



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 172 of 2010

IN THE MATTER OF THE ESTATE OF FARES MICHAEL KUINDWA (Deceased)

RULING

1. Fares Michael Kuindwa (the deceased) was a career civil servant and served the Republic of Kenya in various capacities. He was permanent secretary and secretary to the cabinet and head of the public service. He also served as Kenya's permanent representative to the United Nations and as Chairman of the Postal Corporation of Kenya. The deceased died of pancreatic cancer at the Nairobi Hospital on 11.3.03.

2. In a petition for a grant of representation dated 8.4.10, the Public Trustee stated that the deceased was survived by Eunice Hasango Kuindwa (Eunice) as the 1st widow and her 6 children, Michael Sharuti Kuindwa, Herbert Kiido Kuindwa, Olympia Habia Kuindwa, Clive Abarhaya Kuindwa, Hillary Kirungu Kuindwa and Steven Maumbi Kuindwa. The deceased was also survived by Drusila Josephine Kerubo Kuindwa (Josephine), the 2nd widow and her 4 sons Michael Bocha Kuindwa, Meshak Nyakundi Kuindwa, Collins Mayaa Kuindwa and Gabriel Abagalana Kuindwa. The assets of the deceased were listed as:

- i) L. R. No. 7823/I/MN, English Point.
- ii) L. R. No. 5271/I/MN, Nyal Estate.
- iii) L. R. No. 25165, Kurawa.
- iv) Kipini Plot, Allotment Letter Ref: 8711/494.
- v) Residential House, Oda, Allotment Letter Ref: 30657/IV.
- vi) Agricultural Plot, 3711/111, Tarasaa.
- vii) Kipini ex prison farm, Allotment No. 1607668/7.
- viii) Personal effects.
- ix) Cannon Assurance policy
- x) 200 shares in Bamburi Wind Surfing.
- xi) 15% share capital in East Africa Aviation Ltd.
- xii) 1998 shares in Kenya National Mills.
- xiii) 1 share in Life Flowers Limited.
- xiv) MF Tractor KAJ 832 Y.
- xv) Range Rover
- xvi) Treasury, Pensions, Death Gratuity

The deceased's liabilities were listed as Kshs. 60,000/= owing to Kenya Revenue Authority.

3. A grant of letters of administration intestate (the Grant) in respect of the estate of the deceased was on 18.10.10 issued to the Public Trustee. The Public Trustee on 24.3.11 filed a Summons dated 25.2.11 (the Summons) seeking confirmation of the Grant. However on 7.9.12, Eunice filed an Originating Summons No. 12 of 2012 dated 6.9.12 (the OS) seeking a declaration that she holds 50% share in the following properties registered in the name of the deceased:

- i) L. R. No. 7823/I/MN, English Point.
- ii) L. R. No. 5271/I/MN, Nyali Estate.
- iii) 'K' Kurawa Plot Hotel site Allotment ref: 8711.
- iv) Kipini ex prison farm, Allotment No. 1607668/7.

4. The OS however remained unprosecuted. On 30.9.16, after the Court directed that the Summons proceed to hearing, Eunice filed an Affidavit of Protest dated _____ on grounds that:

- a) Uncertainty of the deceased's immovable properties.
- b) Dispute on the deceased's dependents.
- c) Applicable law on distribution.
- d) Whether confirmation should be made to the Public Trustee.

5. Eunice avers that there remains uncertainty regarding the ownership of the 5 properties. She further protests the inclusion of Josephine and her 4 children as the deceased's dependents by the Public Trustee. Eunice avers that she has no confidence in the Public Trustee who has seemingly taken sides and is protecting the interests of Josephine to the prejudice of Eunice and her family. The Public Trustee who is required to preserve the estate has not been paying rates for the plots in Nyali Estate and English Point. Further, according to Eunice, Josephine was a business partner of the deceased. If she and her children are to be considered as the deceased's dependents then they ought to account for the gifts given to them by the deceased in his lifetime. Only then will the Court give a balanced, equitable, just and legal order on distribution. The properties situate in Tana River and Kajiado district are subject to distribution under customary law vide Section 32 of the Law of Succession Act (the Act).

