



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

SUCCESSION CAUSE NO. 8 OF 2018

IN THE ESTATE OF RICHARD CHURKO STEPHEN 'alias' RICHARD CHURKO GUYO – (DECEASED)

GRACE WAMBUI NGUGI1st OBJECTOR/PLAINTIFF

NANCY SHALLLO CHURKO.....2nd OBJECTOR

COLLINS GUYO STEPHEN.....3rd OBJECTOR

VERSUS

FATUMA GALGALO GUYOPETITIONER/DEFENDANT

AND

ZACHARIA GUYO GUMI.....INTERESTED PARTY

JUDGEMENT

The late Richard Churko Stephen alias Richard Churko Guyo died on the 27th July, 2016 at Nairobi West Hospital in Nairobi. The petitioner, Fatuma Galgalo Jillo, filed Succession Cause No.6 of 2017 before the Marsabit Principal Magistrate's Court and was issued with a Grant of Letters of Administration Intestate on the 18th of September, 2017. The petitioner filed an application dated 12th March 2018 seeking to have the grant confirmed. The Petition was initially filed before the Magistrate's Court but was brought to the High Court. **Grace Wambui Ngugi** and her two children filed an objection for the confirmation of the grant on 8.5.2018. Similarly, **Zakaria Guyo Ngumi** filed his protest against the confirmation of the grant on the same date of 8.5.2018. Before the petition was filed, Grace Wambui Ngugi had filed citation number 8 of 2016 before the Principal Magistrate's Court.

On 15.10.2018 the Court gave directions that the Objection was to be heard by way of oral evidence. The objectors became the plaintiffs while the petitioner became the defendant. Zakaria became an interested party.

PLAINTIFF'S CASE

PW1 Grace Wambui Ngugi informed the Court that she is a nurse by profession and is employed by the Kenyan Government. She knew the deceased in 1981 when she was a student nurse at Kisii Medical college while the deceased was doing his innership at Kisii hospital. The two got married in 1985 under the Burji/kikuyu traditions. They got their first born child Stephen Collins Ngugi in July 1986. In 1990 they got their second born child Nancy Shallo Churko. She denied that she had separated with the deceased. In 1989 they came to live in Marsabit where the deceased was working at Marsabit General hospital. She was also working at the same hospital. In 1997 she was transferred to the Kenya Medical Training College Nakuru. The deceased also went to the same college for further studies. By the time of his death the deceased was a County Clinical officer in Marsabit County. It is her evidence that the deceased did not write any **Will** and most of the time he was in hospital. He could not even walk or climb stairs.

Before 8th July 2016 the deceased had blood transfusion and it is her son Stephen and her brother's son who donated the blood. The deceased was admitted in hospital on 10.7.2016. He was sick and confused. The deceased educated his two children jointly with the plaintiff up to the University level. The plaintiff was now based in Naivasha and used to visit the deceased in hospital. It is her evidence that while living in Marsabit there was balloting for plots in 1990. The deceased went to the DC's office and picked the ballot for plot No.11969/174. The deceased also bought plot No.213 alone in Marsabit. The two also jointly acquired another plot. There is a plot at mountain area which belongs to the deceased's family. The deceased had a clinic in Marsabit town under the name of Mwangaza clinic and Chemist. The defendant sold the clinic.

According to the plaintiff there is death gratuity that was paid to the public trustee in Embu. The defendant wanted to get that gratuity but she was told to obtain a grant from the Court. It is her prayer that both her family and that of the defendant benefit from the deceased's estate. The customary marriage between her and the deceased was registered at the Kisii District officer's office. It is her further evidence that the defendant's children are below 18 years. The defendant has sold the clinic. It was alleged that she is deceased yet she is alive. She was with the deceased at Nakuru KMTC in 1997. While the deceased was sick and hospitalized, her two children together with the deceased's two brothers Zakaria and Kamale and their wives used to visit him. The deceased was an eye specialist. Mwangaza clinic was started around 2012.

PW2 Nancy Shallo Churko testified that she is the deceased's daughter and is 28 years old. Her brother is Stephen Guyo Collins. She went to Naivasha central Primary School, Kerugoya girls high school and Egerton University. It is her late father who paid her fees together with her mother. She knows that her father had another family. By 2016 she was working in Naivasha. She used to visit her father in hospital. The deceased was forgetful and confused at times. He was bed ridden and could not have written the Will. She was born in Marsabit.

DEFENCE CASE

On her part the defendant, **Fatuma Galgalo Guyo** testified that she got married to the deceased in 1997. The deceased was working at Marsabit hospital. They had three children namely: **Honey Richard, Madina Richard** and **Guyo Richard**. She produced an affidavit of marriage sworn by the deceased on 4.7.2007. Before 2016 the deceased became sick. The deceased went for a seminar in 2016 and became sick. He called her to take him to hospital. She took the deceased to Nairobi West hospital on Saturday 1.7.2016. She was the only one with the deceased at the hospital. The deceased's kidneys had failed. The deceased was discharged but the following morning he became sick and she returned him to hospital. He was hospitalized until his death on 27.7.2016. It is her evidence that the deceased wrote a will and gave his property to her and her three children. She does not know the objectors and she has never seen them in Marsabit. The deceased left a plot in town and another land in his rural home. Plot No. 11969/174 was distributed to the deceased by the late Dr. Bonaya Godana. This was over 20 years ago. Her wedding with the deceased was done under Burji customs. Two of her brothers in law namely **Zakaria** and **Husein** attended the wedding and photographs were taken during the wedding. The deceased's mother was alive and she attended the wedding. Her uncle **George Yattan Diba** received the dowry. After his death the body was taken to Marsabit hospital staff quarters where they used to live. The objector and her children did not attend the burial.

The defendant further testified that Mwangaza clinic belonged to her late husband and herself. Due to the deceased's illness the clinic was closed during his life time. The medicine in the chemist got spoilt. She denied selling the clinic. She denied making any allegation that the plaintiff is deceased. The deceased and his two brothers **Kamale** and **Zakaria** were not in good terms. Zakaria has disturbed her for sometime. He stopped the pension money alleging that she is not the deceased's wife. The deceased's workmate in Marsabit hospital contributed money but Zakaria took it. She is a Muslim but the deceased was a Christian. The deceased was from the Burji community while she is from the Gabra community. She was brought up by her uncle. Although the affidavit of marriage indicate that they were married in 1999 it is her evidence that they got married in 1997. On 1.6.2016 the deceased went for a seminar in Nakuru and became sick. He was admitted at Nairobi west hospital and the bill was about Ksh.1.5million. The NHIF paid the bill through the deceased's NHIF card. They were staying in a guest house in Eastleigh, Nairobi and went to the hospital before the deceased was admitted. The deceased was discharged on a Friday and was returned to hospital the following week on a Tuesday. She is illiterate but can recall entering an advocate's office in Nairobi where the WILL was prepared. She was not aware of the other family. The deceased was buried under Christian rituals. The body was taken to ACK Church Marsabit. She attended the mass. The deceased also owned plot No. 213. She was present when the deceased signed the Will. She did not notify the deceased's family members about the Will. Plot no.213 initially belonged to her mother in law. They left the plot to her brothers in law and she does not need anything from that plot although she included it in the succession cause. Her brother in law Zakaria was present when the deceased's body was released from the hospital.

