REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 3 OF 2007

IN THE MATTER OF THE ESTATE OF JOSEPHAT OTANDE OKUKU (DECEASED)

JUDGMENT

1. The deceased herein died on 3rd May 1988. A letter from the Office of the Chief of Lubinu Location, dated 2nd November 2006, indicates that he was survived by three widows, Fridah Sheunda, Dinah Anyanga and Margaret Suto, and four sons and nine daughters. The children of Fridah Sheunda, the first wife, were listed as Mary Omusanga Shitanda, Margaret Anyonje Akhonya and Cyrillah Eunice Otande. The children of the second wife, Dinah Anyanga, were said to be Grace Makokha Nanjende, Nipher Chibole, Floridah Awino and Floice Angulu. The children of the third wife, Margaret Suto, were said to be Benson Bwakali, Joseph Onyolo, Peter Shisia, Shadrack Angara and Pamela Otande.

2. Representation to the estate was initiated in this cause on 4th January 2007 by the first widow, Fridah Sheunda. In her petition, she listed herself and her two co-widows, and their thirteen children, as the survivors of the deceased. She also listed E Wanga/Lubinu/315 and 397 as the assets that he died possessed of. Letters of administration intestate were made to the petitioner on 13th February 2007, and a grant was accordingly issued to her on 28th February 2007.

3. The application the subject of this judgement is the summons for confirmation of grant dated 2nd February 2008. It was brought at the instance of the administrator, Fridah Sheunda. She has identified herself and her co-widows as the survivors of the deceased together with their thirteen children. She proposed that the estate be shared between the widows and the thirteen children. The affidavit refers only to E Wanga/Lubinu/315, giving the impression that that was the only property proposed for distribution. I however, presume that there is an error, and that the first item relates to E Wanga/Lubinu/315 and the second time refers to E Wanga/Lubinu/397. She proposed that E Wanga/Lubinu/315 be subdivided into two equal portions, after which Portion A shall be given to Fridah Sheunda and her children, Mary Omusanga Shitanda, Margaret Anyonje Akhonya, Cyrilan Eunice and Hawa Esther, while Portion B would be given to Margaret Suto and her children – Benson Bwakali, joseph Onyolo, Peter Shisia, Shadrack Angara and Pamela Otande. E Wanga/Lubinu/397 was proposed to be given to Dina Anyonje and her children, Grace Makokha Nanjendo, Nipher Chibole, Floridah Awino and Floice Angulu.

4. The proposals in the application provoked the filing of an affidavit of protest by Joseph Otande, sworn on 9th June 2008. He stated that the administrator had in her application identified the rightful survivors of the deceased, but that he disagreed with her proposals on distribution. He averred that the deceased had written and left a valid will. He stated that in the said will, the deceased had shared out his two parcels of land. According to him, E Wanga/Lubinu/315, measuring 15.5 acres, was given by the deceased to Fridah Sheunda, Margaret Suto, Joseph Onyolo, Peter Shisia and Shadrack Benjamin at the ratios of 2:1:4:4:4. E Wanga/Lubinu/397 was allegedly given to Dina Anyanga and Benson Bwakali at the ratio of 2:4. He stated that Benson Bwakali moved into E Wanga/Lubinu/397 on the strength of the said will. After the deceased died, that the family allegedly met on 12th August 2006 and agreed on distribution of the property. He attached to his affidavit purported minutes of the said meeting. He averred that the widows were not entitled absolutely to a share in the estate as they should only enjoy a life interest. He made his own proposed mode of distribution. He said that out of E Wanga/Lubinu/315 Mary Omusanga should get 0,5 acres, Margaret Anyonje Akhonya 0.5 acres, Cyrillan Eunice 0.5 acres, Hawa Esther 0.5 acres, Joseph Onyolo 4.5 acres, Peter Shisia 4.5 acres, Shadrack Benjamin 4 acres, Pamela Otande 0.5 acres, with Frida Sheunda and Margaret Soto taking a life interest on the portions they occupy. He proposes that E Wanga/Lubinu/397 be given to Benson Bwakali 4.5 acres, Niffer Chibole 0.5 acres, Floice Angulu 0.5 acres, Dina Anyanga life interest on the portion she occupied, Floridah Awino 0.5 acres and Grace Makokha Nanjendo 0.5 acres.