6. In a reply to the Protest sworn on 9.11.16, the Public Trustee averred that the death of the deceased was reported to him by Eunice and Josephine and each swore a report of death to the Public Trustee. Both informed the Public Trustee of the properties forming the estate of the deceased. There is no evidence of omission of any property and the issue of uncertainty of the assets does not therefore arise. Following inquiries on the rightful heirs of the deceased, the Garsen District Commissioner vide a letter dated 27.4.05 from the Chief of Wachu Oda location furnished the Public Trustee with a list of the rightful heirs of the deceased. All parties actively participated in the proceedings herein and even signed the consent to making of the Grant.

7. The Public Trustee further stated that the Parties did on 29.5.12 commence negotiations on distribution of the estate but the same collapsed. Eunice and her children have all along known of the existence of Josephine and her children as the deceased's second family and have treated them as such. The only issue in dispute was the properties and the distribution. The Public Trustee denied taking sides in this matter. The Public Trustee's objective in this matter is to see to it that the distribution of the estate of the deceased is finalized. The Public Trustee further denied that the estate has any property in Kajiado district as alleged. He has no objection to the property in Tana River district being distributed in accordance with customary law as required by Section 33 of the Act. He was never informed of the outstanding land rates and the person occupying the 2 properties ought to pay the same.

8. The Court did on 13.2.17 direct that the issues in OS No. 12 of 2012 which had had been raised in the Affidavit of Protest would be dealt with at the hearing herein by way of *viva voce* evidence.

9. In her testimony, Josephine stated that she met the deceased in 1988 and they became friends. They began to cohabit in 1990. A traditional marriage was held. Her own father swore an affidavit confirming that he had no objection to Josephine changing her surname from Ondieki to Kuindwa, her married name. She and the deceased also swore an affidavit of marriage. At the time she met the deceased, she had 2 sons, twins, aged 6 years, from another relationship and the deceased accepted them as his own children in a ceremony and they were renamed. One was named Michael Bocha Kuindwa after the father of the deceased and the other Meshack Nyakundi Kuindwa after her own father. The twins were dependent on the deceased, lived in his house and he paid their school fees. The deceased obtained birth certificates for the twins. She then had 2 sons with the deceased Collins Mayaa Kuindwa born on 14.10.92 and Gabriel Abagalana Kuindwa born on 28.6.94. The marriage ceremony took place in Tana River and not in Kisii. She produced photos of the marriage ceremony and of the deceased and the children.

10. Josephine stated that the deceased took responsibility of the children's schooling. The school used to address them as Mr. and Mrs. Kuindwa. After his death the school continued to address her as Mrs. Kuindwa. Through the deceased, Josephine was issued with a diplomatic passport and a firearm. Josephine and the deceased incorporated a company known as Life Flowers Limited with equal shareholding. They took a loan of Kshs. 60 million but following default in repayment, the property of the company was sold. She produced academic reports and her diplomatic passport and firearm license.

11. Upon the death of the deceased, Josephine in her capacity as his wife participated fully in the funeral preparations which took place in her house at Mountain View estate, Nairobi. Eunice stayed in Josephine's house during this period and even when the deceased was in hospital. Eunice's children Albert Kiidho, Olympia and Clive Habaraya have also stayed with Josephine during diverse periods. Josephine's children participated in the funeral and Collins and Gabriel carried their father's photograph during the service. She was included as one of the widows in the funeral program and even in the death announcement. Her 4 children were also in the funeral program. Josephine stated that the family recognized her and her children as heirs of the deceased. The minutes of the post burial committee meeting held on 26.4.03 at the Landmark Hotel, refer to Josephine and Eunice as widows of the deceased. She and her children were considered in the distribution of the funeral fund balances. In the letter dated 24.2.05 from the Pensions Department addressed to the Public Trustee Eunice and Josephine were recognized as widows of the deceased. She produced photos of the funeral service.

12. Josephine further stated that she has no objection to the properties listed as forming the estate of the deceased. She is not interested in the home in Oda, Tarasaa, Tana River. She prays that the estate of the deceased be distributed to her children according to law.

