** and the deceased. Accordingly, the applicant posited that had **Esther** or her husband not predeceased her father in law, they would have received half of the estate of the deceased. She therefore prayed for the revocation of Grant; and for an order that she be included as a co-administrator and beneficiary of the estate of the deceased. She further asserted that, in accordance with Nandi customary law, the house of **Esther Chebii** that she represents is entitled to half share of the deceased's estate and that an order be made in that respect.

[10] The applicant called **Joel Kiplimo Arap Kachei (PW2),** one of the neighbours of the deceased, as her witness. He told the Court that they were village-mates with the deceased and had known him from his youth. He therefore confirmed that the deceased had two wives; the respondent being the second wife. He further confirmed that the applicant is one of the daughters-in-law of the deceased; being the wife of the only son of the deceased with his first wife. **PW2** also made reference to Nandi customary law on inheritance and supported the applicant's half-share stake on the basis that where one had two wives, Nandi customary law dictated that the estate of their deceased husband be shared equally between the two houses.

[11] The applicant's 3rd witness was **Charles Orina (PW3),** who was then working as the Management Accountant for **Eastern Produce Kenya Limited** at **Nandi Hills.** He testified that the deceased was one of the company's tea outgrowers and that he would make his deliveries under the name **"Serem Farm."** He produced records of deliveries made to the company from the deceased's farm between the years 1994-2005 and the payments made therefor, totaling some **Kshs. 34,022,418/=.** Since an objection was raised to the production by **PW3** of the company records, the applicant called the company's General Manager, **David Kipkemoi Siele (PW5)**, for that purpose. Thus, **PW5** produced the initial contract between **Eastern Produce Company Ltd** and **Serem Farm** dated **1 January 1994** as well as a schedule reflecting the actual crop delivered between **1994** and **2005,** the value thereof and the total income in sales.

[12] Jeremiah Biama (PW4), another neighbour of the deceased's was also called to support the applicant's case. His testimony was that he was the village elder at **Kirondio** and it was therefore within his knowledge that the deceased owned 50 acres of land at **Kirondio Farm** on which he had planted tea; among other pieces of land. He also confirmed that the deceased had 2 wives and that his deceased 1st wife had only one son who is also deceased. He also confirmed the position that the applicant, as the

widow representing the 1st house, is entitled to half-share of the deceased's estate under Nandi customary law.

[13] **Emmanuel Loparatum (PW6)** was then working with **Kenya Commercial Bank** at Nandi Hills; and was called to confirm the existence of an account with the bank in the name of **Eastern Produce Kenya Ltd** and **R. Serem**. He was however stood down on the realization that the account was being managed solely by **Eastern Produce Kenya Ltd**. His evidence was eventually expunged from the record on **18 May 2009** by an order of the Court (**Hon. Mwilu, J**., as she then was). Hence, the applicant's last witness was her son, **Gilbert Kipruto Misoi (PW7).** He confirmed that his father, **Josphat Kimisoi** died in **1990** and that the applicant was left to fend for him and his siblings with the support of his grandfather, the deceased. He produced as exhibits the Certificates of Birth for himself and his siblings, **Isaack Misoi** and **Hillary Kibiwott Misoi.**

[14] **PW7** further confirmed that, before his grandfather's demise on **1 January 1994,** the deceased used to provide for their upkeep, including payment of their school fees, from his tea farming income**.** He produced the Certificate of Death for the deceased as an exhibit in proof thereof **(Exhibit P5). PW7** also testified that, apart from the 50 acre **Kirondio Farm,** the deceased left behind 4 other farms as well as movable property, namely:

[a] Chevrolet Pick Up Reg. No. KSE 781

[b] Toyota Hilux Pick Up Reg. No. KWL

[c] Datsun Pick Up Reg. No. KAG 755

[d] Ford Tractor Reg. No. KZA 337P

[e] Motor cycle Reg. No. KLR 713

[f] Peugeot 504 saloon.

