REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 64 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE DANIEL OLAL NYAWAWA

PURITY MBETE SALLY KOSKEI.....PETITIONER

VERSUS

EUNICE MWONGELI MWIKYA..... OBJECTOR

CORAM: Hon. Justice R. Nyakundi

Mwaure & Mwaure Advocate for the objector

Odera Were Advocates for the respondent

JUDGMENT

The deceased **Daniel Olal Nyawawa,** died intestate on the 16.5.2015. the claimants, **Purity Mbete Sally Koskei** and **Eunice Mwongeli Mwikya** under the Law of Successions have to date filed several applications to undo each other for this court to recognize one and not the other as the sole surviving spouse of the deceased. Due to the existence of the dispute as to who is truly the legal spouse of the deceased, to exercise dominion over the trusteeship and administration of the estate.

The court pursuant to Section 29 of the Law of Succession ought to determine the issue with finality.

Background

This legal battle started immediately following the death of the deceased. The petitioner **Purity Mbete Sally Koskei** approached the court by way of a petition in 2017 to secure Letters of grant of Administration which would enable her as the sole spouse to share the estate of the deceased with her daughter SK, at the time aged below 18 years old and still in school.

However, **Eunice Mwongeli Mwikya** got information of the petition lodged by **Purity Mbete Sally Koskei** filed an objection that grant of letters of administration not to issued to the petitioner. The objection to the making of the grant by **Eunice Mwongeli Mwikya** was on the grounds that the petitioner has never been a wife of the deceased save that they had a relationship which enabled them to be blessed with one issue namely (SK), who was a dependent of the deceased. She recognizes therefore that any benefit that may accrue from the estate of the deceased is only payable to the daughter and not the petitioner.

Due to the objection the grant of letters of administration were never to be issued to the petitioner in Succession Cause No. 64 of 2017. In the course of the pendency of the objection proceedings in the making of the grant by the court, several preliminary issues have been raised by the petitioner and the objector as referenced hereinunder.

From the Ruling of my brother **Chitembwe J** dated 24.2.2016, the petitioner **Purity Mbete Sally Koskei** had approached the court by way of a petition in Succession Cause No. 48 of 2015 to be issued with special grant of letters of administration Ad Litem for purposes of filing suit in respect to and on behalf of the estate of the deceased. The objector **Eunice Mwongeli Mwikya** lodged a protest to the making of that special grant in favor of the petitioner.

Having considered the material, the court presided over by **Chitembwe J** revoked the grant on grounds of non-disclosure and misrepresentation of material facts to other beneficiaries of the estate by the petitioner.

The petitioner did not stop there. On 25.9.2015 she received a letter from the Defence Forces Pensions Assessment Board which recognized her a beneficiary of the pensions fund of the deceased. This acknowledgement is prima facie evidence that she continued to pursue the benefits of the Estate in exclusion of other legitimate members of the deceased family.

It is also on record vide a Plaint filed by the petitioners in Children's Case No. 95 of 2006 against the deceased as the dependant in the matter of **SK** before the Children's Court at Nakuru. The petitioner pleads as follows:

> ***"The plaintiff (petitioner) started cohabiting with the defendant in the year 2003 and the union was blessed with one issue SK (a minor). That on March 2004 the plaintiff and the defendant separated and started leaving apart. That the plaintiff avers that the defendant (now deceased) has failed to provide and maintain the child. She therefore sought various declarations be made by the children's court on 3.7.2015. The petitioner filled a declaration by the widow form and on oath she deponed as follows. That I married the Late Daniel Olal Nyawawa on 3.4.2003. that at the time of his death, I was not cohabiting with any person since the death I have neither remarried nor cohabited with any person. At the date of death we were survived two wives who surrounded him."***

The petitioner on 3.9.2004 purported by swore an affidavit with the deceased as evidence of marriage. On 16.8.2016 the Director of Pensions forwarded a cheque of Kshs.601968 to the Public Trustee Kakamega under cover as death gratuity and for the benefit of the estate of the deceased.

