



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[CORAM: MRIMA, J.]

SUCCESSION CAUSE NO. 345 OF 2015

(Formerly Kisii High Court Succession Cause No. 452 of 2011)

IN THE MATTER OF THE ESTATE OF THE LATE JACOB SIMBA ABADHO (DECEASED)

BETWEEN

BENSON OGUTU SIMBA.....PETITIONER

VERSUS

PIUS OLIMA SIMBA.....PROTESTOR

JUDGMENT

1. This matter once again brings to the fore sibling rivalry in succession. **Jacob Simba Abadho** (hereinafter referred to as '**the deceased**') died on 20/04/1997.
2. **Benson Ogutu Simba**, one of the sons of the deceased, petitioned for the administration of the estate of the deceased in *Kisii High Court Succession Cause No. 452 of 2011*. Before a Grant of Letters of Administration Intestate was issued the matter was transferred to this Court. **Pius Olima Simba**, another son of the deceased, then prematurely filed a Summons for Revocation of the grant before the issuance of a grant. A consent was recorded and joint Grant of Letters of Administration Intestate was issued to Benson Ogutu Simba and Pius Olima Simba on 20/02/2017.
3. Pius Olima Simba (hereinafter referred to as '**Pius**') then filed a Summons for Confirmation of the Grant on 27/03/2017 (hereinafter referred to as '**the Summons**'). The Summons was opposed by Benson Ogutu Simba (hereinafter referred to as '**Benson**').
4. Directions were taken on the hearing of the Summons. Parties proposed and the Court agreed that the Summons be heard by way of oral evidence. To that end the Pius was deemed as the Plaintiff and Benson deemed as the Defendant. Further to their Affidavits the parties filed various Witness Statements.
5. Some issues were not in contest. They included the fact that the deceased owned two parcels of land. They were *Plot No. 3008 Kanyuor Adjudication Section* in Nyatike District (hereinafter referred to as '**Plot 3008**') and *Kanyamkago/Kawere II/963* (hereinafter referred to as '**Plot 963**'). It is also not in dispute that Plot No. 3008 was sub-divided and shared among the beneficiaries of the estate of the deceased and that there is no dispute over the same.
6. The main dispute centered on the distribution of Plot 963. Several issues played out for determination. They included the following: -
 - (a) **Whether the deceased was married to one Nyakanjira;**
 - (b) **Whether Nyakanjira gifted a portion of Plot 963 to Pius;**
 - (c) **Whether the deceased bequeathed the portion in (b) above to Pius by way of a written will;**
 - (d) **Whether the deceased had a son known as Small Simba;**

- (e) **Whether Charles Odhiambo Auma was a son to Small Simba;**
- (f) **Whether Charles Odhiambo Auma should benefit from the estate of the deceased;**
- (g) **How the estate of the deceased should devolve;**
- (h) **Costs.**

7. The parties variously differed on the above issues. Pius testified. He also availed 8 witnesses. They were *Ibrahim Olwal Nyakire (PW1)*, *Augustinus Otieno Jayoo (PW2)*, *Hesborn Mugasu Mugita (PW3)*, *Pius Ogwel Ongondo (PW4)*, *Jamen Asena Agufa (PW5)*, *Mary Otieno Ogwang (PW6)*, *Rose Anyango Nyaulo (PW7)* and *Michael Ong'ondo Anyuo (PW9)*.

8. Benson also testified. He availed 2 witnesses. *Jeremiah Onyango Maseno (DW1)* and *Charles Odhiambo Auma (DW2)*.

9. From the record it seems that Pius Ogwel Ongondo testified twice (as PW4 and PW8). I will henceforth refer to the witnesses in the sequence in which they testified. For avoidance of doubt, Pius Ogwel Ongondo shall be referred to as PW4.