13. Enos Michael Mayaa Bocha (Enos) the elder brother of the deceased told the Court that the deceased had 2 wives, Eunice and Josephine. Both were married customarily and dowry was paid. As elder brother of the deceased he was involved in both marriages. Under Pokomo traditions, a marriage ceremony is held in the girl's home. The marriage ceremony between the deceased and Josephine however was held in Tana River because their father was ailing and bedridden. "Dabra" a fine paid for holding ceremony in their home and not the girl's home was paid. Dowry was also paid to the Kisii elders present. He identified Josephine, the deceased, their parents, their father's brother Michael Reuben Bocha in pictures taken at the ceremony. Raha and their cousin Michael Fares Yubfo were also present at the ceremony. Their customs allow a woman who has children from elsewhere. The deceased took Josephine and her children. The clan also accepted them and gave the children names. When twins are born one is named after father's side and the other after mother's side.

14. Enos attended the meeting held by the committee after the funeral. The meeting recognized that the deceased left 2 widows Eunice and Josephine and their children. From the money collected Eunice was given Kshs. 800,000/= and Josephine was given Kshs. 600,000/= and no objection was raised. He prayed that estate of the deceased is distributed fairly.

15. Eunice testified that there are uncertainties in the properties of the estate which she lays claim on as a wife. She provided the Public Trustee with names of the children of the deceased as well as the list of assets properties of the estate. After filing the OS, her advocate never told her the position of the case. The properties are in the name of the deceased but she cannot remember when they were acquired. She stated that she did not make any contribution to the acquisition of the properties. According to her she and her children are the only beneficiaries of the estate of the deceased. She is not aware of any marriage ceremony between the deceased and Josephine. In the period between 1990-97, Eunice worked in Nairobi and lived in Mountainview and between 1997-90 lived in Muthaiga. She was transferred to Mombasa in 2003. When deceased died, Josephine, hosted Eunice and her family in Mountainview during the funeral preparations. Josephine was a business partner of the deceased and was given gifts like money. Josephine was given the house in Muthaiga and the land in Kitengela and these should be taken into account. Eunice stated that her objection is that some properties were excluded.

16. During re-examination by her advocate, Eunice stated that she and the deceased built the houses together. They would get a contractor and tell him what to do. She stated that when the deceased died, she was present during the funeral arrangements which took place at Mountainview. Eunice stated that Josephine and the deceased were business partners in Life Flowers Limited. She does not know what became of the land belonging to the company.

17. Sammy Nkaduda Amos a nephew of the deceased averred in his affidavit sworn on 16.5.17 that he lived with the deceased in his house in Riverside, Nairobi from 1979 till 1993. During this time he never encountered Josephine. He only knows Eunice as the wife of the deceased. The deceased used to go to his home in Oda fortnightly and Sammy would take care of his logistical needs as well as run his errands. Sammy encountered Josephine once in 1997 in Oda when she and her father visited. To him, the visit was not a marriage ceremony but just the parent of one friend getting to know the home of the other. He denied that the deceased married Josephine under Pokomo customary law. Under Pokomo customary law, a marriage ceremony could never take place in the home of the man but in the home of the woman. The mother of the deceased did not attend the ceremony. He next saw Josephine when the deceased became ill and later at the funeral. Josephine tried to make him sign a form confirming she was a widow of the deceased but he declined.

18. Christian Komora Mbatu's testimony is that as chairman of the council of elders of Kalindi clan he is conversant with Pokomo customary law and practices including marriage. After a man identifies the woman he wishes to marry, she elopes with him to his home. The man's parents thereafter visit the woman's parents to notify them of the whereabouts of their daughter. Thereafter *hasawa*, a dowry negotiation and payment ceremony takes place at the woman's home. Hasawa is never held in the man's home. Christian is the deceased's cousin. He states that the foregoing took place when Eunice was married. He however said the same did not take place with regard to Josephine. Christian first heard of Josephine at the deceased's funeral when her name was called out as a wife to the deceased. She left the day of the funeral. Under Pokomo customs, no widow of the deceased is ever allowed to leave the home of the deceased on the same day. Eunice and her children remained behind for *dala* ceremony where the deceased's personal belongings were distributed to them as required by custom. To Christian, the fact that *hasawa* was not performed for Josephine and she did not wait for *dala* makes Christian believe that Josephine was not a wife of the deceased.