DW2 Sode Walabo testified that he knows all the parties. He inherited the deceased's mother and married her in 1964. The deceased's mother had three children namely: the **deceased, Zakaria** alias Sungura and **Kamale**. The deceased married **Bokayo** alias **Fatuma(DW1)**. He is the one who took the elders to the defendant's parents. The dowry included a sum of Ksh.20,000/=. He does not know Grace Wambui and has never seen her. The defendant and the deceased got three children together. The deceased's father married their mother in 1954 but they separated in 1958. By then Zakaria was two years old. The deceased was the second born. There was a first born who was three years old called **Ngumi** who is also deceased. **Zakaria** is the third born and **Kamale** is the fourth born. He denied that he separated with the deceased's mother. He had six children with the deceased's mother.

DW3 Joseph Yatani Diba testified that the defendant is her brother's daughter. She was given to him while she was five years old and brought her up until she got married to the deceased. The deceased paid dowry to him including Ksh.20,000/=. At that time Ksh.20,000/- was a lot of money and he personally returned Ksh.10,000/=. The deceased and the defendant had three children namely: **Honey, Madina** and **Guyo**. The deceased was like his son. The deceased also educated his own (DW3) son **Maduka Yattani** up to the University. By the time the deceased died DW3's son was a second year student at the University. He used to talk several times with the deceased and at no time did he tell him that he had married another woman. He is aware that Zakaria Guyo is the deceased's brother. He also knows Kamale and Hussein as the deceased's brothers. The deceased's mother was present during the wedding with the defendant. Whenever the deceased and his wife had problems he would settle the dispute together with the deceased's mother (**mama Shallo**). The deceased and the defendant opened a clinic which had a chemist. The deceased was an Eye Specialist. The clinic and the chemist is now closed. The deceased had a commercial plot that was leased out during his life time. The defendant is also known as Bokayo.

DW4 Hussein Sode Walabo is a step brother to the deceased and DW 2's son with the deceased's mother. It is his evidence that he lives on plot No.213 Shauri Yako village. The plot belongs to their late mother. The deceased was their first born. Zakaria is the second born and Kamale is the third born. He is the seventh born. Fatuma is the deceased's wife and he was present during the wedding. He does not know anything about the plaintiff. The deceased had three children with Fatuma. The deceased never told him that he had another wife. The deceased was a Senior Clinical Officer. Fatuma and the deceased had a clinic but it is now closed.

DW5 Rosemary Wato Galgalo used to work with the deceased at the Marsabit hospital. The deceased used to be her neighbor at the hospital staff quarters. He knew the deceased for over 20 years. In 1999 the deceased married **Fatuma**. The two got three children. **Fatuma** is also called **Bokayo**. The deceased became sick and Fatuma was attending to him. All the time she lived as a neighbour to the

deceased she never saw another wife. The deceased was like a bachelor at the staff quarters before he married Fatuma. The deceased had a plot in town but he had leased it out. The deceased had a clinic and a chemist but it is no longer operating. He saw a document which purported to be a **Will** indicating that the next of kin to the deceased is Zakaria Guyo. She knew the deceased's signature since at one time she applied for a loan at Afya Sacco and the deceased signed her loan form. The signature on the document indicating that Zakaria is the next of kin is a forgery.

DW6 Guyo Diba lives in Majengo within Marsabit township. It is his evidence that Fatuma is the deceased's wife. The two lived at the Marsabit hospital staff quarters. Fatuma is his relative and he was present during the marriage between the deceased and Fatuma. He was present when the deceased's body was taken to their staff quarters house. He is a teacher by profession. When Fatuma got married she was above 18 years old. Fatuma and the deceased had a commercial plot along the Marsabit – Moyale highway. They also had a clinic. There is a hotel on the commercial plot.

DW7 Isako Adan works at the Marsabit General hospital. He knew the deceased as he also lives at the hospital quarters. The deceased was his immediate boss. He knew the defendant as the deceased's wife. He knew the defendant and the deceased from 2006 when he went to work at the hospital. The deceased and Fatuma had three children and he knows them as Honey, Madina and Guyo. The deceased's body was brought by an ambulance upto the Marsabit hospital staff quarters. He did not attend the burial.

INTERESTED PARTY'S CASE

DW8 ZAKARIA GUYO GUMI (HSC) is the interested party. He is the deceased's younger brother. He called five other witnesses in support of his case. His brother died on 27.3.2017 and he was involved from payment of the hospital bill, preservation of the body and the burial in Marsabit. He obtained the burial permit. It is his evidence that plot **number 213**, Marsabit belonged to their late mother. He has two step sisters and one step brother namely Hussein Sode (DW4), Yate Sode and Amina Sode. His late mother got plot number 213 without the input of his step father, Sode Walabo (DW2). Their father died in 1974 and used to work at Marsabit hospital and later at the Moyale sub-district hospital.

DW8 further testified that before the deceased married Fatuma Jillo, he had a chemist and a dispensary. At that time the deceased was married to Grace Wambui Ngugi. Grace is the mother of Nancy (PW2) and Richard. Fatuma and the deceased did not solemnize their marriage in a church or Mosque. They just lived together. The two had one child, Honey. There is plot number 40, Mountain area in Marsabit which belonged to his grandfather. Fatuma has built a house on plot number 1424 in Jirime, Marsabit. The deceased bought a plot and he personally assisted him with Ksh.400,000. The plot is now fenced. He is not claiming the plot but needs a refund of his Ksh.400,000. The deceased applied for plot number 11696/174 in the 1990s while living with the plaintiff. Together with the deceased and their mother, they built 21 stalls on plot number 11696/174. Their mother was against the deceased marrying Fatuma. Fatuma started collecting rent from the stalls and he raised objection. She should also surrender the proceeds from the sale of the chemist. He checked the deceased's bank accounts after his death. There was Ksh.17,000 at the Marsabit Kenya Commercial bank and Kshs.20,000 at Equity Bank. The defendant took Ksh.200,000 from a micro finance. The deceased told them to build a monument for their mother on his one acre share of plot number 40. The records at Afya house indicate that the plaintiff, Grace Wambui Ngugi and her children are the next of Kin. The money was sent to the Public Trustee in Embu. At Afya Sacco, the records indicate that he (DW8) is the next of kin. It is his prayers that the plaintiff, her children and Honey be the beneficiaries. He does not want anything from his brother's estate.