10. I will now deal with the case presented by Pius. Pius relied on the Summons and the Affidavit in support thereof. He also filed Further Affidavits. Pius posited that the deceased was married to two wives; *Teresia Oketch* and one *Nyakanjira*. Teresia Oketch was the first wife. She was blessed with 11 children. 4 of the children passed on leaving behind 7 children. They were: -

- (i) Paul Morris Kasimba - Son
- (ii) Benson Ogutu Simba - Son
- (iii) John Ochanda Simba - Son
- (iv) Wycliffe Oliver Simba - Son
- (v) Pius Olima Simba - Son
- (vi) Millicent Akinyi Ochieng - Daughter
- (vii) Benta Adhiambo Okingo - Daughter

11. Pius further stated that Paul Morris Kasimba and Wycliffe Oliver Simba died. That, the wife of Paul Morris Kasimba also died but left behind their children. The wife of Wycliffe Oliver Simba was re-married after the death of the husband, but also left behind children. Pius also testified that Millicent Akinyi Ochieng and Benta Adhiambo Okingo were married. Pius further testified that Benson, Pius and John Ochanda Simba were also married with children.

12. According to Pius, Nyakanjira was the second wife. She however did not get any children with the deceased. Both Teresia Oketch and Nyakanjira are dead as well.

13. On the property, Pius posited that Plot 3008 was sub-divided into 8 portions and registered in the names of his siblings and/or their respective children. He also stated that the title deeds thereof are yet to be issued. He referred to a letter dated 01/02/2013 addressed by the Migori/Nyatike Districts Land Adjudication & Settlement Officer to the General Manager of National Irrigation. The said letter confirmed that Plot 3008 was initially registered in the name of the deceased. It also confirmed that Plot 3008 was sub-divided and shared as follows: -

- (i) P/No. 3008 – Pius Olima Simba (retained the old number);
- (ii) P/No. 6596 – John Ochanda Simba
- (iii) P/No. 6597 – Benson Ogutu Simba
- (iv) P/No. 6598 – Martin Simba Obadho
- (v) P/No. 6599 – Raymond Odhiambo Simba
- (vi) P/No. 6600 – Douglas Moi Simba
- (vii) P/No. 6601 – Billy Kasimba
- (viii) P/No. 6602 – Calvin Kasimba

14. On Plot 963, Pius stated that the deceased had demarcated 6 portions each for his 6 sons. That, he got his portion thereof. He also stated that the deceased further demarcated 2 other portions. The deceased allocated each of the portions to his 2 wives. According to Pius the rest

of the children of the deceased abandoned the deceased and his second wife. That, it was only him who used to take care of them. Pius testified further that as a result of his support aforesaid Nyakanjira gifted him her portion.

15. It was the further testimony of Pius that the deceased approved of the gift Pius had received from Nyakanjira. To that end, the deceased reduced his approval into a written will dated 11/11/1996. That, the will was witnessed by among others including the then Acting Chief of Kanyamkago Location one Benjamin Matoka.

16. Pius testified that all the children of the deceased have all along been occupying their respective portions on Plot 963. He posited that the current dispute has solely been brought about by Benson who did not involve him in the succession proceedings.

17. It was Pius's prayer that the Plot 963 be distributed as per the demarcations made by the deceased. The portions are as follows: -

(i) Pius Olima Simba - 1.66Ha

(ii) Paul Maurice Simba &

John Ochanda Simba - 3.47Ha

(iii) Pius Olima Simba - 1.87Ha

(iv) Wycliffe Olive Simba

Benson Ogutu Simba &

Francis Matata - 4.85Ha

(v) Asena Agufa - 2.32Ha

18. Pius further testified that Benson had all along not been happy with the demarcations made by the deceased. He stated that Benson had indeed benefitted most from the deceased because the deceased sold 2 other parcels of land and used the proceeds thereof to take Benson to School. That, despite all that, Benson was again given another portion.

19. According to Pius, *Charles Odhiambo* is not a beneficiary to the estate of the deceased. That, the said Charles Odhiambo has no relation with the deceased at all. It was contended that he is instead only used by Benson to defraud the estate. Pius accused Benson of interfering with the boundaries. He produced minutes of a meeting held on 29/11/2011 to that effect.

20. On cross-examination, Pius clarified that Benson was the second born in the family of the deceased whereas he was the last born (10th born). To Pius the deceased married Nyakanjira in 1991. That, Nyakanjira died in 1995 without giving birth to any child. Pius reiterated that the portion the deceased had allocated to Nyakanjira was gifted to him by the said Nyakanjira and approved of by way of a written will by the deceased. Pius conceded that the will did not disclose the names of the children of the deceased.

21. Pius denied ever knowing any one by the name of Small Simba. Pius however admitted that the said Small Simba was allocated one of the portions on Plot 3008. He remained unaware that Small Simba was the father to Charles Odhiambo.