Further, on 26.2.2018 the petitioner moved the court by way of a notice of motion seeking the following orders:

> ***1. That the honorable court urgently issue interim orders to the Ministry of Defence to pay up the monies to the petitioner to enable her pay the school fees and all other educational expenses who was set to join Form one.***
>
> ***2. That this honorable court do attach a power of arrest specifically for Eunice Mwongeli Mwikya for presenting forged documents to the pension officers.***

In support of the motion was her own affidavit sworn on 21.2.2018. basically, though the affidavits took length with details, the borne of contention between the petitioner as against the objector is on the sums that was to be paid out by the Director of Pensions to the beneficiaries. The petitioner argues that the objector has short changed her on account of her claim as a spouse of the deceased while lodging the claim with the Kenya Defence Forces. That the channel followed by the objector was tainted with misrepresentation of facts and non-disclosure of material evidence. On the part of the objector in her replying affidavit she contends that the petitioner was never a wife except that the deceased recognized the existence of the minor, who was born out of the relationship with the deceased.

The issue as to whether there was a marriage between the petitioner and the deceased was subjected to proof on a balance of probabilities through a case management direction taken by the parties to tender viva voce evidence.

The presiding Judge expounded some resources and judicial time to carry out the function of hearing the claimants viva voce evidence long before a determination could be made by the court. The petitioner once more filed another application for this court to re-open the petitioner's case, in order to adduce further evidence in answer to the objection.

I have reviewed the entire record from Succession Cause No. 48 of 2015, to Succession Cause No. 64 of 2017 the elements in the petitioner's suit papers, affidavits, correspondences are clearly expressed to lock out the other beneficiaries to the estate of the deceased.

It will now be my singular duty to determine the broad spectrum of the dispute which in my view crystalizes to the following issues:

> ***1. Whether the petitioner Purity Mbete Sally Koskei was married to the deceased on any legal system of marriage recognized in Kenya.***
>
> ***2. Whether, depending on the answer to (a) above the petitioner is entitled to a share of the estate of the deceased as a dependent or spouse.***
>
> ***3. Whether the deceased was survived by other beneficiaries besides the two claimants/objector and the petitioner.***

On the first issue, the objector **Eunice Mwongeli Mwikya** led evidence was to the effect that the whole confusion about the petitioner being a wife to the deceased has been caused by conflicting letters from the office of the presidency. In her testimony the objector pointed out two distinct letters by the chief one dated 31.8.2015 and a second one dated 3.4.2017. For the objector the letters seems to recognize the petitioner as the first wife while she is a ranking spouse number (2) in the family of the deceased. In her knowledge concerning the deceased the objector told the court that he was married to one wife but in his lifetime he was able to get a child with the petitioner. The beneficiaries of the estate taken in their capacity stated the objector would remain to herself as the sole spouse, the minor served with the petitioner, her own three children.

According to the objector this whole saga has also been contributed to by the various meetings held by the **District Commissioner Likuyani** trying to resolve the impasse about the legality of the petitioner's marriage to the deceased. That is how in one of the meetings the District Commissioner wrote a letter recognizing the petitioner as the 1st wife followed by her as the 2nd wife of the deceased.

The objectors evidence was that due to the letters written to the Ministry of Defence, some indicating the deceased was survived by one widow while another declared existence of two widows as beneficiaries to the estate.

However, in her evidence she asserted that the petitioner was never a wife to the deceased. The next witness called by the objector was **PW2 – Walter Awiti Nyawawa**. He testified as a brother to the deceased. According to Walter, he was only aware of the objector as the right spouse to the deceased.

The third witness who took the witness box was **Shadrack Agiso Nyawawa** apparently also a brother to the deceased. It was Shadrack's evidence that he knew the deceased very well and at the time of his death he had only contracted a marriage to **Eunice Mwikya** and no one else.

The petitioner's case

Ms. Purity Mbete Sally Koskei's evidence was that she married the deceased in 2003 and together they were blessed with one issue of the marriage. She deposited to the court an affidavit sworn jointly with the deceased affirming subsistence of a marriage union. The petitioner also showed the court and exhibited various documents, affidavits and correspondences done in pursuing the benefits from the department of Defence due and owing to the beneficiaries. It was her evidence that the family of the deceased acknowledged and recognized her as the wife to the deceased.

In furtherance of her entitlement to the estate as a spouse the petitioner told the court the efforts being made to access the pension funds to assist her pay school fees and other expenses for the benefit of the child.

DW2 – Josephine Mwikali a friend to the petitioner gave evidence on her personal knowledge and belief that the petitioner was a spouse to the deceased when they lived at Mikadini in Mombasa. She also stated in court that the petitioner later separated in 2005 and went to stay in Gilgil and the deceased remained in Mombasa where he worked as an army officer.