5. The confirmation application was heard orally, and a ruling thereon was delivered on 30th June 2010. The court noted that one of the daughters of the administrator, Frida Sheunda, had died leaving behind two daughters. The name of the said daughter was not mentioned in the ruling. It was also noted that two daughters of the second widow, Dina Anyanga, had also died. The court also found that the deceased had not left any valid will for no evidence of its existence was adduced. In the end the court awarded E Wanga/Lubinu/315 to the first and third widows and their respective children; while E Wanga/Lubinu/397 was given to Benson Bwakali and Dina Anyanga, the second widow, on the basis that the said Benson Anyanga had settled on the said land. He was to get 2.5 acres while second widow and her children were to take the balance of 4 acres. It was further ordered that Benson Bwakali was not to share in E Wanga/Lubinu/315. A certificate of confirmation of grant in those terms was issued on 13th July 2010.

6. The sons of the deceased thereafter mounted a review application on the basis that they had discovered new evidence. Their plea was acceded to on 22nd February 2011, when it was directed that the summons for confirmation of grant be heard afresh. The fresh hearing

happened on 21st June 2018, 25th June 2018 and 18th July 2018.

7. The protestor went first. His first witness was Anyanga Dinah Otande, the second wife of the deceased and one of the two surviving widows. She stated that the deceased had explained how he wanted the land shared out before he died. The sons were to get four acres each, with the remaining land being shared out between the widows with each taking two acres. She testified that that was done on the ground, with each side farming on their respective portions. The transfers were not done so the beneficiaries did not get title deeds or land reference numbers. She said that she wanted the *status quo* to remain. She said that the subdivision was done by the late Joel Shisia and Wilson Juma. During cross-examination she stated that the deceased had not made any demarcations on the ground. She said that only Margaret Akhonya, a daughter from the first house was complaining. She explained that she, the witness, had five daughters, two of who died. She had no sons, and he daughters were married. She said that her farm was six and a half acres in size. A son from the third house was given by his father four acres out of her land, leaving her with two and half acres. She said that her daughters were not getting a share from the estate, and that they were not claiming anything. She stated that the daughters from the first wife should get their share from the land allotted to the first house. On reexamination, she said that Margaret Akhonya was the only daughter utilizing estate property. She said that the son who lives on her side of the estate, Benson Bwakali, had a residence there.

8. The protestor's second witness was Margaret Suto Otande, the third wife of the deceased and the second surviving spouse. She said that before the deceased died he had explained how he wanted his property shared out. According to her, the deceased had said that the second wife, Dina Anyanga, was to live on Wanga/Lubinu/397 with Benson Bwakali, who was a son of the witness. Dina was allotted two acres out Wanga/Lubinu/397 while Benson got four acres. He also allegedly said that the other two wives, Fridah and Margaret Suto, and the remaining three sons – Joseph, Peter and Shadrack - were to live on Wanga/Lubinu/315. The three sons got four acres each out of Wanga/Lubinu/315 while she got one acre and Fridah Sheunda got two acres. The said wishes of the deceased were allegedly carried out in 2014. Benson moved into Wanga/Lubinu/397 which he occupied with the second wife of the deceased and lives to date. The sons have allegedly developed their respective portions where they have put up permanent houses. According to her, none of the daughters of the deceased were claiming anything from the estate. During cross-examination, she stated that Benson Bwakali was her biological son, that he was in Form Three when his father died and that he got four acres out of Wanga/Lubinu/397. She said that her other three sons got four acres each in the other parcel of land. She said that all her sons got a total of sixteen acres and are settled of their respective portions. She said that she also got one acre out of Wanga/Lubinu/315, and that her house therefore had seventeen acres. She insisted that it was not her who had come up with that arrangement. According to her the deceased had reduced his wishes into writing in a document that she said was in the custody of Margaret Akhonya. She stated that the deceased had not shared out the land on the ground. According to her the daughters ought to cultivate on the farms given to their mothers. She said that her daughter ought not cultivate her farm given that the daughter had her own farm. She denied being selfish, saying that she was merely following the rules laid down by her late husband. On reexamination, she said that Margaret Akhonya had declined to surrender the document where the deceased had distributed his property.