22. Pius also admitted that her sisters were married. He also confirmed that they were not among the beneficiaries. Pius did not know a woman by the name of *Noreah Oghenda*. Pius was also unaware if the said Noreah Oghenda was married before his mother, Teresia.

23. Responding to the contents of the Assistant Chief's letter dated 09/09/2011, Pius admitted that the said letter was an introductory letter to the High Court. That, the letter had names of the beneficiaries of the deceased. That, he had no problem with the names of the people named therein except the one referred to as Charles Odhiambo. Pius was aware of a Chief's letter dated 23/07/2012. The said letter did not mention the name of Charles Odhiambo as a beneficiary. Pius however admitted that the Assistant Chief knew the family of the deceased well than the Chief. Pius stated that he only challenged the Assistant Chief's letter in Court. Pius reiterated that the written will was valid.

24. Pius acknowledged the sale of part of Plot 963 by the deceased to *Francis Matata* and *Asena Agufa*. It was the further testimony of Pius that the two persons deserved their rightful shares.

25. Responding to the proposed distribution by Benson, Pius contended that the same was not representative of how Plot 963 was and that Benson was not entitled to any portion as he used his share in his education. Pius prayed that the net intestate estate of the deceased be distributed in accordance with the proposal he made.

26. PW1 relied on his filed statement. It was dated 19/04/2017 and filed on 25/05/2017. He stated that he was born in 1927 and that he was a neighbour to the deceased. He further stated that he was aware that the second wife of the deceased one Nyakanjira was allocated a portion of Plot 963. He was also aware that the said Nyakanjira gifted Pius her portion due to the cordial relationship the two enjoyed. He also knew of the written will by the deceased that confirmed the gift by Nyakanjira to Pius.

27. During cross-examination, PW1 stated that he was aware that the deceased was born in Kadem in Nyatike but lived in Uriri. PW1 was unaware of one Noreah Oghenda. He was also not aware if the deceased had land or family in Kadem. He also did not know if the deceased

had a son by the name Small Simba.

28. PW2 also filed and relied on his statement. He stated that the deceased was his friend and had a very stubborn son and a loyal one. The loyal son was Pius. He further stated that the deceased had allocated 2 portions of his land to Pius and reduced that to a written will. That, the elders also made the announcement during the burial of the deceased.

29. PW2 confirmed that he was one of the Guarantors to Benson during the proceedings towards the issuance of the Grant. However, on advise of Pius he withdraw from the guarantorship. He claimed that he was not aware of his role as a guarantor until when Pius enlightened him. That was when he withdrew.

30. PW3 also filed and adopted his statement as part of his evidence. He stated that he was a neighbour to the deceased. He witnessed the deceased write the will in issue in the presence of the then Assistant Chief.

31. PW4 filed a statement. He adopted it as part of his evidence. He hailed from Homa Bay County. He was a brother to one Martin Auma Ogondo (hereinafter referred to as '**Martin**'). That, Martin married Adoyo and they were blessed with 5 children. Charles Odhiambo Auma (hereinafter referred to as '**Charles**') was the first born. Martin died. PW4 stated that Charles inherited a parcel of land from Martin. PW4 also testified that Charles had so far established his home at Kadhola in Kwabwai Sub-location in Ndhiwa District.

32. PW4 stated that he did not know Pius. He wondered why Charles was involved in this matter.

33. PW5 signed and filed a statement as well. PW5 was a son to one Amega Agufa. His father bought a portion of Plot 963 measuring about 5.5 acres from the deceased in 1977. He was yet to get title documents. Amega Agufa passed on. PW5 was aware that the deceased had allocated 2 portions of his land to Pius. He confirmed that both modes of distribution by Benson and Pius had indicated him as a beneficiary. He however had an issue with the proposal by Benson in that the Survey Report had changed his position on the ground. He had no other problem with the estate.

34. PW5 knew the deceased. He was not aware if the deceased had any land in Nyatike. He knew nothing about Small Simba, Charles and Noreah. He only knew of the children the deceased had at Kanyamkago. PW5 never witnessed the deceased writing his will. He was aware that Pius had initially been gifted a portion by Nyakanjira before the deceased wrote his will.