[15] Thus, it was the evidence of **PW7** that, after the demise of the deceased, not only was his mother excluded from the support she used to receive as a dependant of the deceased, but also that the estate was managed and parts thereof disposed of without her knowledge. He therefore supported the applicant's prayer for appointment as a co-administrator; and for half-share of the deceased's estate.

[16] On behalf of the respondent, evidence was adduced herein on **30 April 2012** by **Sally Jelimo**, one of her daughters. She explained that the respondent had undergone surgery for brain tumour and was therefore unable to perform her duties as an administrator or attend court to testify in this matter. She produced a doctor's letter in proof thereof **(marked Defence's Exhibit 1)**. She confirmed that her father, the deceased, had two wives; namely, **Esther Chebii** who was the first wife and her mother, **Rosaline Jemusik Serem**. **DW1** also confirmed that **Esther Chebii** died in **1983;** and that Esther's only child, **Josphat Kimisoi,** who was the husband of the applicant, also predeceased the deceased, having died in **1990**.

[17] It was further the testimony of **DW1** that in her mother's house, there are 7 children, two of whom are since deceased. She furnished their names as follows:

[a] Richard Kipketer Kemboi

[b] Hellen Chepkoech Serem

[c] Joseph Kiprotich Kemboi (deceased)

[d] Rael Chepleting

[e] **Emily Anne Chebet**

[f] **Sally Jelimo**

[g] **Stephen Kiplagat Kemboi (deceased)**

[18] **DW1** produced several Certificates of Birth to support her testimony. She also conceded that the applicant, **Clara Kemboi,** is her sister-in-law; and therefore entitled to recognition as a beneficiary of the deceased's estate. She however opposed her proposal to be given half-share of the estate, contending that all the children of the deceased, including **Clara Kemboi**, need to be given equal treatment. In terms of assets, **DW1** confirmed the correctness of the list of assets filed by the respondent on **3 July 2006** and reiterated that the deceased left behind the following fixed assets:

[a] **L.R. 4072/02** measuring 50 acres, part of which was under tea bushes;

[b] **Nandi Hills/Kosoiywo Block 1/772**

[c] **Nandi Hills/Kosoiywo Block 1/773**

[d] **Nandi Hills/Kosoiywo Block 1/774**

[e] **Chebarus Farm**, measuring 8 acres.

[19] Regarding the movable assets, the evidence of **DW1** was that most of them were sold and others acquired in replacement; such that, as at **17 June 2019** when she completed her testimony, only motor vehicle **Reg. No. KZA 414** was in her mother's possession.

[20] At the close of the hearing phase, directions were given herein for the filing of written submissions. Thus, in the written submissions dated **18 February 2020, Ms. Cherono**, learned counsel for the applicant proposed the following issues for determination:

[a] Whether the applicant and her children are legal and rightful beneficiaries of the estate of the deceased;

[b] Whether the Grant of Letters of Administration Intestate issued herein should be confirmed as per the applicant's proposed mode of distribution; and,

[c] Whether the Grant should be revoked and the applicant and her children declared legal and rightful beneficiaries of the estate of the deceased.

[21] It was the submission of **Ms. Cherono** that the applicant had proved her case to the requisite standard; and in particular that, as a daughter-in- law of the deceased who was dependent on him before his demise, the applicant is entitled to half-share of his estate. She relied on **Re Estate of Moboroki Marete** [2016] eKLR wherein the deceased's property was divided equally among the widow, son and daughter-in-law. Counsel further submitted that the applicant had demonstrated that she was excluded from the petition by the respondent; and that not all the deceased's assets were disclosed to the Court. Hence, on the authority of **Re Estate of Ibrahim Hassan alias Sheikh Ibrahim Hassan** [2019] eKLR, the Court was urged to find that the Grant herein was fraudulently obtained; and that the intention of the respondent was to disinherit the applicant as the widow of **Josphat Kimisoi** and her children.