According to the interested party, the affidavit of marriage between the deceased and Fatuma is a fraud. The deceased made an oral Will on 26.7.2016 and said his child Honey should inherit him. He is not aware of the written Will. Fatuma did not make any contribution during the purchase of the properties by the deceased. The chemist had a debt of about Ksh.500,000. He swore an affidavit on 16.2.2017 but he disowns it. The plaintiff was legally married to the deceased.

DW9 JOSEPH JACOB LIO is a resident of Marsabit. The deceased was his cousin. The deceased had two wives Fatuma and Grace. Fatuma had three children. Grace was the first wife. Fatuma was not legally married but they were living as husband and wife. He is not aware of any Will left by the deceased. There is no marriage certificate for each wife.

DW10 DAUDI JACOB GACHE is a Marsabit resident. He used to work with Kenya Police as a civilian technician. He knew the deceased as an optician. He knew the deceased was married to the defendant (Bokayo). He has retired and is a village elder. The deceased used to live at the hospital with Bokayo. He heard that initially the deceased had another wife who left.

DW11 MATAAYO WACHE SOSO went to Marsabit in 2010. He used to be a pastor working in a Church in Marsabit. He heard that before marrying Fatuma the deceased had another wife who left. The first wife had two children. Fatuma is also called Bokayo. Bokayo was present during the burial. He did not attend the burial but led one fellowship before the date of the burial. Bokayo also used to attend Church but he later heard that she is a Muslim. He did not meet the plaintiff.

DW12 GODANA ARERO knew the deceased. He knew the deceased's family owned plot number 40 and 2013. He is their neighbor at Shauri Yako village. He knows Sode Walabo (DW2) who used to be a chief before. He heard that Sode Walabo married the deceased's mother, Lydia Shallo. Lydia got a plot at Shauri Yako

DW13 BARAKO KATELO knew the deceased's parents. The deceased's mother used to live at Dakabaricha but later got land at Shauri yako and moved there. The deceased's mother was called Lydia Shallo. Her first husband was Gumi Guyo who also used to work at Marsabit hospital before he was transferred to Moyale. After Gumi Guyo's death, Lydia got married to Sode.

PLAINTIFF'S SUBMISSIONS

Mr. Kinyanjui appeared for the plaintiffs/objectors. Counsel filed written submissions and supplementary submissions. Counsel submit that the deceased was survived by the 1st objector who was the legal wife and his two children who are the other objectors. The plaintiff produced

birth certificates for her children which proves that they are the deceased's children. It is further submitted that the deceased was admitted in hospital on 10/7/2016 and remained there until his death on 27/7/2016. Therefore, the deceased lacked mental capacity to make a **Will** as he was in a state of dementia. Section 5 of the Law of Succession Act, Cap 160 provides that, a person making a **Will** should be of sound mind. It is further submitted that the plaintiff produced exhibit 6 which indicates that the deceased's health deteriorated to the extent that he was taken to Intensive Care Unit. Mr. Kinyanjui also contend that the petitioner/defendant failed to prove her alleged marriage. She does not know the year the marriage took place, the place of cohabitation, whether Marsabit or elsewhere, amount of dowry paid, the number of children she had with the deceased, the asset or properties if any she had with the deceased and the time they were acquired. The plaintiff maintains that the deceased's assets are:

1. Plot no 11969/74 in Marsabit

2. Plot no214, Marsabit

3. Account no. 1102143219 at KCB bank

4. Share of ancestral land plot no 40 mountain/Marsabit.

The defendant didn't contribute any cent towards acquisition of the first two plots. The plots were acquired through joint effort of the plaintiff and the deceased. The defendant took control of the estate and became the sole beneficiary to the exclusion of the objectors. She has been wasting the estate contrary to Section 85 of the Law of Succession Act. Under Section 29 of that Act, it is clear that the objectors are the sole beneficiaries of the deceased. The 1st objector is the legal wife while the 2nd and 3rd objectors are his children who he educated. Counsel relies on the case of the estate of **M.W.W (deceased) Nairobi Succession Cause no 1266 of 2008**. According to the plaintiff, the petitioner is not the deceased's wife. She does not have any marriage Certificate. The deceased only had one child by the name Honey. The other two children, Madina Laila Richard and Richard Churko Guyo are not the deceased's children. Their birth certificates were prepared only for purposes of the Succession Cause. The plaintiff and her children should be declared as the administrators of the estate.

DEFENDANT'S SUBMISSIONS

Mr. Momanyi appeared for the petitioner. Counsel submit that the deceased's estate comprise of share of Plot No. 40, Marsabit/Mountain, LR No. 11969/74 which is a commercial plot and was given to the petitioner exclusively, Plot No. 213 and Account No. 110214319 KCB. Counsel maintain that the petitioner and her children namely, Honey, Madina and Richard are the lawful beneficiaries of the deceased. The plaintiff filed a citation before the Principal Magistrate Court in Marsabit and named her two children together with the petitioner's children as beneficiaries. Parties were given time to file the necessary Succession Cause but the plaintiff and the interested party failed to do so or attend court leading to the filling of the Succession Cause by the petitioner. The trial magistrate raised the issue of jurisdiction since there was a written **Will** and referred the matter to be dealt with by the High Court. The High Court directed that the matter be heard by way of viva voce evidence and witness be called. The interested party, Zakaria Gumi Guyo is a brother to the deceased and filed an affidavit in court on 13/8/2018. Paragraph 5 of the said affidavit confirms that the deceased made a **WILL** dated 8/7/2016.

The Objector in her objection contends that she is the 1st wife while the petitioner is the 2nd wife. The objector did not adduce any evidence of marriage between her and the deceased. She claimed that the marriage was registered in Kisii but she could not trace the records. Although the Objector alleged that she cannot recognize the petitioner as a co-wife, her own statement in the citation application and affidavit in protest states that she was the 1st wife and the petitioner was the 2nd wife. The 2nd objector produced an identity card that was obtained on 15/2/2018 in Naivasha. The 3rd objector did not testify. The objector does not know the deceased's property. The defendant testified that at the time of her marriage she did not know of any failed marriage between her husband and any other person. None of the family members mentioned the plaintiff until when she filed the Succession. The petitioner called 7 witnesses who confirmed that she is the deceased's wife and they were not aware of any other marriage. **PW2 SODE WALABO**, confirmed that he married the deceased's mother while the deceased and his brothers were young. He educated and supported them until when they became adult capable of taking care of themselves. **PW4**, a brother to the deceased also confirmed that the deceased only had the petitioner as his wife. **PW 5** and **PW 6** are the deceased's workmates who only knew the petitioner as the only wife. The interested party's allegation that some of the petitioner's children do not belong to the deceased does not hold water. The contention that the petitioner was a Muslim who was married to a Christian is of no effect.