35. PW6 also filed and relied on her statement. She was a village elder in Bware village in Kanyamkago II where the deceased lived. She had served for 13 years. She was however not an elder by the time the deceased died. It was one *Peter Jayo* who was the elder when the deceased died. She was aware that Pius was allocated 2 portions of Plot 963 by the deceased as he was a very disciplined boy.

36. PW6 testified that she was called by Peter Jayo to accompany him to the home of the deceased to witness the writing of a will. She did not see the will. PW6 stated that he was unaware that Small Simba was a son to the deceased. She was also not aware that Charles was a grandson to the deceased. PW6 knew Teresia and Nyakanjira as wives to the deceased. She did not know of another wife known as Noreah. PW6 attended the burial of Nyakanjira.

37. PW7 was the Assistant Chief of Kasirime-Karanya sub-location in West K'Obwayo Location in Ndhiwa Sub-County of Homa Bay County. She was the author of the letter dated 07/012/2017.

38. PW7 narrated how Pius had approached her and informed her of the dispute in this matter. Pius requested PW7 to issue him with a letter on the parentage of Charles. PW7 was then also the Acting Chief of West K'Obwayo Location. She knew the family of Charles well. She also knew the parents of Charles as Martin and *Philister Adoyo* (hereinafter referred to as '**Philister**').

39. PW7 approached the matter cautiously. She instead called a public *baraza* where the family of Charles attended as well as Pius. The issue was discussed. PW7 then wrote the letter dated 07/012/2017. PW7 did not produce the minutes of the meeting although she acknowledged that it was an official meeting and minutes were taken down. PW7 confirmed that she was not an administrator when Charles was born. She could not confirm where Charles was born. She further confirmed that during her dealing she did not call for any Birth Certificate or Notification of Birth of Charles. PW7 was shocked on hearing that Philister had sworn an Affidavit that the father of Charles was one Small Simba.

40. PW9 filed a statement and relied on it. He was a brother to Charles. He reiterated the evidence of PW4 about Charles. He added that Charles was the first born to Martin and had lived with the family all his life. Although PW9 knew Pius he was not aware what the dispute was all about. PW9 knew the siblings to Charles.

41. The foregone was the evidence in support of Pius' case.

42. I will now deal with the evidence in support of Benson's case. Benson testified. He gave the history of the deceased as narrated to him by the deceased. Benson testified that the deceased told him that he was born in Nyatike. That, the deceased married one Noreah Ogenia (hereinafter referred to as '**Noreah**') from Rapedhi in Ndhiwa sub-county. That, the deceased and Noreah had a son called *Small Ochanda Simba* (hereinafter referred to as '**Small**') and a daughter called *Christa*. That, Noreah died during the birth of Christa. Christa survived. However, Christa later died.

43. Benson further testified that after the death of Noreah the deceased married his mother Teresia. The family then moved from Nyatike to Lower Bware where the deceased had land. That was around 1958. Benson was born in 1952. He was the first born to his mother, Teresia. Benson recalled how they moved from Nyatike. They went along with Small who was by then under the care of Teresia. The deceased and Teresia were then blessed with other children, siblings to Benson.

44. Benson recalled that some of his siblings died at very tender ages and could not remember their names. He testified that one of his brothers was *Paul Maurice Kasimba* (hereinafter referred to as '**Paul**'). Paul was married and had children. Paul passed on as well as the wife. They left behind 5 children being *Ray Kasimba*, *Jay Kasimba*, *Billy Kasimba*, *Douglas Moi Kasimba* and *Knight Dorothy Kasimba*. Knight Dorothy Kasimba was married.

45. There were other siblings to Benson. One was called *John Ochanda Simba* (hereinafter referred to as '**John**'). John is married with children. There is Pius who also has a family. Pius was the 10th follower to Benson. There was also *Wycliffe Oliver Simba* (hereinafter referred to as '**Wycliffe**'). Wycliffe was married and had a son one *Martin Simba* (hereinafter referred to as '**Martin**'). Wycliffe and his wife divorced and the wife left their home. Wycliffe later died.