19. Darrington Kweli Mwachinga a friend of the deceased since high school testified that the deceased had only one wife, Eunice. During a visit to amuluni's house, Darrington and the deceased met Josephine and the deceased took an interest in her. After discovering that the deceased had subsequently met Josephine severally, Darrington cautioned him that she might be a gold digger. The deceased never told Darrington that he had married Josephine nor did he invite him to a dowry payment ceremony. He therefore believes that Josephine is not a wife of the deceased.

20. The testimony of Michael Fares Yubfo, a first cousin of the deceased is that the deceased married Eunice under Pokomo customary law and all rights were performed. During his studies at Kenya Institute of Administration between 1980 and 1981 and thereafter, he frequently visited the deceased at his Riverside home and never heard any suggestion that the deceased had another wife. He disputes the alleged customary marriage between the deceased and Josephine. No such ceremony would have taken place without him and his father being informed.

21. I have considered the evidence and the submissions by the parties. The following issues fall for determination:

- i) Whether Josephine is a wife of the deceased.
- ii) Whether Eunice is entitled to 50% of the estate of the deceased.
- iii) Whether Josephine's children are beneficiaries of the estate of the deceased.
- iv) Whether confirmation of the Grant should be made to the Public Trustee.
- v) How the estate of the deceased should be distributed.

Whether Josephine is a wife of the deceased.

22. The deceased belonged to the Pokomo community in Tana River while Josephine belongs to the Kisii community. Josephine claims that a customary marriage was held between her and the deceased at his home in Oda, Tana River. Her allegation is supported by Enos Michael Mayaa Bocha the elder brother of the deceased. He stated that dowry was paid to the Kisii elders from Josephine's family. He explained that this ceremony which ordinarily would be held in the girl's home was held in the deceased's home because their father was ailing and bed ridden. This claim is challenged by Eunice's witnesses. Christian Komora Mbatu being chairman of the council of elders of Kalindi is no doubt well versed in Pokomo customary practices as. According to him, Josephine was not a wife of the deceased. To buttress his claim, he asserted that *hasawa* was not performed for Josephine and the ceremony that allegedly took place in the deceased's home could not have been *hasawa* which is never held in the man's home but always in the girl's home. Further she did not wait for *dala* as the deceased's wife both of which are requirements of custom. On his part, Darrington Kweli Mwachinga a friend of the deceased since high school maintained that Josephine was just a girlfriend of the deceased. As a friend, the deceased would have invited him to the ceremony of his marriage to Josephine but he did not as there was no such ceremony. Similar sentiments were expressed by Michael Fares Yubfo, a cousin Sammy Nkaduda Amos, a nephew of the deceased.

23. A person who seeks to propound customary law must call evidence to prove that customary law. In Sakina Sote Kaittany & another v Mary Wamaitha [1995]eKLR, Gicheru, J.A. (as he then was had this to say concerning proof of customary law and practices:

...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. call evidence to prove that customary law, as would prove the relevant facts of his case.

24. Josephine did not bring in an expert of Pokomo or indeed Kisii customary law to support her claim that a customary marriage took place between her and the deceased. On the other hand, Eunice called in Christian Komora Mbatu. As chairman of the council of elders of Kalindi clan, Charles is no doubt well versed in Pokomo customary law and practices. He described to the Court how a Pokomo customary marriage is performed. In particular, he stated that the ceremony signifies a marriage and the ceremony takes place in the home of the woman and never in the home of the man. It is not disputed that a ceremony took place at the rural home of the deceased. Whatever the purpose of the ceremony, it does not from the testimony of Charles meet the requirement of a Pokomo customary marriage. My finding therefore is that no customary marriage took place between the deceased and Josephine.