[22] On behalf of the respondent, **Ms. Chesoo** relied on her written submissions dated **27 February 2020**. In her view, the following issues fall for determination herein:

[a] Whether this Court has jurisdiction herein;

[b] Who are the beneficiaries of the estate of the late **Daudi Kipserem Serem?**

[c] Whether the Grant of Letters of Administration Intestate should be revoked;

[d] What mode of distribution should be adopted by the Court; and,

[e] Who should bear the costs of the application?

[23] **Ms. Chesoo** made reference to **Article 165(3)(a)** of the **Constitution** and **Section 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, to support her posturing that whereas this Court has the requisite jurisdiction to grant the orders sought, the applicant had not made out a good case to warrant the issuance of those orders in that she had not proved dependence for purposes of **Section 29** of the Law of Succession Act. She cited **Re Estate of Samuel Gichuhi Mugambi alias Gichuhi S/O Mugambi** (Deceased) [2018] eKLR for the proposition that a widowed daughter-in-law of the deceased is beneficially entitled to a share of the estate just like the other children of the deceased; and therefore has no priority in terms of rank or share.

[24] From the standpoint of **Section 76** of the **Law of Succession Act, Ms. Chesoo** was of the view that the applicant had utterly failed to demonstrate any of the recognized grounds for revocation. In her view, the grant-making process employed herein cannot be faulted, as the respondent complied fully with the applicable law and procedure. She added that no evidence was adduced by the applicant to prove her allegations of fraud or maladministration. Counsel relied on **Re Estate of Stephen Kurgat Kimwei (Deceased)** [2017] eKLR and urged the Court to note that, as a demonstration of good faith, the respondent purchased a parcel of land with mature tea bushes and constructed a permanent house thereon for the applicant and her children.

[25] Counsel further took issue with the applicant's proposed mode of distribution, contending that it was premised on the wrong notion that the applicant is standing in the position of her deceased mother-in-law. She therefore urged the Court to disregard the argument that the applicant is entitled to half-share of the estate. In support of her posturing, **Ms. Chesoo** relied on **Re Estate of Ndirangu s/o Waihiga (Deceased)** [2018] eKLR, **Re Estate of Elijah Kipketer Misoi (Deceased)** [2018] eKLR and **Saweria Wamuruoma Muchanji vs. Kimano Ngare** [2008] eKLR, among others, which favour equity amongst the children as opposed to equality between the two houses. In counsel's view, the application of Nandi customary law of inheritance to the matter would work injustice to the 2nd house in which there are 8 units, including the widow; and thereby offend the provisions of the **Article 27** of the **Constitution**. She therefore urged the Court to adopt the respondent's proposed mode of distribution which, in her view, offers the most equitable approach.

[26] I have given careful consideration to the evidence adduced herein as well as the written submissions filed on behalf of the parties by their counsel. It is manifest therefrom that there is no dispute that the deceased herein, **Daudi Kipserem Serem**, died intestate on **1 January 1994**. The Certificate of Death was produced herein by the applicant and marked **Exhibit P5.** There, is likewise, no dispute that the deceased was survived by a widow, **Rosaline Jemisik Serem**, who is the respondent herein and her children. It is common ground too that the deceased was a polygamist and that his 1st wife, **Esther Chebii**, predeceased him; having died in **1983**. It is no wonder therefore that the respondent took the responsibility of solely applying for Grant of Letters of Administration in respect of the estate.

[27] The parties were further in agreement that the applicant, **Clara Jelagat Kemboi**, is the widow of **Josphat Kimisoi Serem**, the eldest son of the deceased; with whom she has 4 children. Hence, while it is true that the applicant's name was omitted from the list of beneficiaries in the respondent's affidavit filed in support of her petition, the respondent has since expressly acknowledged that the applicant, **Clara Jelagat Kemboi,** is a *bona fide* beneficiary of the deceased's estate. This acknowledgement was made vide the consent order dated **5 February 2007** (reproduced hereinabove at paragraph 6; and also by **Sally Jelimo (DW1)** in her evidence herein. For instance, in the proceedings of **30 April 2012, DW1** testified that:

> **"…The objector states she has been omitted from P&A 5. Confirms that she has been omitted but is recognized as a beneficiary. She is to be treated as a child of the deceased like all other**

children. Father is one – two mothers – Josphat lived with us. She was married by my step-brother…"

[28] Likewise, **DW1** conceded in cross-examination, at page 170 of the handwritten proceedings that:

"…my father had 2 wives. Josphat Kimisoi is the husband of the Objector. He passed on in 1990. My father passed on in 1994. It is true that my father took care of the family of Josphat Kimisoi upon his demise. Josphat used to reside on Kirondio Farm – Parcel No. 4072/2. That is where Josphat was buried…"

[29] And in re-examination, she reiterated that:

"…As a family we recognize that Clara is my sister-in-law and is entitled to benefit from the estate of our father. She is entitled to equitable share like the other children…"

[30] In the premises, the dispute is basically on distribution, as was indeed acknowledged in the proceedings of **5 February 2007**. Nevertheless, from the evidence adduced herein by the applicant, there appears to be a lingering dispute as to whether there is any **justification for revoking the Grant of Letters of Administration Intestate** issued herein for the purpose of **including the applicant as a co-administrator**. And, although the question of jurisdiction was raised by **Ms. Chesoo** for the respondent, it was not a contentious issue. There is therefore no doubt that the Court has jurisdiction to entertain the dispute. The Court's jurisdiction stems from **Article 165(3)(a)** of the **Constitution** as well as **Section 47** of the **Law of Succession Act**. In this regard, **Section 47** of the **Law of Succession Act**; is explicit that:

"**"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient…"**

[31] With regard to the prayer for revocation of grant**, Section 76** of the **Law of Succession Act,** provides that:

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.

[32] The applicant moved the Court pursuant to **Section 76(b)** of the Act; and therefore alleged fraud against the respondent. The allegation was in two respects; firstly, that the respondent omitted her name, as a *bona fide* beneficiary, from the list of beneficiaries; and secondly, in not furnishing the Court with a full and accurate list of assets of the deceased. However, as has been mentioned hereinabove, the respondent's explanation for this was that she bought a piece of land at **Mosine Farm** with mature tea bushes for the applicant and constructed for her a four-bedroomed house thereon and thereby had her relocate from the **Kirondio Farm**. In her thinking, this was sufficient for the applicant. Accordingly, the issue would not be one of fraud but sufficiency of the allotment. Moreover, the parties did enter into a consent on **5 February 2007** whose import was that the applicant's grievance if any, would be for consideration and resolution by the Court at the distribution stage; and therefore that there would be no justification for undoing the confirmed Grant of Letters of Administration Intestate dated **3 September 2002.**

[33] There is another reason why the applicant's clamour for appointment as a co-administrator is flawed. **Section 66** of the **Law of Succession Act,** which sets out the order of preference for purposes of petitions for Grant of Letters of Administration Intestate, provides thus:

> **When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—**
>
> **a. Surviving spouse or spouses, with or without association of other beneficiaries;**
>
> **b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
>
> **c. The Public Trustee; and**
>
> **d. Creditors**

[34] It is manifest therefore that, for the specific purpose of administration of the estate of the deceased, the respondent has always ranked in priority to the applicant; and this notwithstanding the demise of both her mother-in-law and her husband. Authorities abound for the proposition that a widow ranks in priority when it comes to the administration of the estate of her deceased husband. For instance, in **<u>Re Estate of Peter Ambani Mataywa</u>** (Deceased) [2020] eKLR, **Section 66** of the **Law of Succession Act** was underscored thus by **Hon. Musyoka, J.**:

> **"… the court ought to be guided by Part V of the Act, which settles the order of priority in entitlement to a share in the estate of the deceased. Priority is given to the surviving spouse, followed by the children of the deceased, followed by parents of the deceased in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter. The same applies with regard to entitlement to administration by dint of section 66. The surviving spouse has priority to administration, followed by the children, parents of the deceased, siblings, other relatives to the sixth degree, the Public Trustee and creditors in that order. When that is applied to the instant case, it would mean that the widow of the deceased, the administratrix herein, had priority to appointment over her children, the applicant included."**

[35] Clearly therefore, while the applicant is in no position to seek equal standing with the respondent for purposes of administration; she is nevertheless entitled to an inheritance as has been stated herein above.