46. Benson testified that he instituted the succession proceedings in Kisii High Court after adequate family consultations where everyone was involved including Pius. He obtained the introductory letter from the Assistant Chief dated 09/09/2011. Benson explained that the introductory letter included the name of Charles as a beneficiary. He posited that Small was the father of Charles and the first born to the deceased. Small was therefore their brother. Since Small had died then Charles (the son to Small) was included as a beneficiary of the estate of his father Small. Benson clarified that what happened to Charles had also happened to the other children of his siblings who died.

47. There was no dispute to the portions which the deceased had sold to *Cosam Matata* and *Timona Amega*. As the two had died they were represented by *Francis E. Matata* and *Jamwi Asema Agufa* respectively.

48. Benson acknowledged that the deceased had married Nyakanjira. She was also known as Jane Atieno. She died before the deceased died. Their union was not blessed with any children.

49. It was Benson's firm position that the deceased never left behind any will. He stated that the deceased only demarcated some portions where each of his children and their families were to live on. That was in 1994. The demarcation was done in the presence of elders and the Area Chief. Benson denied any sub-division to have been undertaken.

50. As Sketch Plan on the proposed distribution of Plot 963 was filed by Benson. He proposed that Plot 963 devolve as follows: -

- | | | | |
|--------|--------------------|---|----------|
| (i) | Francis Matata | - | 1.85 Ha |
| (ii) | Jamin Asena Agufa | - | 2.025 Ha |
| (iii) | Benson O Simba | - | 1.765 Ha |
| (iv) | Wycliffe O. Simba | - | 1.815 Ha |
| (v) | Pius Olima Simba | - | 1.876 Ha |
| (vi) | John Ochanda Simba | - | 1.885 Ha |
| (vii) | Small Simba | - | 1.885 Ha |
| (viii) | Maurice Kasimba | - | 1.069 Ha |

51. Benson also denied that the deceased gave Pius 2 plots. He argued that if the deceased wanted to give Pius a larger share he would have instead given him one large portion other than 2 separate ones. He posited that Pius was out to disinherit Charles since Charles does not live on the land. Benson contended that Pius used to lease the portion earmarked for Charles for a while and now wants to disinherit Charles. He added that Pius used to lease the portion on a clear understanding that it belonged to Charles. He sees the action by Pius as utterly unfair on Charles. Benson wondered why Pius did not oppose to Charles' inheritance on Plot 3008.

52. Benson further contended that Charles was born in Lower Bware in 1977 and left with her mother who was remarried elsewhere. He prayed that Pius' protest be dismissed.

53. DW1 signed and filed a statement. He adopted it as part of his testimony. He was born 75 years ago. He was a neighbour to the deceased. He stated that he knew the family of the deceased quite well. DW1 was also related to the deceased by marriage. His was a brother-in-law to the deceased. DW1's sister one *Esther Ochola* was married to *Zabiano Bwai Nyatiro* who was a cousin to the deceased.

54. According to DW1 the deceased resided both in Nyatike and in Bware/Kanyamkago. He was aware that the deceased was initially married to Noreah who gave birth to Small. To his recollection the mother of Small died in Nyatike. Small was taken care of by Teresia who was married after the death of Noreah. Small moved with the deceased and Teresia from Nyatike to Bware. He saw Small grow under the care of Teresia until Small was of age and married one Risper Adoyo. He witnessed Small putting up his house on the right hand side of the main house of the deceased as the first-born son to the deceased. That was in accordance with the Luo customs. Small and Risper Adoyo were blessed with Charles. When Small died Risper Adoyo moved to Ndhiwa where she lives to date.

55. DW1 termed as ridiculous any claim by Pius that Small and Charles are strangers to the family of the deceased. DW1 further wondered why Pius had not opposed the inheritance by Charles in Plot 3008. Whereas DW1 knew of Noreah and Teresia, he did not know that the deceased had another wife by the name of Nyakanjira.

56. DW1 confirmed that he did not meet Noreah physically but the deceased told him about Noreah. DW1 confirmed attending the burial of the deceased.

57. Charles testified as DW2. He also adopted his statement. He lived in Ndhiwa in Homa Bay. He was born in 1978. According to Charles he knew all along that he was a son to Small and Philister. Charles testified that she was taken care of by Teresia who was his grandmother and the deceased who was his grandfather until when his mother was remarried in Ndhiwa where she lives to date. His father, Small, died in 1977. Small was buried in Bware.