Mr. Momanyi contend that the petitioner filed a Succession Cause in accordance with the law. She obtained a grant and there is no application to have it annulled. The objections are only on the confirmation of the grant. The deceased left a valid **Will** that was annexed to the petition. The **Will** was attested by two adults and has not been challenged. The plaintiff produced a letter date 6/12/18 written by a doctor while the matter was pending in court. The authenticity of the letter cannot be ascertained. Witnesses saw the deceased sign the **Will**. There was no oral **Will** as alleged by the interested party.

It is also submitted that the objector's family emerged immediately after the death of the deceased purposely to gain from the Estate. Collins Guyo was born on 16/7/1986 but his registration was done on 18/8/2016 after the death of his alleged father. This cannot be possible and it was done purposely for a claim on the Estate. Nancy Shallo Churko was born 10/4/1990 but obtained her national identity card on 15/2/2018. She claimed to have gone up to the university and completed her studies. This is not possible as one must have a national identity card before joining the university. Her identity card is a Fabrication. The only beneficiaries of the deceased is the petitioner and her children.

SUBMISSIONS BY THE INTERESTED PARTY

Mr. Mwitii appeared for the interested party who also refers himself as an objector. It is submitted in his submissions and supplementary submissions that the petitioner was not the deceased's wife. She was more of a friend but was never married either in church, mosque or otherwise. There is no certificate of marriage to support any marriage. She is not known to the family. The deceased's estate comprises of **1 Acre** out of **plot No. MARSABIT/MOUNTAIN/40, PLOT 213** belonged to the deceased's late mother. Plot no 11969/174, KCB Account. No. 110214319. It is submitted that plot 11969/174 used to belong to the family of Guyo Gumi although it is in the name of the deceased.

The interested party gave Ksh. 400,000 to the deceased when he was buying plot number 1424. The petitioner has fraudulently transferred this plot to herself. The petitioner is from the Gabra tribe whereas the deceased is from Burji. All her witnesses are from her tribe. Her witnesses are not credible.

The interested party also submit that the petitioner is a Muslim and she cannot inherit from a non-Muslim. **SODE WALABO(DW4)** had a relationship with the deceased's mother when the deceased and the interested party were already adults and above 18 years.

The interested party's mother gave birth to five children with **SODE WALABO** before they separated. The grant was obtained illegally and fraudulently. Under the Burji customs it was the interested party Zakaria Guyo who was the one to take charge and administer the property. The petitioner's lawyer had the habit of not serving the lawyers for the objectors and this led to the issuance of the grant fraudulently. The petitioner's intention is to defraud the objectors of the property. The **WILL** produced by the petitioner is fraudulent. It was witnessed by strangers. The only biological children of the deceased are, Honey Churko Richard, Collins Richard and Shallo Nancy. Unless DNA tests are done to the other children then the interested party disputes that they belong to the deceased.

The interested party is seeking a refund of Ksh. 400,000 which he lent the deceased and compensation of the stalls that were damaged by the petitioner together with cost of the case.

ANALYSIS AND DETERMINATION

The dispute raises the following issue.

1. Did the deceased make any **Will**, oral or written.
2. Are the Objectors the deceased's beneficiaries
3. Is the Petitioner the deceased's wife.
4. Are the Petitioner's children entitled to inherit the deceased.
5. What comprises the deceased's estate.
6. How should the estate be distributed and who should be appointed as the administrator or executor.
7. What is the position of the interested party.

It is the interested party's position that the deceased made an oral **Will**. This point is hammered in the interested party's witness statement dated 27th March, 2019 at paragraph 10 which reads as follows:

That on 26th July 2016 my late brother, in presence of Woche Dofa made an oral Will while we were at his bedside and willed that he be succeeded by his children, that I should be in charge of his interest in plot No.213 in Shauri Yako and I should follow up a pending case on the plot. That his clinic named Mwangaza clinic and chemist is to be sold off and the proceeds be used towards his children's education. Further a small monument be put up in memory of his parents in his share of our parents plot No.40 at Dakabaricha. That his children should benefit from his plot at Jirime.

Section 8 of the Law of Succession Act, Cap 160 states that a **Will** may be made either orally or in writing. Section 9 of the Act states as follows:-

(1) No oral will shall be valid unless:

(a) It is made before two or more competent witnesses; and

(b) The testator dies within a period of three months from the date of making the will

According to the interested party the oral **Will** was made on 26th July, 2016 and the deceased died the following day on 27th July, 2016. This fulfils the requirement that the person making the **Will** should die within a period of three months from the date of the oral **Will**.

The interested party contends that he was present when the oral **Will** was made. The other person named is **Woche Dofa** and others. None of the other witnesses testified. It cannot be confirmed that indeed the deceased made the oral **Will**. The Petitioner testified that she was with the deceased in hospital. The objector also maintain that she used to visit the deceased at the hospital. Her children also used to visit their father. All these people never heard the deceased making the oral **Will**. The oral **Will** was done one day before his death.

There is a letter dated 6th December, 2018 from the Nairobi West Hospital. It is indicated that it was signed by the resident doctor. Although Counsel for the petitioner alledged that the letter is not authenticated and the name of the doctor is not given, I do find that the letter is very much relevant as it gives the medical condition of the deceased. All parties agree that the deceased was hospitalized at that hospital. The letter reads as follows:

RE: RICHARD GUYO IPNO.5238

Diagnosis: End stage renal disease/severe sepsis/Anaemia/HTN/Bilateral pleural effusions with lung collapse.

Consultant: Dr. Ngigi – Physician nephrologist

Dr.I.Ochieng–Consultant General physician

The subject matter refers to above named who was a patient admitted at our facility on 10.07.16 for medical stabilization and treatment. Patient was a known hypertensive, presented with history of difficulties in breathing and vomiting with severe left sided chest pain and productive cough.

On examination he was sick looking a febrile dehydrated and in distress. BP – 170/100mmHg, pulse rate – 107b/min and respiration rate – 26 b/min.

