



REPUBLIC OF KENYA

High Court at Kakamega

Succession Cause 133 of 2010

IN THE MATTER OF THE ESTATE OF BERNARD KARANI AYUGU..... DECEASED

MGAPETITIONER/DEFENDANT

V E R S U S

ASM OBJECTOR/PLAINTIFF

J U D G M E N T

The petitioner filed this petition seeking letters of administration intestate on the 26.2.2010. Before a grant of letters of administration was issued the objector filed her objection to the making of the grant on 6.4.2010. The objector also filed her petition by way of cross petition for a grant of letters of administration on the 28.7.2010. Before the issue of the letters of administration was determined the petitioner filed an application seeking to have the objector restrained from intermeddling with the deceased's estate. Justice Lenaola heard that application and gave his ruling on the 17.11.2010. Parties agreed to have the objection proceedings proceed by way of oral evidence. The objector became the plaintiff while the petitioner became the defendant.

The plaintiff testified as PW1. Her evidence is that the deceased, **BKA**, was her husband. They started living together (PARTICULARS WITHELD) On 4.8.2007 the deceased paid dowry to the plaintiff's parents while accompanied by his parents. The dowry comprised of two cows and KShs.10,000/= . An agreement for the dowry payment was written in the Maragoli language and a translated version was produced. The deceased also swore an affidavit on the 25.9.2007 before Mr. Balongo Advocate stating that the plaintiff was his wife. When the deceased died the defendant filed a case and the same was decided on the 18.1.2010 by Justice Osiemo before the Eldoret Court. The court released the deceased's body to the plaintiff and the defendant both being recognized as the deceased's widows.

The plaintiff further testified that the defendant filed for divorce claiming that the deceased had married the plaintiff. According to the plaintiff the deceased left a Will which indicates how he intended his estate to be distributed. The plaintiff had three children and the deceased took them as his and even paid school fees for them. The plaintiff did not have any child with the deceased. After the death of the deceased both the Public Trustee and the local administration recognized her as the deceased's widow and the plaintiff produced letters to that effect. When the plaintiff married the deceased there was a mud house at the Moi's Bridge plot and the deceased built for her a permanent house. During the construction of the house Maragoli traditional rituals were conducted which proved that she was the wife of the deceased. The plaintiff further testified that she knew one EOG who was her lover but the two did not marry because Elijah was lawfully married to one HG with whom he had four children. The plaintiff denied that she ever got married to the said EO. She knew Elijah through the Israel Church where they were both members. The deceased lost his father in the year 2006 and the plaintiff attended the funeral

with the deceased. She took photographs during that burial. The deceased and the plaintiff used to attend church together at Moi's Bridge at Kitale and the deceased even invited the pastor to their home. Before the deceased died he transferred plot numbers (PARTICULARS WITHELD) to the plaintiff. A consent was obtained from the relevant Land Control Board. The plaintiff would like to be recognized as the deceased's widow.

The plaintiff's further evidence is that the petitioner left out in her petition the plaintiff and seven children of the deceased. The deceased adopted the plaintiff's children and also had other children with one M namely: - (NAME WITHHELD) . M is deceased. All the seven children who were not included have birth certificates. The deceased used to work as an officer in the Fisheries Department. The deceased built her a four bedroomed permanent house and they prepared the plan before the house was built. By the time the deceased died he had separated with the defendant. The plaintiff denied that she had sold some vehicles belonging to the deceased. The defendant has never lived at Matunda. She lives at Greenfield Estate in Nairobi.

GIDEON BARONGO, testified as PW2. He is an Advocate of the High Court of Kenya. He testified that he knew the deceased from 2007. He prepared an affidavit on 25.9.2007 indicating that the plaintiff was the deceased's wife and he was told that the two had celebrated their marriage under customary law. He also did another affidavit on 25.9.2007 showing that the deceased had lost his title deeds for plot numbers (**PARTICULARS WITHELD**) On 20.11.2009 the deceased went to his office with the plaintiff and told him that he wanted to transfer the above two plots to the plaintiff. PW2 witnessed the transfer forms. PW2 represented the plaintiff during the burial dispute before the Eldoret High Court. The affidavit of marriage he prepared did not indicate the amount of dowry paid. The Eldoret suit was finalized by way of a consent. He was also involved in the sale of motor vehicle registration number (PARTICULARS WITHELD) Subaru which belonged to DK. The vehicle was sold to one Kimilu for KShs.280,000/=.