58. Charles testified that the deceased called him at one point. He accompanied him to Nyatike where the deceased showed Charles a portion of land that he had set aside for Small. He was told by the deceased that the portion was his share given that his father was dead. Charles further testified that the deceased showed him another portion of land at Bware as his father's share. Charles knew and referred to Pius as his uncle. He cited Pius as out to disinherit him.

59. Charles clarified that he was allocated his father's portion in Nyatike. That, he sold it and there has been no problem or at all. He in particular contended that Pius had not sued him over that portion of land in Nyatike. Charles stated that he approached his uncle Benson and requested for his inheritance. He accused Pius of severally threatening him to leave the land. Charles stated that due to repeated threats by Pius he moved from Kadhola to Nyatike. Charles supported the proposal by Benson.

60. That marked the close of Benson's case.

61. With the foregone factual background, I will now deal with the issues for determination. I will handle one after the other.

(i) Whether the deceased was married to one Nyakanjira:

62. There was a consensus between Pius and Benson that the deceased married Nyakanjira as one of his wives. There was a further consensus that Nyakanjira never had a child with the deceased. I therefore answer the first issue in the affirmative.

(ii) Whether Nyakanjira gifted a portion of Plot 963 to Pius:

63. According to the record Plot 963 was registered in the name of the deceased. Whereas there is no doubt that Nyakanjira had been allocated a portion by the deceased, that portion was not transferred to her. Pius did not produce any document in proof of the gift. As rightly held by Nyamweya, J. in **Re Estate of the Late Gideon Manthi Nzioka (Deceased) (2015) eKLR** '*a person cannot gift that which he or she does not own*'.

64. Since Plot 963 was not owned by Nyakanjira, but the deceased, Nyakanjira was therefore not possessed of the legality to gift it to anyone including Pius.

65. Further, even if Nyakanjira had the power to gift the portion still the transaction was not completed as to legally yield the portion to Pius as a legal gift. In the words of Nyamweya, J. in **Re Estate of the Late Gideon Manthi Nzioka** (supra): -

In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

.....For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trust or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.

66. As I fully associate myself with the foregone, the second issue is answered in the negative.

(iii) Whether the deceased bequeathed the portion in (b) above to Pius by way of a written will:

67. Pius contended that a portion of Plot 963 was bequeathed to him by way of a written will by the deceased. The alleged will is dated 11/11/1996.

68. **Section 11** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Act**') provides for written wills as follows: -

No written will shall be valid unless-

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgments of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

69. I have carefully considered the document dated 11/11/1996. It is a copy. The document is a letter allegedly written by the deceased to a Chief one Benjamin Mitoka. The letter was about a portion of land given by the deceased to Pius. The Chief acknowledged the letter.

70. The question which now begs for an answer is whether the letter was a legal will. The law does not require that a written will to be in a specific format. Of importance is the fact that such a will must contain the ingredients of a written will.

Pursuant to **Section 11(a) of the Act** the will must be signed by the testator or the testator must affix his mark to the will. Alternatively, the will may be signed by some other person in the presence and by the direction of the testator. In this case it is not clear that the letter was signed by the testator who was the deceased. The letter only contains the name of the deceased at the bottom thereof just like at the top. I will nevertheless give Pius the benefit of doubt and find that the letter was duly signed by the maker.

72. As regards **Section 11(b) of the Act**, there is no doubt that the signature or mark of the deceased on the letter intended to give effect to the contents of the letter.

73. On **Section 11(c) of the Act**, there is no indication on when the 5 elders signed the letter. It is also not clear whether the said elders saw the deceased sign or put his mark on the letter. Apart from PW3 it remains unknown whether the other elders signed the letter in the presence of the deceased. None of the elders testified that they had received a personal acknowledgement from the deceased of the signature or the mark of the deceased on the letter. As to whether PW3 signed the letter in the presence of the deceased as he alleged my attention was drawn to the numbering in the letter. The letter has the names of persons appearing as numbers 1 to 5. However, PW3 was entered as number zero (0). It really defeats logic why one would start numbering from zero instead of one (1). To me, it is highly likely that the name of PW3 was inserted in the letter much later so as to beef up his evidence. I say so since Pius did not produce the original letter.