9. The protestor called Wilson Chuma Omulaka as his third witness. He was the deceased's nephew. He said that the deceased had told him how he wanted his farm to be distributed. He said that that happened at the deceased's home, and it involved just the two of them. He allegedly told him that he had two farms occupying two ridges. He wanted one son to occupy the farm on one ridge, leaving the other sons on the other ridge. One farm was fifteen acres in size, while the other was six and half acres. He said that he was the one who shared out the land, assisted by his father Shisia. That he did after the deceased died. According to him they shared out the land following the deceased's wishes. He said that the family lived on the land as shared out. During cross-examination, he said that eleven children were alive as at the date he testified. He said that Benson Bwakali was still a minor when his father died, and had not yet put up a house. He said that he and the deceased were alone when the deceased told him about how he wanted his property distributed. He said that what was said by the deceased was not reduced into writing. The deceased did not talk about it later, and the witness could not say how soon thereafter the deceased died, only saying that he ailed for a long time. He said that when he shared out the land they marked the boundaries with plants. He said that all the widows and the children were present during the exercise. The daughters were not given a share of the land. He said that the daughters were not entitled to anything from the estate, more so those whose mothers did not begat sons. During reexamination, he said that he later heard that the deceased had his wishes reduced into writing with one of his daughters.

10. Benson Bwakali Otande followed as the next witness for the protestor. He testified that he was a son of the deceased, and that he was sixteen years of age when the deceased died. He confirmed the evidence of the other witnesses on the manner of the sharing out of the two parcels of land that the deceased died possessed of. He was given four acres out of six and half acres of Wanga/Lubinu/397, and he resided on the land with his stepmother, Dina Anyanga. His brothers got four acres of land from Wanga/Lubinu/315 and lived there with the other two widows of the deceased. He stated that the land was shared out as per the wishes of the deceased. He claimed to have been present when the deceased expressed his wishes. They were allegedly reduced into writing by Grace Nanjero from the first house. That happened in 1988, Margaret Akhonya alleged took custody of the document. The elders then subsequently sat and implemented the wishes on 12th August 2006. He asserted that the elders were implementing the will of the deceased. He said that the family agreed with the wishes of the deceased and signed the minutes of the said meeting. He said that Margaret Akhonya was claiming seven and half acres, was tilling the two acres allotted to her mother and he had no objection to her being given the two acres. He urged the court to uphold the will of the deceased. During cross-examination, he stated that the minutes he proposed to put in evidence were made after the distribution. He said that those who signed the documents were the three widows and the four sons. According to him Margaret Akhonya was not among the signatories.

11. Grace Makokha Nanjero came next. She was one of the daughters of the deceased. She testified that before the deceased died he had called a meeting of the adults sometime in 1987 to attempt to share out his property. She said she Margaret Akhonya and Benson Otande attended the meeting. Benson Otande was said to have been aged sixteen then. She confirmed the evidence of the other witnesses, called by the protestor, on how the deceased alleged shared out his property amongst his sons and widows. She testified that the wishes of the deceased were reduced into writing by herself, the document was read out to those present, who thereafter executed the same. The document was then given to Margaret Akhonya for safekeeping. She said that she was not interested in getting a share of the land as she was married, was concentrating on her marriage and had left the property to her brothers. The wishes of the deceased were allegedly executed on 12th August 2006, in an event attended by the widows and children of the deceased. She said that Margaret Akhonya's claim to her mother's share of the land was inconsistent with the wishes of the deceased. During cross-examination, she said that she was s daughter of the second wife, Dina Anyanga, who lived on Wanga/Lubinu/397 with Benson Bwakali. She said she had no claim to the land, and Benson Bwakali was entitled to it, including the portion that her mother was tilling. She said that he was taking care of her mother, and was therefore entitled to her share. The deceased allegedly made his will or expressed his wishes in 1987 before he died in 1988. She confirmed that the will had not been presented to court.