Her joinder as a co-administrator would only be tenable for purposes of accountability pursuant to **Section 56(1)(b)** of the **Law of Succession Act** and **Rule 25(6)** of the **Probate and Administration Rules**, which recognizes that a Grant can be made to joint administrators, not exceeding four.

[36] In terms of distribution, it is noteworthy that the applicant invoked Nandi law in urging for half-share of the estate. It is however manifest that Nandi customary law is not applicable herein, having been specifically ousted by **Section 2** of the **Law of Succession Act**. That provision reads thus:

> **"(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.**
>
> **(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."**

[37] It bears repeating, therefore, that, since the deceased herein died on **1 January 1990**, it is plain that the **Law of Succession Act**, whose date of commencement was **1 July 1981** is the applicable regime of law. Indeed, in **Rono vs. Rono & Another** [2005] eKLR, the Court of Appeal held that:

> **The deceased in this matter died in 1988, while the Succession Act which was enacted in 1972, became operational by Legal Notice No. 93/81, published on 23.06.1981. I must therefore hold, as the Act so directs, that the estate of the deceased falls for consideration under the Act. Section 2(1) provides: -**
>
> > ***"2.(1) Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."***
>
> **The application of customary law, whether Marakwet, Keiyo or otherwise, is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in Section 32 and 33 in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. But the application of the law or custom is only limited to "such areas as the Minister may by Notice in the Gazette specify." By Legal Notice No. 94/81, made on 23.06.1981, the Minister specified the various districts in which those provisions are not applicable. The list does not include Uasin Gishu district within which the deceased was domiciled. So that, the law applicable in distribution of the agricultural land in issue in this matter is also written law."**

[38] In the premises, there being no indication that Nandi County has been exempted from the application of the **Law of succession Act**, in the manner envisaged by **Sections 32 and 33** thereof. Accordingly, the distribution of the subject estate is governed by **Section 40** of the Act; which provides that:

> **(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**
>
> **(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."**

[39] Since **Esther Chebii** predeceased the deceased, the applicant's interest; and by extension the interest of her children are to be considered along with the interests of the children of the deceased; the applicant being considered as a unit in place of her deceased husband**, Josphat Kimisoi.** The respondent conceded as much in the consent of **5 February 2007** and vide the evidence of **DW1.**

[40] It is in the light of the foregoing that I now turn my attention to the proposals made by the parties on the mode of distribution. I need to point out at the outset that in the initial list of assets filed with the petition, the respondent only made mention of one property, namely, **Sergoit/Karuna Block 2(Sergoit)65**, with an estimated value of **Kshs. 4,000,000/=.** Upon the filing of the application for revocation, the respondent conceded that she did not make a full and frank disclosure of the assets of the deceased. It was also well-proved by the applicant that the respondent concealed **the Kirondio property** from which she would earn substantial sums of money from the tea bushes left thereon by the deceased; and that she left the applicant to fend for herself and her four children. Both the applicant and her son **PW7** demonstrated that many were the times when the applicant was unable to pay fees for her children and had to resort to well-wishers; yet the respondent was well aware and conceded that the deceased had taken the applicant under his charge as a dependant and would pay for the school fees for her children. The applicant also proved, and this was conceded to by **DW1,** that the respondent disposed of quite a number of the estate assets without taking into account the applicant's interest therein.