74. Apart from the foregoing, the letter was a copy. No basis under **Section 68 of the Evidence Act, Cap. 80** of the Laws of Kenya was laid as to give effect to the receipt of secondary evidence. The copy of the letter was hence principally inadmissible in law.

75. A will must be clear on its contents. In this case the letter did not state the parcel of land in issue. It cannot therefore be said with certainty whether the letter referred to Plot 3008 or Plot 963 or to any other parcel of land. Further, the letter also did not state the size of the portion allegedly granted unto Pius.

76. There was another issue with the letter. A will must disclose the beneficiaries to the estate and their respective shares of the estate. In this case the letter did not disclose the names of the other beneficiaries to the estate of the deceased. It only mentioned Pius.

77. The upshot is that the alleged copy of the letter on record was inadmissible in evidence. As such, it was not even available for legal interrogation in the first instance. That aside, the letter did not meet the mandatory requirements of **Section 11(c) of the Act**.

78. Having considered the evidence on record and pursuant to **Rule 54(4) of the Probate and Administration Rules, 1980** I find that the letter dated 11/11/1996 did not amount to a written will. The said letter was inadmissible in evidence and was not duly executed as a written will. I therefore refuse probate in respect to the letter dated 11/11/1996. The third issue is hence answered in the negative.

(iv) Whether the deceased had a son known as Small Simba:

79. Pius denied that the deceased had a son known as Small. Pius was the 10th born whereas Benson was the 1st born of Teresia and the deceased. None of the witnesses called by Pius testified of the life of the deceased in Nyatike.

80. Benson and DW1 testified of how the deceased lived in Nyatike. DW1 was aged 75 years old when he testified. He was a brother-in-law, a neighbour and a friend to the deceased. DW1 narrated the life of the deceased in Nyatike as told to him by the deceased. He further narrated the life of the deceased at Bware until the deceased met his death. I carefully watched the demeanor of DW1 as he testified. I did not find anything to doubt that DW1 was not truthful. I find DW1 a truthful witness and I believed his testimony.

81. The evidence of DW1 corroborated that of Benson. Just as DW1, Benson gave a convincing narration of how the deceased married one Noreah in Nyatike and were blessed with Small and Christa. Benson was also told of the history by the deceased.

82. By placing the evidence of Pius on one hand and that of Benson and DW1 on the other hand, I find that the deceased married Noreah in Nyatike and were blessed with two children namely Small and Christa. I am also convinced that Christa died while she was a minor, but Small grew up, got married and was blessed with a child before he died. It is also true that the deceased married Teresia after the death of Noreah.

83. I therefore find the fourth issue in the affirmative. In other words, the deceased had a son called Small whose mother was his first wife one Noreah.

(v) Whether Charles Odhiambo Auma was a son to Small Simba:

84. Pius denied that Charles was a son to Small. He instead contended that Charles hailed from Ndhiwa in Homa County. PW7 and PW9 vouched the testimony of Pius.

85. PW7 was an Assistant Chief in Ndhiwa. She confirmed that she was approached by Pius and requested to write a letter that Charles was a son from Ndhiwa. PW7 called a public baraza and deliberated the issue. She then wrote the letter to the effect that Charles hailed from Ndhiwa and gave it to Pius.

86. PW7 did not request for any documents on the birth for Charles. There is no evidence that PW7 summoned or interviewed the mother of Charles or Charles himself. There is also no evidence that the mother of Charles and/or Charles were invited to the public baraza. The minutes of the meeting were also not produced in evidence. The source of the information contained in the letter which PW7 wrote and gave to Pius cannot therefore be vouched.

87. PW9 was not aware if the mother of Charles had been married elsewhere before her marriage in Ndhiwa. He only knew Charles as a son from Ndhiwa.

88. On the other hand, Benson and DW1 narrated how Small got married to Philister from Ndhiwa and that they were blessed with a son, Charles, before Small died. Benson and DW1 saw Charles grow up at Bware before Charles left with his mother when she was remarried in Ndhiwa.

89. Charles also testified. He stated that he knew that his father was Small from Bware. He was aware that he had followed his mother to Ndhiwa when his father died and his mother remarried. Charles knew the deceased as his grandfather and Teresia as his grandmother. Charles was aware that his father was buried at Bware.