12. The protestor's next witness was Pamela Mercy Otande, a daughter from the third house. Her testimony was largely that she was not interested in taking a share in the estate. She alleged that the deceased had shared out his property before death, but confirmed that she was not at the meeting where that happened. She said she had her own land, and was satisfied with it and did not wish to go against the will of the deceased.

13. Saidi Ndombi Chitechi was the last witness on the protestor's side. His evidence related to the events of 12th August 2006. He testified that the clan had been summoned that day by Margaret Akhonya to execute the will of the deceased. He was the one who recorded the proceedings, which were chaired by Joel Shisia Mwimali. They discussed how the estate was to be distributed. After that they went to the ground and parceled out the land according to the will of the deceased. The original minutes that he prepared and signed were allegedly taken away by the village headman, Ibrahim Walumbe, who represented the government. During cross-examination, he stated that the meeting of 12th August 2006 was by the clan summoned by Margaret Akhonya for the purpose of executing the will of the deceased. He stated that it was the family that informed the meeting of the contents of the alleged will, whose contents were as per the case presented by the protestor. He stated that Margaret and her sister Grace were the only persons aware of the will, and no one reacted to the statement that Margaret made. Everybody present was satisfied and they went ahead and signed the documents.

14. The administrator's case opened with Margaret Anyonje Akhonya on the stand. She stated that as a daughter she expected to be given a share in the estate. She proposed that the property be shared out equally amongst the children. She said Wanga/Lubinu/397 belonged to the second house and proposed that the same be shared amongst the children in that house, plus the son of the deceased who has settled there. She denied the version of the events of 12th August 2006 as presented by the protestor. She testified that she did not summon the meeting, instead it was Benson Bwakali who had invited her to the meeting. She said that she did not attend the meeting to the end for she left early after she was summoned back to her place of work. She alleged that it was the stepfather of the sons who chaired the meeting. She said that she signed a document before she left. She asserted that the deceased did not leave a will. During cross-examination, she stated that she did not attend the meeting, saying that she only sat through the prayers before she left. She was asked to sign a document, which she did and that was before the meeting started. She said the deceased had not left a will and that she did not see any will. She further stated that the demarcation was done after the meeting and that she did not agree with the demarcation. She confirmed that her brothers were living on the portions allocated to them after the meeting. She said that the twenty-two acres ought to be shared out equally amongst the eleven survivors who were willing to share in the property. She confirmed that she was the one who had been utilizing the two acres allotted to her mother at that meeting.

15. Jescah Omusanga Mbayi testified next. She was a daughter of the deceased from the first house. She said that would have liked the larger farm to be shared out between the first house and the third house equally. She said that was not opposed to all the children getting a share. During cross-examination, she stated that the second wife was on the smaller farm with Benson Otande from the third house. She proposed that the second farm ought to be shared out between the second wife of the deceased and Benson. She stated that she had attended the meeting of 12th August 2006, which was a peace meeting called to share the land. She stated that Margaret just signed the attendance form and left. She alleged that the sons brought in a man who had married their mother to chair the meeting. They were not able to agree, but the chairman nevertheless went ahead and shared out the land. The sons went ahead and developed the portions allotted to them, with one building a permanent house.