Investigation done revealed Hb of 8.3g/dl WBC of 7.48×10^9 and neutrophilia. C-reactive protein was highly elevated and creatinine of 779mmol/l noted. Management was begun and patient was noted to desaturate below 805 when off oxygen. Treatment was adjusted accordingly and close monitoring continued. CT pulmonary angiogram was negative for pulmonary thromboembolism. It further revealed bilateral posterobasal collapse and consolidation. Bilateral batwing ground glass opacities – likely due to pulmonary oedema. Bilateral fine centrilobular emphysematous foci sub centimeter mediastinal lymphadenopathy noted. Renal replacement therapy was commenced and patient shifted to the intensive care unit on 17.07.2018 due to deteriorating clinical condition. Chest physiotherapy was done regularly.

There was minimal improvement despite the intensive care. Patient on 27.07.2016 at 4.00pm went into bradycardia and asystole while on inotropes. He was stated on cardiopulmonary resuscitation in accordance to ACLS standard and protocol. He remained asystole and was declared dead at 4.30pm of 27th July 2016.(emphasis added)

Any assistance accorded to the next of kin is highly appreciated.

Sincerely yours,

Resident doctor

According to the letter the deceased was taken to Intensive Care Unit on 17th July, 2016. He stayed in the Intensive Care Until 27.7.2016 when he died at 4.30pm. Can it be said that several people were inside the Intensive Care Unit at the deceased's bedside including the interested party, Woche Dofa and others on 26.7.2016 when the oral **Will** is alleged to have been made? My answer is that I do not think so. I am satisfied that there was no oral **Will** made by the deceased.

The other issue relates to the written **Will**. The petitioner filed this petition before the Principal Magistrate's court. I have perused the documents that were initially filed before the Magistrate's Court and I am satisfied that the initial petition did not contain the **Will**. The affidavit in support of the petition was sworn on 12th July, 2017. The petition itself was filed on 29.6.2017. The affidavit does not bare the Court stamp. How could an affidavit sworn on 12th July, 2017 support the petition that was filed in Court on 29th June, 2017. I am aware that citation number 8 of 2016 was filed by the objectors in December, 2016 and the petitioner replied to it. The petitioner filed, the **Will** in the citation and her position was that here was a **Will**.

The gazette notice number 8211 of 18th August, 2017 indicate that the Marsabit District Registrar signed the notice on 4th July, 2017. The notice in the gazette indicate that the deceased's widow, Fatuma Galgalo Jillo had applied for Letters of Administration intestate to the deceased's estate. The notice was followed by a grant that was issued on 18th September, 2017. The grant clearly indicate that on 18th day of September 2017 **Letters of Administration intestate to the estate of Richard Churko was granted to Fatuma Galgalo Jillo.**

The petitioner filed an application dated 12th March, 2018 for the confirmation of the grant. The application was stamped by the Court on 8th May, 2018. Its supporting affidavit was stamped on 29th March, 2018. The prayer on the application reads:-

- 1. That the grant of probate/with will annexed made to Fatuma Galgalo Jillo in this matter on 18th September, 2017 be confirmed.**
- 2. That costs of this application be provided for.**

It is clear from the record that the Court did not issue the petitioner with a grant of Probate with a **Will** annexed. The grant that was issued was intestate. It is also not clear to me how the objectors got wind that the petitioner had filed the application for confirmation of the Letters of Administration on 8th May, 2018 and a day before on 7th May, 2018 Zakaria Guyo swore an affidavit of protest that was filed on 8th May, 2018, the same day the application for confirmation of the grant was filed. Similarly, a notice of appointment of advocates by M/S Kinyanjui & Njau Advocates was filed on 8th May, 2018 together with an objection by the objectors which though dated 3rd May, 2018 was coincidentally filed on 8th May, 2018. M/S Kaberia Arimba & Co, abdicates of Meru filed their notice of Appointment of Advocate's for Zakaria Guyo on 8th May, 2018 although it is coincidentally dated 3rd May, 2018.

The **Will** is dated 8th July, 2016. It is witnessed by Patrick Wanjohi and Jacinta Masoo. Their signatures are witnessed by Kennedy M. Onkwani Advocate. Coincidentally it is the same advocate who witnessed the Petition for letters of Administration drawn by M/S O.H. Momanyi Advocates. It could be possible that the said Advocate works for M/S O.H Momanyi Advocates or the firm of S. Ndege & Co. Advocates who prepared the **Will**. S. Ndege & Co. Advocates are coincidentally located on the same second floor of St. Georges House, Nairobi, where the petitioner's advocates are located. Kennedy Onkwari seems to have been a witness for the signatures of the other two named witnesses. The other two named witnesses indicate that they witnessed the deceased at the same time and signed the **Will** in the presence of each other.

In her evidence in chief the petitioner testified as follows:

“ In June 2016 he went for a seminar. He used to do regular checkup. When he went for the seminar he was sick. After the seminar he called me and asked me to take him to hospital. I took him to hospital on Saturday 1.7.2016. I was the only one with the deceased in hospital. He became very sick after 8 days in hospital. The kidneys failed. Before he became sick he had been discharged and I took him to my house in Eastleigh in Nairobi. The following morning he was sick and I returned him to hospital. After the second admission I stayed with him in hospital until his death on 27th July, 2016. My husband wrote a Will before he died. He gave the property to me and my children.”

During cross examination by Mr. Kimathi, Counsel for the Objectors, the petitioner stated as follows:

“I was alone when I took him to hospital. We came from a guest house in Eastleigh and we went to hospital. After admission he became okay for a short time and he was discharged. I can't recall the date. I had him discharged on Friday. I then returned him the following week on Tuesday. On the date the deceased signed the Will he was feeling well. We went in a taxi upto the advocate's office..... I know Patrick Wabjohi. He is not related to the deceased. Patrick used to be our advocate. Jacinta is also an advocate. I will call the two advocates as witnesses.

The Will was signed on 7th July, 2016. The letter from Nairobi West hospital indicate that the deceased was admitted on 10th July, 2016 and was in critical condition.

Section 5 of the Laws of Succession Act states as follows:-

- (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by Will.. and may thereby make any disposition by reference to any secular or religious law that he chooses.
- (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.
- (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing. (emphasis added)
- (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

In the case of **NGETICH, IN RE ESTATE OF; (2003) KLR, 84** Justice Nambuye dealt with the issue where a wrong procedure was used in a succession involving a **WILL**. The court held inter alia:

4. Where a party, as in this case, uses a wrong statutory form to apply for a grant, there is no procedure for substitution with the proper form.
7. The fact that a wrong procedure had been followed to present a Will to the Court did not mean that the Will had to be ignored. It had to be looked at. When the Will is so looked at, the Court has to decide whether the same is to be upheld.