PW3, was **AKK**. Her evidence is that she was a step mother to the deceased. When she was married by the deceased's father in 1965 the deceased was about 10 years old. The deceased got married to the defendant, **M** and used to visit his rural home. The deceased used to work for the Fisheries Department. At one time the deceased went home and told PW3 that he had been assaulted by the defendant and her son. The deceased later went back and told PW3 that he had married the plaintiff. The plaintiff and the deceased used to visit her together. PW3 participated in the burial of the deceased. She is aware that the deceased paid dowry for the plaintiff and the plaintiff lives in the deceased's house at Matunda. She was present during the burial dispute in Eldoret and the court directed the two parties to bury the deceased. In 1974 she separated with the deceased's father but later reunited. She had four children with the deceased's father. She was not present when dowry was paid to plaintiff's father.

TLK, testified as PW4. His evidence is that he is the chairman of the Gisemba clan to which the deceased belonged. The deceased was also his neighbor at Banja village in Hamisi District. He knew the deceased when he was young. The deceased got married to the defendant and later married the plaintiff. When the deceased died the plaintiff notified him. At one time the deceased informed him that the defendant had sued him and the case had been completed and he was directed to pay KShs.30,000/=. He participated in the burial dispute between the two parties before the Eldoret Court. The case started at the Kitale court and was later transferred to the Eldoret court. As the chairman of the clan he advised the parties to reconcile and bury the deceased. During the burial the defendant talked as the first wife while the plaintiff talked as the second wife. The deceased lived at Matunda with the plaintiff.

PW5, was **EAK**. He is a step brother to the deceased and the son of PW3. His evidence is that the deceased had one wife who is the defendant. He later heard that he had married the plaintiff. The plaintiff was living at Matunda with the deceased. The deceased retired and went to live at his farm at Matunda. The deceased became sick and died. The body was taken to a hospital in Kitale. He went to the hospital with the defendant and when he went to the deceased's homestead he was arrested on the allegations that he had assaulted the plaintiff's worker. According to him the plaintiff was not the deceased's wife. She only lived with the deceased for only two years as friends. The house at the

Matunda farm belongs to the defendant. The deceased and the defendant started building a permanent house at the farm. He denied that PW4 is the chairman of the Gisemba clan and testified that the funeral committee was headed by **EI, FI, Z** and **JM**.

The defendant testified as DW1. The defendant is a Secretary with the Kenya National Examination Council. She testified that she got married to the deceased on 2.8.1980 at Goibei Pentecostal Church. They were blessed with four children namely (names withheld) The two met when the deceased was in college. The deceased worked as a fisheries officer in various places before rising to become the Director of Fisheries. They lived in Banja village in Hamisi district and later moved to Kitale where they bought land in 1987 from one LN. They bought one plot in Kitale and later added another one. These are plot numbers (PARTICULARS WITHELD) (PARTICULARS WITHELD) is 1.340 Hectares while plot (PARTICULARS WITHELD) is 0.970 Hectares. When they bought the land title deeds were not being issued for the area and they processed title deed in 1998. She has been keeping the two title deeds since then. In 1989 together with her late husband they put up a semi-permanent structure on the Kitale plot. They then laid a foundation for a permanent structure and a pastor was called to pray during the laying of the foundation. The two were putting up a maisonate at Kitale. The building was developed up to the lental level.

The defendant further testified that due to harassment by the plaintiff she filed for separation in 2005. She got information from a relative that the plaintiff was seen coming from her bedroom in the Kitale house. She got to know that the plaintiff was married to one E who resides at (PARTICULARS WITHELD) . He met E who confirmed to her that he was the plaintiff's husband and the two had undergone a church wedding ceremony at Eldoret. According to her the plaintiff was not married to the deceased. The deceased indicated the defendant as his next of kin in his employment records with the Ministry of Fisheries. The deceased had no other children. She saw birth certificates of some people having been placed in the pension file. One of those people is ES who was their worker in Kitale since 2000. Together with her husband they owned a four bedroomed maisonate in Nairobi which is jointly registered in both names. They bought motor vehicles registration (PARTICULARS WITHELD) The defendant went on to testify that the vehicles were sold by the plaintiff. The lorry was sold in Busia, the Peugeot was sold to a retired teacher and the Subaru was sold to JM. She knows PW3 who is her step mother in-law and she was sent away by the deceased's father for having tried to poison the deceased. The defendant also knows PW4 TK who is a neighbor at Banja and he participated during their wedding in 1980.