Analysis and resolution

With these both counsels were directed to file submissions on the matter. Before embarking on the main issue of this Succession Cause claim above, I ought to rule on the petitioner's application to re-open the proceedings to adduce further evidence. While I can understand the petitioner's anxiety to obtain leave of this court with a prospect to get another a chance to ventilate her case, the purpose of it must be of necessity satisfy the test of sufficient cause and the interest of justice.

Whether from the affidavit evidence is sufficient for this court to exercise discretion is a matter of fact. The task of such a discretion exercised judiciously must be within the confines of the following principles in the case of **Samwel Ketilewa v Housing Finance Co. Kenya Ltd & Another [2015] eKLR** where **Kasango J** citing and adopting the principles in **Smith versus New South Wales [1992] HCA 36 176 CLR 256** stated:

> ***"If an application is made to re-open on the basis that need or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that the hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or out which reasons for the Judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised."***
>
> ***The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that re-opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed when it is intended to fill gaps in evidence. Also such prayer for re-opening of the case, will be defeated by inordinate and unexplained delay."***

In the alleged affidavit by the petitioner she has not demonstrated that she was not given an opportunity to be heard to summon and adduce additional evidence held by her witnesses. This was a case where the parties took case management directions on adjudication before the Judge on 9.4.2018.

The relevant witness statements by each party to the objection proceedings duly filed before the commencement of the trial. Further viva voce evidence as stated on record was admitted by the trial Judge and both counsels filed written submissions to supplement the oral evidence.

Before the highlighting of submissions was scheduled for the 23.1.2019 what followed were other applications by the petitioner some which impacted on timely disposal of the objection proceedings. Before proceeding further, I would point out that a remarkable and astounding feature of this case was and is whether the petitioner can be recognized as legitimate spouse of the deceased.

The issue whether the petitioner requires more time to proof the elements of marriage has not been discharged from the evidential material filed in support of the application. This court as properly constituted should not lose sight of Section 1A and 1B of the Civil Procedure Act. On overriding objective. It empowers the court to take all the necessary steps to determine thereof that within the meaning of the overriding objective the dispute is to be resolved in a timely and at a cost affordable by the respective parties. I consider it quite late in the day and without sufficient cause by the petitioner that there is additional evidence out which ought to be admitted to meet the ends of justice in the case. The nature of the evidence has not been disclosed for that matter.

On the basis of this concerns raised, I decline to grant leave of this court to the petitioner to re-open her case for purposes of putting in new evidence. I dismiss the request for lack of merit.

The second issue as reiterated about is whether the petitioner can quality as a spouse to the deceased to entitle her to benefit from the estate of the deceased.

The Law

It is necessary to put to rest the issue of burden of proof under Section 107 (1) of the Evidence Act it provides:

> ***"Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."***

Further, Section 108 provides thus:

> ***"The burden of proof in a suit or proceeding lies on that person who will fail if no evidence at all were given on either side."***

In the case of **Britestone Ptl Ltd v Smith & Associate Far East Ltd 2007 4 SLR 855** the court held:

> ***"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms 'proved', 'disapproved' and 'not proved' are statutory definitions contained in the Evidence Act Cap 97, (1997 Rev. Edition): The term proof wherever it appears in the Evidence act and unless the context otherwise suggests, means the burden to satisfy the court of the existence or non-existence of some fact, that is the legal burden of proof."***

Pausing there clearly, the facts set to be proven by the burden bearer are those pleaded in the suit or claim to be answered by the adverse party. The court will therefore not make any decision on unpleaded fact and grant Judgment to a party which was not based on a pleaded fact in the suit. Pleadings continue to play a central role in civil administration of justice on various cause of actions filed in the courts under the purview of the Civil Procedure Act and Rules.