It is not a requirement that a testator must be proved to be both physically and mentally fit for purposes of making a **Will**: At times a sick person may anticipate the coming of his death and decide to make a **Will**. My main concern in this matter is the way the **Will** is purported to have been made and the way it was introduced in Court. I am aline to the holding in the case of **WAMBUI & ANOTHER V GIKONYO & 3 OTHERS; (1988) KLR** where the Court of appeal held inter alia:-

3.Even in cases where a person is very sick or mentally ill at the time of executing a Will, it cannot be a ground for nullifying the Will because there are lucid periods where the person becomes normal and capable of giving instructions for writing a Will. There was no evidence to show that the deceased was not normal at the time he gave instructions to write the documents.

Similarly, in the case of **DEN V VANDEVE (1819)5 NJI(2 2 South 589**, cited in “a casebook on the Law of Succession by Justice W.W. Musyoka at Pg 69, the court had this to say on the mental soundness of a testator.

By the term ‘a sound and disposing mind and memory’ it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be

enough left clearly to discern and discretely to judge, of all those things, and those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be said to be of sound mind and disposing mind and memory.'

From the evidence on record, I am satisfied that the deceased did not make any **Will** and if he did, which I reiterate he didn't, he was not in the proper mental frame of mind capable of freely making the **Will**. The petitioner in her evidence in chief indicated that the deceased was sick in June. He did not return to Marsabit when he went for the seminar. He stayed in Nairobi until his death in a period of about one month. When he was admitted in hospital on 10.7.2016, he was dehydrated, sick looking and in distress as per the letter from the hospital. The petitioner could remember that she went to the advocate's office near parliament and had the **Will** drawn. That is the same building where her current advocate is located.

The sequence of events show that the deceased was sick. It is true that during moments of sickness one can compose himself and prepare a **Will** which can pass the test of mental capacity. However, the circumstances of the case have to be considered. The petition for letters of administration was filed through an advocate. A grant was issued indicating that the deceased died intestate. The procedure involving testamentary disposals was not followed.

Are the objectors the deceased's beneficiaries?

In his submissions, Counsel for the petitioner contend that the alleged two children of the 1st objector obtained birth certificates for purposes of claiming the estate. The birth certificates were issued much later. Collins Stephen Guyo was born on 16.7.1988. The birth was registered on 18.8.2016 and a birth certificate was issued on that date of registration. Nancy Shallo Churko was born on 10th April, 1990. The birth was registered on 15th May, 1999.

The interested party filed the deceased's eulogy as part of his documents. It is indicated that the eulogy was to be read by Collins Guyo Richard (Son). The eulogy indicate that the deceased was father to Collins, Nancy and Honey.

The plaintiff in her evidence dwelt on how they met and got married under Burji/Kikuyu customs in 1985. The two knew each other since 1981 when they met at Kisii general hospital. Both were in the medical profession. The plaintiff is a nurse. They worked together in Marsabit general hospital. At one time they were both in Nakuru Kenya Medical training college.

From the evidence on record, I do find that the objectors have not emerged out of nowhere to claim the deceased's estate. They are part of the deceased's family. It could be true that the plaintiff had separated with the deceased for quite sometime. That alone cannot make her ineligible as a beneficiary. There is sufficient proof that the two did undergo a traditional marriage. It does not matter whether the marriage was registered in the District officer's office in Kisii or not. The two lived together as husband and wife. They worked in Marsabit and the plaintiff ably explained how some of the properties were obtained in the 1990s. Section 3 of the Law of Succession Act defines a wife in the following terms

'Wife' includes a wife who is separated from her husband and the terms "husband" and "spouse", "widow" and "widower shall have corresponding meaning"

In the case of **ATEMO V IMUJARO (2003)KLR 435** the Court of Appeal at Nairobi held as follows:-

It was a notorious fact of which the Court would take judicial notice of, that under customary law of all the African communities in Kenya, no valid marriage can be contracted without payment of marriage consideration. Up to the time of the demise of the deceased, no valid marriage under Teso customary law had come into existence.

I do find and hold that the 1st plaintiff was the deceased's wife and her two children are the deceased's children. It does not matter at what point in time the two obtained their birth certificates. Madina Laila Richard was born on 28.8.2005 and her birth was registered on 22.08.2016 over ten years later and after the deceased had passed on. Honey Churko was born on 27.9.1999 and her birth was registered on 2.12.2008. The late registration of the children cannot be an issue unless there is evidence to prove that the registration was done for purposes of facilitating fraud. Further, Section 29(b) of the Law of Succession Act does not require that one has to be a biological child of the deceased for purposes of being the deceased's dependant. I do find that the objectors are the deceased's beneficiaries. The interested party is a family member and recognizes them as his brother's children. Even the purported **Will** in one of the paragraphs states as follows:-

3. I declare that in my lifetime I have made provision for my other children.

If it is true that the deceased made a **Will**, then who are these children he had provided for in his lifetime. Are they the other two petitioner's children or the 2nd and 3rd objectors. The documentation inform of birth certificate for the 2nd and 3rd objector was done late. The same applies to Laila Richard, the petitioner's 2nd child. I am alive to the court of appeal decision in the case of **Gachigi V Kamau (2003) KLR 169** where the court held inter alia:

Documentary evidence adduced to prove that the appellant's children were children of the deceased was of no evidential value as the same was obtained during the pendency of the case, for the purpose of the case.

The evidence on record proves that the deceased lived with the 1st objector as husband and wife and they had two (2) children. The family members acknowledged that fact. Equally the deceased lived with the petitioner as his wife until his death. The three (3) children of the petitioner are the deceased's children. The late registration of their birth does not disqualify them as beneficiaries.

Is the Petitioner the deceased's wife?

The petitioner testified that she got married to the deceased in 1997. At that time the deceased was working at the Marsabit General hospital. **DW2 Sode Walabo** was married to the deceased's mother, **Lydia Shallo**. He witnessed the traditional marriage between the petitioner and the deceased. **DW3 Joseph Yattani Diba** received the dowry of Ksh.20,000. He brought up the petitioner. It is his evidence that the deceased and the petitioner had three children. **DW4, Hussein Sode Walabo** is the deceased's step brother. He also witnessed the marriage. **Rosemary Wato Galgalo (DW5), Guyo Diba (DW6) and Isako Adan (DW7)** all testified that they knew the petitioner as the deceased's wife. **DW5** and **DW7** are the deceased's workmates. They all used to live at the Marsabit hospital staff quarters. The deceased also used to live with the petitioner as his wife in the staff quarters. The evidence shows that the deceased had no house in Marsabit and was living in the staff quarters. That is where his body was taken before the burial.