The defendant further testified that the plaintiff was not the deceased's wife. The property left by the deceased was acquired together with her. On 7.5.2006 the plaintiff went to her office with two police officers alleging that she had beaten the deceased and thrown him out of the Nairobi house. The plaintiff had a P3 form and the defendant was taken to Buru Buru police station. There was also an allegation that the defendant had stolen the title deeds.

It is the defendant's evidence that she was called by a neighbor on or about the 26.11.2009 informing her that the semi-permanent house in Kitale was being demolished and some items were being taken away. The plaintiff upon the death of the deceased took the body to a mortuary and neighbours got information that the deceased had been hidden. The defendant went to Kitale and learnt that the deceased had died on the 24.11.2009. She filed a court case in Eldoret after learning that the plaintiff, PW3 and PW4 wanted to bury the deceased secretly. The plaintiff went to the Pensions Department and tried to get the pension money transferred to her own account. The deceased's body was given to her by the Eldoret court for burial. When she filed for separation she indicated that the deceased had taken the plaintiff to their rural home. She was separated from the deceased but they were not divorced. The deceased was ordered to pay KShs.30,000/= as maintenance. The two plots in Kitale were bought from monies taken by her and the deceased from their respective saccoes. She did not consider the plaintiff as her co-wife because she was already married to Elijah. The plaintiff is occupying the permanent house at Matunda. She did not participate in the consent that was filed in the Eldoret court. At one time on the 22.4.2012 she participated on a Kenya Television Network (KTN) on a programme on (PARTICULARS WITHELD) . The plaintiff went to live with the deceased in 2005. The vehicles were sold by the plaintiff immediately after his death and before the burial. The plaintiff also sold part of the land.

DW2, EOG testified that the plaintiff is his wife. They got married at PAG church in Eldoret and a marriage certificate number (PARTICULARS WITHELD) was issued to them. He knew the plaintiff in the year 2000 and they started living together from 2001. In 2001 the plaintiff changed her Identity Card to include DW2's name and she became (PARTICULARS WITHELD). He produced the marriage certificate and a copy of the plaintiff's changed identity card. DW2 further testified that the deceased was known to him and he used to go to his house several times and he would leave with the plaintiff. On one occasion in 2005 the deceased went to DW2's house when DW2 was sick. The plaintiff told him that she wanted to go for a church meeting as she was a church official. The deceased had a car and together with the plaintiff they put items in the car. They asked DW2 to pray for them which he did. Since then the plaintiff has not gone back to him. He called her and she told him to forget about her.

It is DW2's evidence that he has not divorced the plaintiff and neither has the plaintiff filed for divorce. On 6.1.2007 he wrote a letter to the Director of Pensions informing him that although he had nominated the plaintiff as his next of kin, he was dropping her. He saw the plaintiff at the Kitale High Court. He was a member of the Israel Church together with the plaintiff. The plaintiff had taken the original marriage certificate. He was aware that the deceased had married the plaintiff. On 16.1.2006 he wrote a letter to the OCPD Central Police Station Nairobi complaining that the deceased had married his wife. The plaintiff had children before he married her. His position is that the plaintiff is still his wife.

DW3, TEM, testified that he lives in Matunda, in Mois Bridge Kitale. He knew the deceased and the defendant since 1986. He had a neighbor by the name NDUNGU who wanted to sell his land. The defendant and the deceased bought the land measuring 5 acres and they became his neighbours. After buying the land they went back to Nairobi. In 1987 the deceased and the defendant built a semi-permanent house on the land. This was a mud house and it was demolished in 2009. In 1986 the deceased and the defendant did a foundation for a permanent house. The house was built up to the lental level. When the semi-permanent house was being built he is the one who provided the poles. The deceased and the defendant used to visit their Matunda farm during Christmas. Initially they had three children but later had another one. The deceased was his friend but from 2005 he never used to see him frequently. One day he saw the deceased driving his Subaru vehicle and they had a chat. When the mud house was being demolished in 2009 he informed the defendant. The deceased later bought two more acres of land from one FL but he was not involved in that transaction. DW3 used to see the plaintiff in the Matunda home. DW3 swore an affidavit during the burial dispute before the Eldoret court. The deceased had told him that the foundation for the permanent house was for a story building. Currently people live in that house.