16. Ibrahim Oluyayi Walumbe followed. He was the village elder for the area where the two parcels of land were situated. He confirmed attending the meeting of 12th August 2006 on the instructions of the area Assistant Chief, Fred Osundwa Shillingi. He confirmed that the meeting was chaired by Joel Mwimali, it discussed the two farms belonging to the deceased. Everything went well but the meeting did not make any resolutions. He was give the original of the minutes which he took to the Assistant Chief. The parties disagreed and the meeting ended. He said that the point of the disagreement was that the daughters wanted a share in the estate, which was opposed by the sons. He identified the daughters who wanted a share as Margaret, Mary and Celina. In reexamination, he stated that he only signed the attendance sheet. He stated that they did not distribute the lands.

17. Cyrillah Eunice Otande testified as an independent witness. She was a daughter of the deceased from the first house. She stated that the deceased had left a will in the custody of Margaret Otande, which had distributed the property in the terms that had been spelt out in the protestor's case. Subsequently, the family called clansmen in 2006, and they shared out the land in accordance with the will. She said that she was not interested in her father's land as she had her own property. During cross-examination, she said that it was Margaret who had told her about the will, she did not see it herself.

18. At the close of the oral hearing, the parties were directed to file written submissions. There has been compliance. I have read through the written submissions lodged in court by both sides and I have noted the arguments made.

19. I conducted the confirmation and protest proceedings on the basis of the summons dated 2nd February 2008. The applicant in that application was the sole administrator Fridah Sheunda. In the course of preparing the judgement herein, it has come to my notice that that Frida Sheunda passed away and was substituted as administrator by Margaret Anyonje Akhonya, Anyanga Dinah Otande and Margaret Suto Otande, and letters of administration intestate were accordingly made to them on 19th April 2017 and a grant issued to them on 5th October 2017. Two of the administrators appointed on 19th April 2017 filed a summons for confirmation of their grant, dated 8th November 2017. The record indicates that the application that fixed for hearing on 21st June 2018 was that dated 2nd February 2008. On the appointed hearing date the parties agreed to withdraw the application dated 8th November 2017, and proceed with that dated 2nd February 2008, even though the same was founded on a grant that had been impliedly revoked following the appointment of fresh administrators on 19th April 2017. The ideal situation should have been that it was the application dated 2nd February 2008 that was withdrawn so that the parties proceeded with the letter application dated 8th November 2017. I shall proceed to determine the matter before me on the basis that the grant up for confirmation is the one made on 19th April 2017 rather than the earlier one of 13th February 2007, presuming that all the other factors remained constant.

20. The matter before me is for confirmation of the grant herein. Confirmation of grants is provided for under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40 of the Probate and Administration Rules. At confirmation the court is expected to address two key issues. The first relates to representation. The court should consider whether the administrators had been properly appointed,

if satisfied about that it then proceeds to confirm them as administrators, essentially paving way for them to go ahead and distribute the estate. The court also considers whether the administrators have gone about the business of administering the estate in accordance with the law. If the court is not satisfied that they have discharged their duties as expected, it may then proceed under section 71(2)(b), by appointing someone else to take over the administration of the estate. In the proceedings conducted before me with regard to confirmation of the grant before me, no issues were raised with respect to the propriety of the process leading upto the appointment of the three administrators, nor concerning the manner in which they had proceeded to manage the estate. The three administrators are therefore available for confirmation to continue in office as administrators.

21. The second issue is on the distribution of the estate. Where the deceased died testate, and a will has been placed before the court, distribution shall be in accordance with the will, and the court ought to direct that the estate be distributed as per the terms of the will. Where the deceased died intestate, the administrators would have to propose distribution of the estate, which proposed distribution would then be confirmed or approved by the court, subject to the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules. The proviso states as follows –

> *'Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.'*

Rule 40(4) states as follows –

> *'Where the deceased person has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.'*

22. The effect of the two provisions above is that the court will have to be satisfied, before it confirms a grant in intestacy, that all the persons entitled to a share in the estate have been properly identified and that the shares in the estate to which they are entitled have also been identified, so that after confirmation the certificate of confirmation of grant would reflect all such persons and the shares allotted to them.