[41] Thus, against the foregoing backdrop, the applicant's proposed mode of distribution filed on **28 June 2019,** was that:

[a] **Kirondio Farm LR No. 4972/02** measuring 50 acres be shared as follows:

- 40 acres to **Rosaline J. Serem** and her children
- 10 acres to the applicant, **Clara J. Kemboi**, and her children

[b] **EATEC Farm** measuring approximately 50 acres purchased after the sale of **Sergoit/Karuna Block 2 (Sergoit) 65** be shared as follows:

- 42.5 acres to the respondent **Rosaline J. Serem** and her children
- 7.5 acres to the applicant, **Clara J. Kemboi** and her children

[c] **Nandi Hills/Kosoiywo Block 1/772** measuring 1.1 Ha be given to **Clara J. Kemboi** and her children

[d] **Nandi Hills/Kosoiywo Block 1/773** measuring 1.14 Ha be given to **Clara J. Kemboi** and her children

[e] **Nandi Hills/Kosoiywo Block 1/774** measuring 0.15 Ha be given to **Clara J. Kemboi** and her children

[f] **Mosine Farm** measuring 6 acres where the applicant's house is situate to her and her children

[g] All movable assets and machines be given to **Rosaline J. Serem** and her children

[h] Tea proceeds and bonus from the death of deceased to date (approximately **Kshs. 35,000,000/=)** be left with **Rosaline J. Serem** and her children

[42] The respondent, on the other hand, was of the posturing that as the surviving widow, she was entitled to a sizable share of the estate. She accordingly filed her proposed mode of distribution on **6 March 2020** and suggested the following:

[a] That **Kirondio Farm LR No. 4072/2**, measuring 50 acres, be given to the respondent and her children, to be subdivided as follows:

Rosaline Serem (widow) – 10 acres

Richard Kemboi (son) – 5.7 acres

Hellen Chepkoech (daughter) – 5.7 acres

Miriam Cheptoo (daughter-in-law and widow to the late Joseph Kiprotich, son to the deceased)) – 5.7 acres

Rael Chepleting (daughter) – 5.7 acres

Emily Anne Chebet (daughter) – 5.7 acres

Sally Chelimo (daughter) – 5.7 acres

Miriam Cheruto (daughter-in-law and widow to the late Stephen Kiplagat, son to the deceased)

[b] Nandi Hills/Kosoywo Block 1/772, measuring approximately 2.7 acres to be given to the respondent, **Rosaline Serem**

[c] Nandi Hills/Kosoywo Block 1/773, measuring approximately 2.7 acres to **Clara Kemboi**

[d] Mosine Farm, measuring approximately 6.8 acres to **Clara Kemboi**

[e] Motor Vehicle Reg. No. KZA 414, Pick-up, to Rosaline Serem

[f] Kshs. 2,000,000/= being proceeds of sale of **Sergoit/Karma Block 2 (Sergoit) 65** to be shared equally among all the beneficiaries.

[43] It is noteworthy, therefore, that the parties are largely in agreement that the **Kirondio property** be given to the respondent and her children, save that the applicant seeks to be given some 10 acres thereof. There is however consensus within the household of the respondent on how the property will be shared and distributed to each of the units in the respondent's house, if given the whole of that property. There is, likewise, consensus that the applicant be given **the Mosine Farm** where she is currently resident. It is to be recalled that she agreed to be relocated from **Kirondio Farm** where she lived with her deceased husband, to **Mosine Farm;** and that the said property was specifically purchased and a permanent house built thereon by the respondent for the applicant and her children. While no mention was made by the respondent of **Nandi Hills/Kosoywo Block 1/774** in her proposal, she claimed **Nandi Hills/Kosoywo Block 1/772** for herself; and was agreeable to **Nandi Hills/Kosoywo Block 1/773**, measuring approximately 3.45 acres being given to the applicant. It appears that the respondent had already disposed of the **Nandi Hills/Kosoywo Block 1/774** for **Kshs. 2,000,000/=,** going by the evidence of **DW1**. I note too that the applicant was agreeable to all the movable properties, including **Motor Vehicle Reg. No. KZA 414** being given to the respondent. In effect, the dispute narrows down to whether the applicant should receive 10 acres from the 50-acre **Kirondio** farm and an additional 7.2 acres from **the EATEC property**; and, who, between the applicant and the respondent, should be given **Nandi Hills/Kosoywo Block 1/772**.