The second situation is where a party admits existence of certain facts to the claim from a consideration of Section 61 of the Evidence Act it provides as follows:

> ***"No fact need to be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree by writing under their hands, to admit or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings."***

The threshold issue whether the objector has right satisfied the standard of proof against the petitioner can be supported by the proposition in the Court of Appeal case of Uganda **(Elizabeth Wamala v Jolly Kasende & 2 others CA No. 70 of 2014)** where the court heed on appeal as follows:

> ***"The issue of whether or not the appellant was a wife of the deceased was not a matter that could be resolved as an agreed fact. This was ultimately a legal question which could duly be resolved after establishment of the relevant facts. It is clear that on the pleadings of the 3rd respondent, the legality of the union between the appellant and the deceased was called in question. This is a matter that could only be resolved by the court though the parties could abandon the issue obviating the need for a court decision. The inquiry into whether there was subsisting marriage does not lose relevance because of the death of a party to it. To the contrary it is important to establish the legal relationship between the deceased and other people claiming a share in his estate as an entitlement, including the right to apply for and be granted Letters of administration. The right to share in the estate of a deceased or to be granted letters of administration ordinarily depends on the legal relationship between those persons and the deceased. The resolution of the nature of relationship that each of these persons enjoyed with the deceased was key to resolving the matters in controversy in this suit. At some point the trial Judge states that since the deceased was no longer alive, it was immaterial to determine whether the appellant was married to him or not."***

The legal burden of proof shifts to the petitioner to proof on a balance of probabilities that she was married to the deceased. A review of the evidence by the petitioner is reflective of a marriage under Luo Customary or one entered into with the deceased and may have qualified into marriage by presumption.

Let me begin with the test on Luo Customary Law:

> ***(a). Section 43 (1) of the Marriage Act provides that:***
>
> > ***"A marriage under this part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.***
>
> ***(b). Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage."***

When dealing with the evidence of the petitioner and her witness besides the averments in the affidavit there was no evidence of the Luo marriage ceremony and rituals have taken place with the deceased. There are many features on what constitutes a valid Luo customary marriage from a study in the economic and social life of the Luo of Kenya **(John W. Ndisi in 1974), (African Religious and Philosophy (J. S. Mbiti Henneman 1969).** The evidence that marriage between the two people is about to be covenanted among the Luo community is the payment of bride wealth (commonly referred to as dowry) to the family of the bride. It was preceded with permission by grown up son to his father. That it was necessary for him to enter into a marriage union. The engagement of the wife to be would either be directly by the bridegroom or through a go-between.

According to customs the suctioning of the quantum of dowry or brides wealth was left to be determined by the family of providing the girl for marriage. Further the payment of bride wealth would be accompanined with a reward specifically for the grandmother who had taught the girl on sex matters. The gift or reward would take the form of (nalo) word ring Nyange (ankle ring or a goat). The mother to the girl was given a cow with a young calf called (Dher Nyodo).

In the meantime when a girl moves to her new home, its followed by other rituals to signify cementing of the relationship. The girls home will then prepare food which was right ceremony referred to as (Yedo Chego) consisting of dried meat, groundnut and beans. It was also meant to signify that their daughter has acquired herself a new home and a husband. See **(Dissertation on the impact of Christianity on the Luo Traditional Marriage System by L. Obudho UON 1985)**

> ***"It is trite law that customary law must be proved. It cannot be presumed. In Mwagiru vs Mumbi (1967) E.A. 639, the court held that marriage at customary law is a fact needing proof. In that case, it was held that the plaintiff had failed to prove he was married to the Defendant, as he did not prove that the Defendant was present and consenting at one of the vital stages of the ceremonies. Similarly, Civil Appeal No. 107 of 1999 Titus & Another vs Nangurai a recent decision before the Court of Appeal, was a case very similar to that which is now before this court, in which 2 persons claimed land as dependants of the deceased from an Administrator. Kwach J. A. (In his Judgment at pages 4 – 5) in upholding a decision by a land adjudication committee stated that it was the applicant's duty to satisfy the adjudication committee that their mother was married to the deceased under Maasai customary law, which they failed to do."***

From a proper understanding of the evidence by the petitioner and her witness DW2, the necessary elements of availed Luo Customary Marriage as outlined by **Mr. Obudho** in his desertion were far from being fulfilled. The petitioner and her witness testified as having been married according to the Luo customs of her late husband but failed to show any payment of dowry or other rituals solemnize the marriage.

According to **Mr. Obudho** dissertation, some of key elements which are central for the validity for a Luo customary marriage, are not dispensable. Therefore, contrary to the evidence by the petitioner a Luo customary marriage could not have been solemnized with the deceased without the two families meeting the set conditions of such a marriage. The affidavits sworn by the petitioner and her witnesses remain mere allegations to the fact to prove such a marriage ever took place with the deceased.