23. To identify and ascertain the persons entitled in intestacy to shares in the estate of an intestate, and to work out their respective shares, the administrators must have recourse, in cases where the intestate died after the Law of Succession Act had come into force, to Part V of the Act, which provides for disposition of intestate estates, and in particular sections 35, 36, 38, 39 and 40 thereof. Section 35 provides for situations where the intestate is survived by one spouse and several children, while section 36 provides for instances where the intestate is survived by a spouse but no children. Section 38 covers cases where the intestate leaves behind a child or children but no spouse. Section 39 regulates distribution where the deceased is not survived by a nucleus family, that is to say a spouse or children. Section 40 caters for distribution where the deceased had married more than one wife.

24. In the instant case, when representation was sought by the petitioner, it was on the basis that the deceased had died intestate. The petition lodged herein on 4th January 2007 was for letters of administration, and the grant made herein on 13th February 2007 and issued on 28th February 2007 was for letters of administration intestate. When the administrator appointed in the grant of 2007 died, she was substituted in 2017 and the grant made to the new administrators on 19th April 2017 and issued on 5th October 2017 was for letters of administration intestate.

25. It would appear to me from the material before me that there is no dispute as to the persons who survived the deceased. That would suggest that the administrators have satisfied the court that they have properly ascertained and identified the persons who survived the deceased. It is agreed that the deceased died a polygamist having married three times. It is also agreed that he begat several children with the three wives. The names of the three wives were Fridah Sheunda, Dina Anyanga and Margaret Suto. The first wife, Fridah Sheunda has since died. The first two wives bore daughters only, while the third wife had four sons and a daughter. In the petition lodged herein. In the petition and the summons for confirmation of grant the deceased was said to have had the thirteen children listed in paragraph 1 of this judgment. At the conclusion of the oral hearing eleven of the thirteen children were said to be alive, meaning that two had died. The said two were not identified. No certificates of death were placed before me as evidence of their death. This is critical as it would have a bearing on whether or not their estates would be entitled to a share in the estate. Secondly, it was not disclosed whether the two who died had been survived by children, for such children, being grandchildren of the deceased, would be entitled to a share in the estate by virtue of section 41 of the Law of Succession Act. The court is being invited to proceed as if the deceased had been survived by eleven children rather than the thirteen initially mentioned in the petition.

26. The dispute before me appears to turn largely on the question of distribution. In other words, the question is as to how the estate ought to be distributed amongst the individuals that the administrators have identified as the survivors of the deceased. The summons that is the basis for this judgement appears to proceed on the basis that the deceased died intestate, while the protest is mounted on the claim that the deceased had made a will and that therefore meant that the estate ought to be distributed in accordance with that will.

27. The starting point is that the cause was commenced on the basis the deceased had died intestate, and a grant of letters of administration intestate was made. None of the survivors of the deceased came forward to object on the basis that the deceased had died testate, and to place before the court any alleged will. When the application dated 2nd February 2008 was lodged herein, an affidavit of protest was filed herein on 10th June 2008, sworn on 9th June 2008, where it was alleged that the deceased had written and left a will. Curiously, the deponent of that will did not attach a copy of the alleged will. When the administrator applicant in the application dated 2nd February 2008 died, she was substituted on 19th April 2017 by consent of the parties, and the grant issued on 5th October 2017 was a grant of letters of administration intestate. Two of the administrators appointed on 19th April 2017, and who testified in these protest proceedings as witnesses for the protestor, moved the court by the summons dated 8th November 2017, which was withdrawn on 21st June 2018. They sought by it to have the court confirm their grant of letters of administration intestate. At the hearing of the protest, the protestors case was that the deceased had made a will but none was placed before me. It was alleged that it had been in the custody of Margaret Akhonya, yet when the said Margaret testified she denied that the deceased had made a will and that she had custody of any will of the deceased. There is nothing on record

therefore to support the contention that the deceased ever made a will. The distribution of the estate of the deceased therefore cannot be founded on a will that has not been proved.