[44] Counsel for the respondent endeavoured to demonstrate that, as a widow, the respondent is entitled to a larger share of the estate. The justification given for this stance is a general assertion that the respondent contributed towards the acquisition of the estate assets. It is noteworthy that, whereas there is however no such ground for distinction in **Section 40** of the **Law of Succession Act**, the applicant conceded to the respondent retaining all the movable assets of the deceased, including **Motor Vehicle Reg. No. KZA 414**. It is also significant that the respondent sold **the Sergoit property** without any reference to the applicant and, with the proceeds of the sale, bought **the EATEC property** which she apparently gave to one of her sons.

[45] Thus, considering all the foregoing and in particular the fact that the applicant was in fact dependent on the deceased before his demise, an equitable approach be adopted that would take into account the fact that the applicant has been largely excluded from the estate. It is therefore instructive to keep in mind the words of **Omollo JA** in **Rono vs. Rono** (supra) that:

> **"…I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act."**

[46] The same position was taken by the Court of Appeal in **Scolastica Ndululu Suva vs. Agnes Nthenya Suva** [2019] eKLR thus:

> **"It is therefore evident that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate."**

[47] The factual circumstances aforementioned would include considerations as to whether some of the beneficiaries are already in occupation of some specific parts of the estate, so as not to cause unnecessary hardship to any beneficiary. Accordingly, the deceased's estate is hereby distributed amongst his beneficiaries as follows:

No.	Description of Property	Beneficiary
1.	**Kirondio Farm, LR No. 4072, measuring 50 acres**	**40 acres to Rosaline J. Serem and her children** **10 acres to Clara J. Kemboi**
2.	**EATEC Farm, measuring 50 acres purchased after sale of Sergoit/Karuna Block 2(Sergoit) 65**	**42.5 to Rosaline J. Serem and her children** **7.5 acres to Clara J. Kemboi and her children**
3.	**Nandi Hills/Kosoiywo Block 1/772 measuring 1.1Ha**	**To Clara J. Kemboi and her children - whole**
4.	**Nandi Hills/Kosoiywo Block 1/773 measuring 1.1Ha**	**To Clara J. Kemboi and her children - whole**
5.	**Nandi Hills/Kosoiywo Block 1/774 measuring 1.1Ha** **(Or payment of its value by the respondent)**	**To Clara J. Kemboi and her children - whole**
6.	**Mosine Farm measuring 6 acres**	**To Clara J. Kemboi and her children - whole**
7.	**Motor Vehicle Reg. No. KZA 414, Pick up**	**To Rosaline Serem - whole**

[48] Credible evidence was adduced herein by DW1 to show that the sole administrator has been ailing and therefore not in a position to discharge her duties as such. A letter dated 5 October 2010 was

presented to the Court showing that the respondent had undergone surgery twice for brain tumour which had affected her adversely. It was on that account that the Court proceeded to have her daughter, **Sally Jelimo (DW1)** testify on her behalf. Thus, granted the background of this dispute and for the purposes of expediting the distribution of the subject estate, it is hereby ordered, pursuant to **Article 159(2)(d)** of the **Constitution** and **Rule 25(6)** of the **Probate and Administration Rules**, that the Grant of Letters of Administration Intestate issued herein on **3 September 2002** be and is hereby revoked; and that a fresh grant be issued forthwith in the joint names of **Sally Jelimo and the applicant, Clara Jelagat Kemboi,** along with a Certificate of Confirmation that accords with this Judgment. It is further hereby ordered that the applicant's costs hereof be paid out of the estate.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF NOVEMBER 2020

OLGA SEWE

JUDGE