In my view, the affidavit of marriage purportedly sworn jointly with the deceased is neither one of the conditions for a customary Luo marriage or one by presumption to be validated. An affidavit is just an affidavit on the averments and contents disposed by the deponents. Why do I say so? The legal system of marriages is incorporated under the Marriage Act 2014. Similarly, the photographs annexed as exhibits taken as whole fits nowhere among the conditions precedent to be made for existence of a valid customary marriage. It is noteworthy in this entire proceedings the petitioner direct or by implication constantly refers herself as the wife but various essential stages that must be fulfilled prior to solemnization of a valid Luo customary marriage was missing from her evidence. On this ground, the court agrees with the objector that the petitioner was not legally married to the deceased under Luo Customary Law.

It follows therefore, to weigh the evidence on whether she qualifies as a spouse under the presumption of marriage. This system of marriage starts with cohabitation between two consenting adults.

The onus of establishing circumstances showing presence or absence of presumption of marriage is on the party relying in such a system of marriage.

The test as stated by **Chitembwe J** who in relying on **Blacks' Law Dictionary.** In the case of **NLS v BRP 2016 eKLR** defined **presumption to mean*:***

> ***"a legal inference or assumption that a fact exists on the known or proven existence of some other fact or group of facts."***

In addition, the Marriage Act of 2014 Section 2 defines **cohabitation to mean:**

> ***"to hide on an arrangement, in which an unmarried couple lives together in a long term relationship that resembles a marriage."***

Dealing with the concept of presumption of marriage the text book on **Family Law by Brunley 5th Edition** states:

> ***"If a man and a woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove there was no marriage and not on those who rely on it to prove that it was solemnized."***

From a number of cases, it is trite in marriage by presumption there must be something based on the acts and conduct of both parties consistent with the continuation of that marriage before the presumption should be indulged.

Arguably, the basis to invoke legality of a marriage with the deceased by the petitioner is in due of the fact that by the death of the deceased it would bring within a source of benefit program to defend her claim involving the deceased intestate succession. To this end the evidence must be clear and convincing in order to rely on this doctrine of marriage by presumption.

It has been contended by the petitioner that she cohabited with the deceased as husband and wife. The objector disputed that the petitioner has laid or given any evidence to indicate that the entire relationship matured into a marriage by presumption.

The objector advanced the case which included the testimony by the two brothers of the deceased **Walter Nyawawa (DW2)** and **Shadrack Nyawawa (DW3)** that during the lifetime of the deceased there was no regularly recognized marriage for the petitioner to rely on to acquire beneficial interest to the estate. With regard to the problem raised by factual matrix I rely on the principle in the of cases, the court in **Njoki v John Kinyanjui Muthere [1985] KLR** stated that:

> ***"The doctrine of presumption of marriage has a statutory foundation, in Section 119 of the Evidence Act Cap 80 of the Laws of Kenya. The court may presume the existence of any fact which it thinks widely to have happened regard being had to the common course of natural events, human conduct and public and private business. In their relation to the facts of the particular case."***

As **Kasango J.** quoted in the case of **M.M.M. v E.G.M. 2014 eKLR**

> ***"Prove of presumption of marriage is of importance here; presumption of marriage is a creature of Common Law; it is a child of Judges, and it is a Judge made. Marriage the principle states that where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and a wife, a lawful marriage may be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted by evidence to the contrary."***

In the instant case, it was submitted to this court by the objector's counsel that are apparent inconsistencies in the standard of proof to rebut the marriage by presumption between the petitioner and the deceased. To this submissions counsel moved the court to consider the period allegedly stated by the petitioner she spent with the deceased.

Secondly, the family of the deceased attacked the validity of any marriage by the petitioner to the deceased to warrant her to qualify as a widow for the benefit to the estate.

Sure, to this submission it is on record that the petitioner cohabited with the deceased in 2003 and as soon as it was practicable she deserted the home in 2004. It is the purpose of this evidence that facts to rebut the evidence by the objector PW1, and her witnesses PW2 and PW3 that any formal or essentials of a validity of a marriage could be concluded within such a short period of cohabitation. Presumption as noted from the cited case law, a rule of law applied in the absence of evidence, and is not itself evidence. The story by the petitioner is a strange in answer to the objector's evidence. The records and photographs that were admitted into evidence still failed to overcome the petitioner's burden of proof on presumption marriage.