28. Having concluded that there is no proof that the deceased ever made a will, it follows that the deceased died intestate and his estate ought to be distributed in accord with that law. The deceased died in 1988, after the Law of Succession Act had come into force in 1981. Distribution must therefore accord with the Law of Succession Act. Part V of the Law of Succession Act provides for distribution in intestacy for estates of persons who died after the Act came into force.

29. The deceased died a polygamist, and therefore his estate must be distributed in accordance with section 40 of the Act, which provides 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.'*

30. At the oral hearing there were clear gender overtones in the case presented by the protestor. The position articulated was that daughters are not entitled to a share in the estate of a deceased person. No statutory provision nor case law was cited to support that proposition. Part V provides for distribution of an intestate's estate amongst his or her children equally. There is no provision in the Law of Succession Act which defines child or children as referring only to those of the male gender. I am not aware of any judicial pronouncement where a superior court as interpreted the terms 'child' and 'children', as used in the Act, as referring only to the male gender. The two must be given their ordinary everyday meaning, that 'child' and 'children' are gender-neutral, they can refer to persons of either gender. Therefore, when the law talks of children being entitled to equal shares in the estate it would mean that children of either gender are entitled to equal shares in the estate.

31. The position articulated by the protestors reflects the customary law position. The deceased herein died after the Law of Succession Act became operational and therefore the customary law position does not apply to his estate. Section 2(1) of the Act ousted the application of customary law to estates of person dying after the Act came into force, save for estates of persons exempted by sections 32 and 33 of the Act. It has not been demonstrated that the area that the deceased hailed from fell within the exemption.

32. Going by the prescriptions of section 40 of the Act, the estate of a polygamist ought to be distributed amongst the houses of the deceased proportionate to the number of survivors in each house, both the children and the widows. The total number of survivors is put at eleven, so the estate should be split into eleven units. However, I note that the family agreed that the deceased had two assets. Two houses occupied one, Wanga/Lubinu/315, while the other house occupies Wanga/Lubinu/397. They are also agreed that distribution should follow those lines. So Wanga/Lubinu/315 should be shared out between between the first house and the third house, while the second house shall have Wanga/Lubinu/397. One of the sons in the third house is said to have moved into Wanga/Lubinu/ 397 and put up a residence there, his share should come out of Wanga/Lubinu/397 and not Wanga/Lubinu/315.

33. I shall accordingly make the following final orders

> **(a) That I declare that the deceased was survived by three houses, with the following survivors- (i) House No. 1 – Mary Omusanga, Margaret Akhonya, Cyrillah Otande and Hawa Otande (ii) House No. 2 – Dinah Anyanga Otande, Grace Makokha, Nipher Chibole, Floridah Awino and Floice Angulu, including Benson Bwakali (iii) House No 3 – Margaret Otande, Pamela Otande, Joseph Onyolo, Peter Shisia and Shadrack Otande, excluding Benson Bwakali.**
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> **(b) That I declare that the property that the deceased has been proven to have died possessed of is E Wanga/Lubinu/315 and E Wanga/Lubinu/397;**
>
> **(c) That the said property shall be shall be shared out as follows –**
>
> > **(i) E Wanga/Lubinu/315 to House No 1 and House No 3 in the ratio of 4:5,**
> >
> > **(ii) E Wanga/Lubinu/397 to House No 2;**
>
> **(d) That upon the sharing in terms of (c) above, the landed property shall devolve into the names of the two widows during lifetime, and thereafter to the children in each house in equal shares in accordance with section 35 of the Law of Succession Act;**
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> **(e) That any child or beneficiary who is not interested in the share allotted to them by this judgement shall give it to whoever he or she shall please amongst the survivors or dispose of it as he or she shall please;**
>
> **(f) That the grant of letters of administration intestate made on 19th April 2017 and issued on 5th October 2017 is hereby confirmed in those terms;**
>
> **(g) That a certificate of confirmation of grant shall issue to the administrators in those terms;**

(h) That each party shall bear their own costs; and

(i) Any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April 2019

W. MUSYOKA

JUDGE