Apart from the above witnesses, **DW9 Joseph Jacob Lio DW10, Daudi Jacob Gache** and **DW11 Matayo Wache Soso** all testified that they knew the petitioner as the deceased's wife. Some of these witnesses were summoned by the interested party and confirmed that the petitioner was the deceased's wife.

The eulogy prepared by the interested party reads as follows:

Husband to Grace Wambui Ngugi and friend to alleged wife Fatuma Galgalo.

The dispute herein started by way of a citation. This is citation number 8 of 2016 before the Principal Magistrate's Court. The 1st objector, **Grace Wambui** cited the petitioner. Grace swore an affidavit on 19th December, 2016 in support of the citation. Paragraph 5 thereof reads as follows-

5. That the deceased had a second wife by the name Fatuma Galgalo Jillo.

It is clear to me that the objectors were very much aware that the petitioner was the deceased's wife. The 1st objector did file the citation knowing that the petitioner was the person who was better placed to file the succession cause.

The interested party has vigorously maintained that the petitioner was not married to the deceased. According to the interested party, Fatuma was just a friend. Mr. Kinyanjui advocate drew the citation together with the supporting affidavit which recognizes Fatuma as a 2nd wife. In his written submissions, Mr. Kinyanjui made an about turn and contend that the petitioner was not the deceased's wife as she failed to explain the date of the marriage, the place of cohabitation, the amount of dowry, the number of children the two had and the properties they acquired together.

Given the evidence on record, I do find that both the objectors and the interested party are blowing hot and cold. There is no requirement under the Law of Succession Act that for one to be recognized as a wife, she must prove that the marriage was solemnized in a church or Mosque or that a marriage certificate must be produced. It does not matter at what age Fatuma got married to the deceased. She was over 18 years old when she got marriage to the deceased in 1997 or 1999. She told the Court that she is now 39 years old. I do find that the petitioner is the deceased's wife. She was the one living with the deceased prior to his death. A marriage can be presumed between the deceased and the petitioner. They lived together from around 1999 until 2016 when the deceased passed on. The general public viewed them as a married couple. The affidavit of marriage was Commissioned at the Marsabit Law Court. It is further proof of the marriage.

Are the petitioners children entitled to inherit the estate?

According to the interested party only Honey Churko is the deceased's child. Honey is the first born child from the petitioner and the deceased. There is no evidence that after the deceased and the petitioner got married they at one time separated. The two lived together all along until the deceased's death on 27th July, 2016. There is no child born after his death. All the children were born during the period of the marriage.

On her part, the 1st objector in her affidavit in support of the citation did include all the deceased's children as beneficiaries. Paragraph 11 of the affidavit reads as follows:

That the deceased was survived by the following beneficiaries: -

- | | |
|--------------------------|----------------------|
| (1) GRACE WAMBUI NGUI | 1 ST WIFE |
| (2) FATUMA GALGALO JILLO | 2 ND WIFE |
| (3) HONEY CHURKO RICHARD | DAUGHTER |
| (4) MADINA LEILA RICHARD | DAUGHER |
| (5) GUYO RICHARD CHURKO | SON |
| (6) COLLINS STEPHEN GUYO | SON |
| (7) NANCY SHALLO CHURKO | DAUGHTER |

There is also a letter dated 1st November, 2016 from the Deputy County Commissioner, Marsabit which indicate the list of the deceased's heirs. Honey, Madina and Guyo are listed. Honey was indicated to be 17 years, Madina 11 years and Guyo 8 years. The contention by the interested party that the last two children are from two different fathers are misplaced. I do find all the petitioner's children are the deceased's children and are the deceased's beneficiaries.

Section 118 of the Evidence Act, Cap 80 states as follows:

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

It is clear to me that Fatuma and the deceased were never separated until his death. Fatuma and her children are the deceased's beneficiaries.

What comprise the deceased's property/estate?

I see no major dispute on this matter. All parties agree that the deceased was the registered owner of plot number 11969/174 located in Marsabit town. There were stalls on the plot but were removed and the plot has been leased out.

The petition listed KCB account number 110214319 and plot number 213, Marsabit. These are basically agreed upon. The equity bank account seems not to be known to the petitioner. The interested party made reference to equity bank account. It is further established that there is death gratuity. It does not matter who is mentioned as the next of kin in the information kept by the deceased's employer. Once the court determines who are the beneficiaries of the estate, then all of them are entitled to the estate. The death gratuity is part of the estate.

The interested party testified that he was mentioned as the next of kin at Afya Sacco. No document was produced to that effect. Should it be found that the deceased has shares at Afya Sacco, then that forms part of the deceased's estate. DW5, Rosemary Wato Galgalo testified that at one time the deceased signed for her a loan form for Afya Sacco. This proves that the deceased had an account with Afya Sacco.

The petitioner filed her application for confirmation of the grant. Paragraph 7 thereof gives the deceased's estate as:

- (a) Plot No.1169/74 at Marsabit County (whole)**
- (b) Plot No.213 at Marsabit Count (whole)**
- (c) Total amount in Account No.1102143219 – Kenya Commercial Bank**
- (d) Full share (entitlement) of ancestral land belonging to the deceased i.e. to be excised from LR/Marsabit/Mountain/40**

In his submission, Mr. Kinyanjui confirmed that the properties listed in the petition form part of the estate. Counsel included a chemist and dispensary within Marsabit town. There is mixed up between plot number 214(mentioned by Mr. Kinyanjui) and plot 213 indicated in the petition.

The interested party made reference to plot number 1424. It is his claim that he assisted the deceased with ksh.400,000 to purchase that plot.

The interested party submitted that their late mother owned plot numbers 890 and 879. There is no dispute on that property as it does not form part of the estate.

There is also plot number 40/Marsabit mountain. All parties agree that the deceased is entitled to a share of that plot. The plot measures four (4) acres. It belongs to the deceased's late parents and no succession for those parents has been done. Although the interested party seems to have allocated himself two (2) acres of that plot and his brothers, Kamale and the deceased, one acre each, I do find that the proper distribution will only be done when that property is subjected to a proper succession. All what I can say for now is that the deceased is entitled to a share of that property. I take cognizance of the efforts of the interested party in defending that property from the time of adjudication upto the High Court.

The last property is plot number 213, Marsabit. This property is listed in the petition. The interested party's position is that the plot belongs to their late mother. The record bares me out. There is rates clearance certificate dated 2nd September, 2015 from the Marsabit County Government. It indicate that the plot is registered in the names of Richard Chuqo Guyo. This document forms part of the interested party's document.