25. Josephine stated that she met the deceased in 1988 and they began to cohabit in 1990. She stated that the deceased took in her 2 children as his own. Josephine and the deceased went on to have 2 children of their own, Collins Mayaa Kuindwa born on 14.10.92 and Gabriel Abagalana Kuindwa born on 28.6.94. These children were born during their long cohabitation. Pictures were produced of the deceased with Josephine's children taken on diverse dates. An academic report from Strathmore School for Gabriel dated 14.2.02 was addressed to Mr. & Mrs. F. M Kuindwa and another dated 15.2.07 was addressed to Mrs. J. Kuindwa. Further, arrangements for the deceased's funeral took place in Josephine's house at Mountainview estate. If Josephine was just a business partner or girlfriend of the deceased, as Eunice and her witnesses would have this Court believe, why would this be so? Why would Eunice, of her own admission, be hosted by Josephine in her house during the funeral arrangements if indeed Josephine was just a business partner? Why would Josephine be described as a wife to the deceased in the funeral program and obituary published in the newspaper? Why would Josephine's children carry the picture of the deceased at the church service?

26. The Court further notes that it was indicated in the obituary published by the Postal Corporation of Kenya, that the deceased was the husband of Eunice Hasango and Josephine Kerubo Ondieki. It was also indicated that the deceased was son in law of Philip Motitikwa Ondieki and Alexina Bonareri. Additionally, minute 34/2003 of the post burial funeral committee meeting held on 26.4.03 at the Landmark Hotel reads:

1. Equal credit points allocation to each of the ten children of the deceased under the custody of the two widows whose names are Mrs. Eunice H. Kuindwa and Mrs. Josephine K. Kuindwa.

27. Could all these factors taken together lead this Court to presume a marriage between Josephine and the deceased? In Beth Nyambura Kimani v Joyce Nyakinywa Kimani & 2 others [2006] eKLR, the Court of Appeal stated:

As stated earlier, the Judge was satisfied that there was no customary marriage proved between the appellant and the deceased and decided the case on that basis. He further made a finding that the appellant had lived for 13 years as a mistress with the deceased. In point of fact the period was 18 years from 1970 to 1988. Unfortunately, the learned Judge went no further. He said nothing about presumption of marriage. It was a live issue which was raised by learned counsel for the parties who made submissions and cited relevant authorities including Hortensiah Wanjiku Yaweh v Public Trustee Civil App. No. 13 of 1976 (ur). In Veronica Rwambah Mbogoh v Margaret Rachel Muthoni & Anor Civil App. No. 311 of 2002 (ur) this Court stated as follows: -

“For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant’s favour. Such was the situation facing the predecessor of this Court in Hortensiah Wanjiku Yaweh v Public Trustee, Civil Appeal No. 13 of 1976. Mustafa J.A in his leading judgment stated: -

“I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption,

28. Duly guided by the Court of Appeal in the Beth Nyambura Kimani and the Veronica Rwambah Mbogoh cases (supra), although this Court has made a finding that no customary marriage between Josephine and the deceased was proved the evidence on record is such as requires that the Court must go further. It is immaterial that neither statutory nor customary marriage requirements between Josephine and the deceased are strictly proved herein. This Court must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in Josephine’s favour. All factors and circumstances set out herein and my own evaluation of the evidence adduced before me when taken together lead me to the finding that by general repute and long and open cohabitation Josephine was indeed a wife of the deceased.

Whether Eunice is entitled to 50% of the estate of the deceased.

29. Eunice stakes her claim of 50% share in the properties of the estate of the deceased before distribution. Citing Section 17 of the Married Women’s Property Act, 1882 (repealed) (MWP), it was submitted that Eunice made non-monetary contribution towards the acquisition of the properties. As averred in her affidavit in support of her OS, she worked at Central Bank from marriage till retirement. She paid school fees for their children, food, clothes and other amenities so as to free the deceased’s income for the purchase of assets. Section 17 of the MWP provides in relevant part as follows:

In any question between husband and wife as to the title to or possession of property, either party .. may apply by summons or otherwise in a summary way to any judge of the High Court of Justice .. and the judge of the High Court may make such orders with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit

30. The case of Christopher Michael Strong v Sabina Wairimu Strong [2002] eKLR was cited to support the argument that the Court should consider both direct monetary contributions and indirect contribution to the welfare of the family. This case is in my view not relevant. The matter related to division of matrimonial property upon dissolution of the parties’ marriage unlike the present case which is a succession matter. Further the case relates to a monogamous marriage unlike the present case where the deceased was polygamous and Eunice seeks a determination of her interest in the assets of the estate before distribution of the same m.