90. To drive the point further home, Charles stated that he was called by the deceased and was shown a parcel of land in Nyatike (Plot 3008) and another one in Bware (Plot 963) that belonged to his father Small. The deceased asked Charles to inherit the portions. Since Charles was the sole child to his father Small he later sold the portion at Nyatike. No one, including Pius, had ever challenged that sale.

91. One would therefore expect Pius to have opposed the allocation of any share to Charles in Plot 3008 if Pius was certain that Charles had no nexus with the family of the deceased. Pius did not do so. Pius only contended that Charles is unknown to the family of the deceased in respect to Plot 963 and not Plot 3008. Pius was obviously untruthful. He perpetrated and sustained a lie.

92. On the preponderance of probability there is credible evidence that Charles was the son of Small whose mother was Philister. The fifth issue is answered in the affirmative.

(vi) Whether Charles Odhiambo Auma should benefit from the estate of the deceased:

93. Having found that Small was a son to the deceased and that Small bore Charles then Charles is entitled to benefit from the estate of the deceased. However, Charles shall only get what would have been the share of his father.

94. Charles is hence a lawful beneficiary to the estate of the deceased.

(vii) How should the estate of the deceased devolve?

95. Having found that Nyakanjira did not gift the portion of land to Pius and that the alleged will is not valid it turns out that the deceased died intestate. He was also not survived by any of his wives. The deceased was survived by several children. Some of the children passed on, but left behind their children.

96. In that case the net intestate estate must devolve under **Section 38 of the Act**. The said section provides as follows: -

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

97. **Section 41** of the **Act** deals with instances where there are minor beneficiaries. That is not the case herein. **Section 42** of the **Act** deals with cases where a deceased paid, gave or settled any of his/her property to the benefit of any beneficiary during his/her lifetime. In such instances such property must be taken into account during distribution in determining the share of the net intestate estate finally accruing to such a beneficiary.

98. In this case I was invited by Pius to find that Benson benefitted from sale of 2 plots by the deceased to cater for his education. I however decline the invitation on the following reasons: **One**, apart from the allegation by Pius there was no evidence of the existence of the alleged plots, how much they were sold for and to whom they were sold to. **Two**, there was no evidence on how the proceeds of the plots were expended if at all the plots were indeed sold. **Three**, if it is true the deceased sold the plots to educate Benson then such plots cannot be deemed to fall within **Section 42** of the **Act** since the deceased was discharging his constitutional duty towards Benson as one of his children. **Four**, for **Section 42** of the **Act** to apply the property must have been solely paid, given or settled to the benefit of a beneficiary.

99. Resulting from the foregone the net intestate estate of the deceased must henceforth devolve equally among the children of the deceased.

100. There is no dispute on how Plot 3008 was distributed. On Plot 963, I have considered the proposals by Pius and Benson. The proposal

by Pius infringes the law to the extent that the property will not be equally shared among the beneficiaries. The proposal by Benson abides by the law. I therefore find and hold that the net intestate estate of the deceased shall be distributed as per the proposal by Benson. I hence adopt the proposal by Benson as the mode of distribution of Plot 963.

(viii) Costs:

101. Given the contest in these litigious proceedings costs must follow the cause.

102. In the end, the following orders do hereby issue: -

(a) The Grant of Letters of Administration Intestate jointly made to Benson Ogutu Simba and Pius Olima Simba on 20/02/2017 is hereby confirmed.

(b) The parcel of land known as Kanyamkago/Kawere II/963 shall devolve as follows: -

- (i) Francis Matata - 1.85 Ha**
- (ii) Jamin Asena Agufa - 2.025 Ha**
- (iii) Benson O. Simba - 1.765 Ha**
- (iv) Wycliffe O. Simba - 1.815 Ha**
- (v) Pius Olima Simba - 1.876 Ha**
- (vi) John Ochanda Simba - 1.885 Ha**
- (vii) Small Simba - 1.885 Ha**
- (viii) Maurice Kasimba - 1.069 Ha**

(c) A Certificate of Confirmation shall issue forthwith.

(d) Costs of these proceedings shall be borne by Pius Olima Simba. However, each of the beneficiaries above shall meet the costs of sub-division of their respective portions.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of October 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mudeyi Counsel instructed by Messrs. Mudeyi Okumu & Company Advocates for the Petitioner.

Pius Olima Simba the Protestor in person.

Evelyne Nyauke - Court Assistant