The record also contain a dispute between the deceased and his step siblings. There is civil suit numbers 37 of 2015 pending before the Marsabit Principal Magistrate's Court. It is the deceased who filed that suit against Yatte Sode, Hussein Sode and Amina Sode. These are his step brother and sisters from his mother. In his plaint dated 11th November, 2015 the deceased indicate that he is the owner of plot number Marsabit/Mountain/213. In his witness statement, paragraph 3, he states that the plot was given to him in 1970 during the lifetime of his parents. I not to hesitate to add that this does not mean that it was given to him by his parents.

Mr. Momanyi in his submissions agree that plot numbers Marsabit/Mountain/890 and 879 are not the subject of the dispute. The same applies to plot number 1424 as there is no proof of ownership according to Mr. Momanyi.

In his affidavit sworn on 27th March 2019, the interested party at paragraph 29(a) states that plot **No.213 belongs** to their late **mother Lydia Shallo** who owned it from around 1972 or thereafter. Paragraph 29(f) indicate that there is a dispute relating to plot numbers Marsabit/Mountain/890 and 897 with their siblings from their mother.

In his twelve page statement dated 5th December, 2018 Zakaria Guyo Gumi states the following at page 5:

That before his death, my brother named his successors as Zacharia Guyo, Kamalle Guyo and Richard Guyo's Wambui children who will be the beneficiaries of the commercial plot. That the successor will be me (Zachariah Guyo) the beneficiary of Shauri Yako Plot No.213. My late mother's house and I must follow-up the case that is pending before court to the final stage, hence develop the same in my mother's name (deceased). The successors will be my beloved children and Wambui the only surviving who will be the beneficiary of Mwangaza clinic and chemist.

The documentary evidence does prove that plot number 213 belonged to the deceased. It is registered in his name. It is possible that the late Lydia Shallo was residing on the property. However, the fact remains that the plot belonged to the deceased. The 1st Objector mentioned this plot in her testimony. The deceased filed a suit against his siblings and he categorically stated that the plot is his. I do find and hold that plot number 213 Marsabit forms part of the deceased's estate. The evidence of DW12 and DW13 that the late Lydia got a plot at Shauri Yako does not categorically prove that. She got plot number 213. There is no transfer document showing that the late Lydia Shallo transferred plot number 213 to the deceased. A search from the County Government confirms that the plot belongs to the deceased.

There is evidence that the deceased had a chemist and a clinic. According to the petitioner the business was closed down when the deceased was sick. The interested party in his documents indicate that the business was indebted to about Kshs.500,000. I do agree with the petitioner that the business closed down and there is nothing to distribute.

The estate therefore comprise of:

- (I) **Plot number 11969/74**
- (II) **Plot number 213 excluding any development**
- (III) **KCB A/C 110214319 and any other bank account in the deceased's name**
- (IV) **Share of Plot number Marsabit/ Mountain/40**
- (V) **Death gratuity**

How should be the estate be distributed?

It is my finding that the deceased's beneficiaries are:-

- (1) **GRACE WAMBUI NGUI** **1ST WIFE**
- (2) **FATUMA GALGALO JILLO** **2ND WIFE**
- (3) **HONEY CHURKO RICHARD** **DAUGHTER**
- (4) **MADINA LEILA RICHARD** **DAUGHER**
- (5) **GUYO RICHARD CHURKO** **SON**
- (6) **COLLINS STEPHEN GUYO** **SON**
- (7) **NANCY SHALLO CURKO** **DAUGHTER**

Section 40 of the Law of Succession Act states 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 within each house shall then be in accordance with the rules set out in section 35 to 38.

Similarly, Section 29 (a) of the Act states:

For the purposes of this part, "dependant" means-

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

The deceased is survived by six beneficiaries each is entitled to an equal share. The estate has not been valued to enable the Court make an informed decision.

The above holding is in line with Section 66 of the Law of Succession Act.

Who should be appointed as the administrator of the estate.

I have found that the deceased did not make a **Will** and therefore died intestate. The record shows that Honey was born in September 1999. She is now over 18 years old. Madina Laila Richard was born in 2005 while Guyo Richard was born in 2008. They are both minors. This call for more than one administrator. Section 66 (a) gives preference to the widow or widows with or without association of other beneficiaries.

In the case of **MATHEKA & ANOTHER –V- MATHEKA (2005)I KLR 455**, the Court of Appeal held as follows:-

4. 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) serving 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 of the Law of Succession Act;

(c) The public trustee; and

(d) Creditors.

I do hereby appoint the Petitioner, Fatuma Galgallo Jillo and the 1st objector Grace Wambui Ngugi jointly as the administrators of the deceased's estate.

What is the position of the interested party?

The interested party maintains in his evidence that he does not intend to inherit his late brother's estate. However, he testified that he was named as the next of kin in relation to the deceased's Afya Sacco account. He also loaned the deceased Kshs.400,000 when the deceased was buying plot number 1848, Marsabit. He also used his money to develop stalls on plot number 11969/174.

There is no proof on all these allegations and I do find that interested party is not entitled to anything from the deceased's estate. All his alleged expenses do not form any liability on the deceased's estate. He did not pay the hospital bills. Money was also collected during the funeral which assisted in the burial and he collected the money as a representative of the family.

FINAL DETERMINATION

Having found that the deceased left no **Will** and died intestate and having appointed the petitioner and the 1st objector as the administrators, the grant issued to the petitioner on 18th September, 2017 is hereby revoked. A fresh grant to be issued in the joint names of the administrators

It is my finding that the deceased died intestate and the above named six beneficiaries will benefit from his estate. In view of the fact that there is no valuation on the properties I do proceed and make the following orders.

1. The following properties be valued.

(a) Plot Numbe.11969/174, Marsabit town

(b) Plot number 213, Marsabit

2. Parties can agree to conduct joint valuation and in the event that there is no agreement each party namely the Petitioner and the Objectors shall be at liberty to file separate valuations.

3. The valuations shall be on the undeveloped valuers of the plots and not on any development although the values can indicate what is developed on the land.

4. The amount of pension and gratuity to be ascertained.

5. The amount in any bank account belonging to the deceased to be ascertained. This shall include any amount in the Afya Sacco account.

6. The valuation of the estate to be as per orders 1,2 and 3 to be done within 45 days hereof and parties to share the costs equally in case of joint valuation or meet costs individually in the event of separate valuation.

7. Upon ascertaining the value of the estate the Court shall issue final orders including a confirmed grant distributing the estate.

8. Parties shall meet their own costs of this suit.

Dated, Signed and Delivered at Marsabit this 24th day of September, 2019

S. CHITEMBWE

JUDGE