31. The Court did give directions that Eunice prove her claim in the OS by adducing *viva voce* evidence herein. **In her evidence, Eunice stated that she did not know when the said properties were purchased. She further stated that she made no contribution towards the purchase of the same. On re-examination however, she stated that she and the deceased built the properties together. The evidence on record shows that Eunice worked at Central Bank of Kenya for 17 years and 5 months before her retirement on 31.8.08. It would appear that she began to work in 1991. It is not known how much her income was. Other than her pay slip of February 2008 the year she retired, no evidence of her previous earnings was availed. It was submitted that the repayment of a development loan shown in her pay slip is indicative of a wife taking a facility to develop her home. This submission is however not supported by evidence. Eunice did not state the purpose of the loan and in any event this pay slip is for a period of 5 years after the demise of the deceased.**

32. In DM v MM [2008] 1 KLR (G & F) the Court of Appeal observed:

It should also be remembered that realistically spouses do not keep accounts of their day to day expenditure or adjust their affairs in binding legal arrangements

33. The Court is alive to the reality that spouses do not keep a record of expenditure hoping to use them at an opportune time. Indeed to do so would undermine their commitment to the marriage institution. In the instant case, **while the Court does not doubt that as wife and mother, Eunice made some indirect contribution towards the welfare of the family, the extent of that contribution is unclear. In spite of being accorded an opportunity to prove her case by oral evidence, Eunice made no effort to demonstrate her earnings or her non-monetary contribution. When she stated that she and the deceased built the properties together, she ought to have gone further to demonstrate to the Court exactly what her role was.** This would have assisted the Court in arriving at a conclusion that her contribution warrants the grant to her of 50% of the estate before distribution that she seeks.

34. Article 45(3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. In P N N v Z W N [2017] eKLR Kiage, JA had this to say about equality of spouses as contemplated by Article 45(3) of the Constitution:

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

35. For this Court to arrive at the conclusion that Eunice is entitled to 50% of the estate before distribution, she must prove that she made equal effort towards the acquisition, preservation or improvement of estate. As matters stand, she provided no such proof. In the premises,

her claim must fail.

Whether Josephine's children are beneficiaries of the estate of the deceased.

36. It is not disputed that Collins and Gabriel are the biological sons of the deceased. There is therefore no question as to their entitlement to the estate of the deceased. As regards the twins Michael and Meshack, it is also not disputed that they are not the biological sons of the deceased. This being the case, are they entitled to the estate of the deceased?

37. Section 3(2) of the Act provides:

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

38. Josephine stated that the deceased took her then 6 year old twin sons in when she and the deceased began cohabitation. She stated that a traditional acceptance ceremony of the twins took place. No evidence was however produced to support this claim. The twins were given new names. One was named Michael Bocha Kuindwa after the father of the deceased and the other Meshack Nyakundi Kuindwa after her own father. Josephine further stated that the deceased made an application to amend the twins' birth certificates. The Court has seen the said birth certificates. The Court notes that the said birth certificates bear the names given. The father of the twins is indicated thereon as the deceased. The Court further notes that the birth certificates were issued on 17.12.98 during the lifetime of the deceased. Indeed the birth certificates of all the children were issued on the same date.

39. The Court further notes that in the obituary published by the Postal Corporation of Kenya, Michael Bocha and Meshack Nyakundi are named among the 10 children of the deceased. Additionally, in the post burial funeral committee meeting held on 26.4.03 at the Landmark Hotel, Michael and Meshack are listed among the children of the deceased in the formula for distribution of funeral fund balances. Having considered all these factors, I find that on a balance of probabilities, Michael Bocha Kuindwa and Meshack Nyakundi Kuindwa are children of the deceased as contemplated in Section 3(2) of the Act and are thus entitled as beneficiaries of the estate of the deceased.

Whether confirmation of the Grant should be made to the Public Trustee.