It is at least put on record as far as way back in 2006 in her Plaint dated 22 June 2006 in **Childrens Case No. 95 of 2006 at Nakuru**. That she cohabited with the deceased approximately to a year and left him in 2004. The period covered by the evidence of reputation is short in comparison with the underlying principles of our Law to hold such a stay to rise to the level of presumption of marriage.

The unfolding story which can be deduced from the set of circumstances and proven by the objector and her witnesses, is that the intention of the petitioner and the deceased to consent a marriage or to cohabit together remained questionable until his death. Much of the evidence the petitioner in this case is relying on the alleged cohabitation is having the child together with the deceased.

I am of the view that in a case of cohabitation or presumption of marriage the legitimacy of the child should not be a substantial equation which presumption ought to be anchored on by the courts.

The cogent evidence by the objector together with the petitioners were admitted facts under Section 61 of the Evidence Act is clearly and allowed to firmly doubt the existence of a marriage by presumption. To me that ground as argued by the objector succeeds. It is therefore disputed that the petitioner was married to the deceased.

Giving by the evidence the deceased died intestate

According to the supporting affidavit the deceased residual estate remains to be the amount referred as Death gratuity from the Director of Pensions Ministry of Defence. The petitioner listed no real or personal property of the deceased. I find that the disputed amount being claimed by the objector and petitioner is accordingly classified in the text by **Musyoka J** as follows:

> ***"Discretionary pension scheme may allow the contributor to nominate a third party to receive benefits on eh contributor's death. Such nominations are not binding on the trustees of the scheme, with the consequence that they give no property rights to the deceased that can form part of the deceased's estate, where the trustees do exercise their discretion in favour of the nominated pension they pay the lumpsum or pension directly to third party."***

As regards to the issue of dependant Section 29 (a) provides that:

> ***"for 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."***

It is the objector's contention, that the deceased died intestate and the claim by the petitioner succeeds only to the extent that the daughter sired with the deceased is entitled to a share to the estate because she qualifies as a dependant under Section 29 of the Act. In other words, the claim of any benefit by the petitioner fails in view he was not legally married to the deceased or was she a dependant of the deceased during his lifetime. The responsibility to cater for dependants arising out of the property to the estate is expressly recognized under Section 26 of the Law of Succession Act.

The Law of Succession Act under Section 66 powers for the pensions to be apportioned to administer the estate of the deceased who died intestate. Further part VII outlines in terms of Rule 26 (1) and (2) of the Probate and Administration Rules requirement for letters of administration not to be granted to any applicant without notice to every other person entitled in the same degree or on priority to the applicant.

According to the facts of this case to my record, the distribution should be guided by the principles in the case of **In the matter of the estate of Joshua Orwa Ojode NBI Succession Cause No. 2015 of 2012 where Musyoka J** held:

> ***"Going by the above provision, where a deceased person is survived by spouse and child or children the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child."***

Thus court having considered the evidence in regard to the objection proceedings finds it fit to make the following declarations:

That despite the office of the presidency issuing different instructions letters the deceased was survived legally by:

(i). Eunice Mwongeli Mwikya

(ii). Agnes Imali Olal (Daughter)

(iii). Shamina Kelly (Daughter)

(iv). Joseph Nyawawa Olal (Son)

(v). Dorcas Imali Olal (Daughter)

As for the widow she is entitled to the benefits to the estate as stated in Section 35 (1) of the Law of Succession:

a). The personal and household effects of the deceased absolutely.

b). A life interest in the whole of the net intestate estate.

In accordance with Section 38 of the Law of Succession, the deceased herein is survived by more than one child. My assessment of the evidence is that they will be entitled a share of the estate in equal share.

Further, for the above reasons I am satisfied this long standing succession dispute has to be settled with the following orders in mind:

(a). That the grant of letters of administration be issued to Eunice Mwongeli Mwikya and Purity Mbete Sally Koskei as co-administrator for sole purpose as a trustee for the benefit any share which may accrue to S K.

(b). That on petitioning for grant of letters of administration in due course the Public Trustee Kakamega do file a probate account with this court within the next 21 days from today's date.

(c). That on receipt of the probate account further orders be issued in respect with release of the funds withheld to cater for School tuition and other expenses for the children of the deceased before new term which starts in January 2020.

(d). The costs to be in the cause.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 18TH DAY OF DECEMBER, 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mayaka for Odera Were Advocates for the respondent

2. Purity Mbete Sally Koskei - Petitioner