40. Eunice has accused the Public Trustee of bias in favour of Josephine. She further claims that she has lost faith in the Public Trustee as administrator. As such the Court using its discretion should issue a certificate of confirmation of the grant to a person other than the Public Trustee. Section 71(1) of the Act provides:

After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

41. This Court appointed the Public Trustee as the administrator of the estate of the deceased. As the holder of the Grant, only the Public Trustee may legally apply for the confirmation of the same. A party who is dissatisfied with the administration of the estate of a deceased person has recourse under Section 76 of the act to apply for the revocation of the grant of representation issued to the administrator. Rather than seeking that the certificate of confirmation of the Grant be issued to a party other than the Grant holder, Eunice ought to have sought the revocation of the Grant. As matters stand, the Grant issued to the Public Trustee remains valid and in place. The law is that a certificate of confirmation cannot be issued to a person who does not hold a grant. Further it is the Grant issued to the Public Trustee that is before this Court for confirmation and not any other. In the premises, the prayer sought by Eunice is one that cannot be granted by the Court.

How the estate of the deceased should be distributed.

42. Having come to the conclusion that Josephine was a wife of the deceased it follows that the distribution of the estate shall be governed by Section 40 of the Act which stipulates the mode of distribution of an estate of a polygamous man as follows:

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of 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.

43. Prior to distribution of the estate, all liabilities including the amount owed to Kenya Revenue Authority shall be paid. This is a requirement under Section 86 of the Act which provides:

Debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.

44. The Court noted that there is on record a letter indicating that 'K' Kurawa Plot Hotel site Allotment ref: 8711 no longer belongs to the estate. There is on record from the Commissioner of Lands dated 3.5.06 cancelling the allotment for the reason that the deceased failed to accept the offer as required. From the copy of title on record, L. R. No. 22879 CR 30225 (and not CR 31309 as indicated) Kurawa Ranch was acquired by the deceased and 6 others.

45. In the view of the foregoing the Court makes the following orders:

- i) Drusila Josephine Kerubo Kuindwa is a wife of the deceased.
- ii) Eunice Hasango Kuindwa is not entitled to 50% of the estate of the deceased before distribution.
- iii) Michael Bocha Kuindwa, Meshak Nyakundi Kuindwa, Collins Mayaa Kuindwa and Gabriel Abagalana Kuindwa are children of the deceased.
- iv) The beneficiaries of the estate of the deceased are:

Eunice Hasango Kuindwa	Widow
Michael Sharuti Kuindwa	son
Herbert Kiido Kuindwa	son
Olympia Habia Kuindwa	daughter
Clive Abarhaya Kuindwa	son
Hillary Kirungu Kuindwa	son
Steven Maumbi Kuindwa	son
Drusila Josephine Kerubo Kuindwa	widow
Micahel Bocha Kuindwa	son
Meshak Nyakundi Kuindwa	son
Collins Mayaa Kuindwa	son
Gabriel Abagalana Kuindwa	son

v) The Grant of Letters of Administration issued to the Public Trustee on 18.10.10 is hereby confirmed.

vi) In line with Section 40 of the Act, the following assets forming the estate of the deceased shall be distributed to all the beneficiaries in equal shares:

- a) L. R. No. 7823/I/MN, English Point.
- b) L. R. No. 5271/I/MN, Nyali Estate.
- c) Personal effects.
- d) Cannon Assurance policy
- e) 200 shares in Bamburi Wind Surfing.
- f) 15% share capital in East Africa Aviation Ltd.
- g) 1998 shares in Kenya National Mills.
- h) 1 share in Life Flowers Limited.
- i) MF Tractor KAJ 832 Y.
- j) Range Rover
- k) Treasury, Pensions, Death Gratuity

vii) Pursuant to Section 33 of the Act, the following assets in Tana River County shall be distributed to the beneficiaries of the estate of the deceased in accordance with law or custom applicable to the deceased's Pokomo tribe.

- a) Deceased's share in L. R. No. 22879 CR 30225, Kurawa Ranch
- b) L. R. No. 22584, Kipini ex prison farm, Allotment No. 1607668/7.
- c) L. R. No. 25165, Kurawa.
- d) Kipini Plot, Allotment Letter Ref: 8711/494.
- e) Residential House, Oda, Allotment Letter Ref: 30657/IV.
- f) Agricultural Plot, 3711/111, Tarasaa.

viii) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 26th day of April 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Public Trustee**

..... **for the Protestor**

..... **Court Assistant**