DW4, ESA, testified that he knew the deceased and the defendant. He knew the deceased from the year 2000 and he became his employer. He worked for him at his Matunda farm. There was a semi-permanent house where he used to live. The deceased was putting up a storied building and the plaintiff's brother by the name S changed the house plan. He testified that the house plan produced by the plaintiff was meant to be another house for the plaintiff's children. The plan was drawn by SS, the plaintiff's brother, after the burial of the deceased and DW4 was present. DW4 knows all the seven children who are claimed to be the deceased's beneficiaries. He knows GT whose father is called B. He knows E K who is the son of DK and he is the grandchild of the plaintiff. SK is a daughter of the plaintiff's sister. He also knows SC she is the plaintiff's daughter and she is married. DK is the plaintiff's son. One CM was brought by the plaintiff and was asked to claim that she is the deceased's child with a maid. DW4 denied that he is the deceased's child and testified that his father is alive. The plaintiff told him to claim that he is the deceased's child so that he could recover his salary that had not been paid for over four years. He was to benefit from the pension money. He was shown a birth certificate indicating that he was the deceased's child but he disagreed with the plaintiff.

It is DW4's evidence that the deceased died on the 24.11.2009 and he died on his hands in the house (PARTICULARS WITHELD). By that time the plaintiff had gone to Busia to sell the deceased's Canter vehicle. When the plaintiff went back she took the deceased to a hospital in Eldoret and the body was checked into the hospital using the Identity card of LS, the plaintiff's brother who had already died. The plaintiff then demolished the semi-permanent house claiming that the defendant would have stayed in that house during the funeral. The deceased had a Subaru vehicle, a Peugeot 504 as well as a canter. All the

vehicles were sold. The Peugeot was sold to a teacher at Matunda. The Subaru was sold to one Mutuku and the canter was sold in Busia. The plaintiff also sold a portion of the Matunda land after the death of the deceased. According to DW4 the deceased never paid dowry to the plaintiff's parents. The witness testified that the dowry agreement was done after the burial of the deceased by one T and S. The agreement was backdated. Even the sale agreement for the land was backdated and SS and D were the ones drafting the agreements. Some people are occupying the land having bought portions thereof from the plaintiff. DW4 is the one who used to take documents to PW2, Mr. Barongo Advocate. He left the deceased's home in September 2011 after having been threatened by the plaintiff. He reported the plaintiff's threats at Mois Bridge police station. It is his evidence that the deceased did not die on the date indicated in the death certificate. The deceased's body was taken from Moi Referral Hospital to Cherenganyi Nursing Home. The papers from the Moi Referral Hospital were destroyed. The deceased used to take the plaintiff's children like his.

DW5, FIO, testified that he is a pastor from Banja village and came from the same clan as the deceased. He was aware that the deceased married the defendant and two cows were paid as dowry. He used to live with the deceased at Banja in the same house. **PW3, A** left her husband and went to live in Mombasa until 1992 when her son **EA (PW5)** brought her back. His further evidence is that the houses in Matunda were built by the deceased and the defendant.

Parties filed written submissions. Counsel for the plaintiff submitted that the plaintiff has proved her case. She has proved that the petitioner left her out yet she is the deceased's widow. The defendant in her own documents including the separation petition and a letter to the Fisheries Department indicated that the plaintiff was married to the deceased. PW2 did testify that he prepared a marriage affidavit for the deceased. When the house in Matunda was being built a Maragoli customs ritual known as "Ekesege" which is done when a ridge or the last iron sheet is placed on the roof was performed in the presence of the deceased and the plaintiff. Counsel relies on the case of **MACHARIA V NJOMO & ANOTHER [2008] 1KLR 754**. Counsel further submitted that Section 35 of the Law of Succession Act recognizes the plaintiff as a wife and a beneficiary of the deceased. Counsel also submitted that the plaintiff's children and the other children the deceased took care of are also beneficiaries of the deceased as they come within the definition of a dependant under Section 29 of the Law of Succession Act. Further Section 3(2) of the Act recognizes as beneficiaries a child whom the deceased had expressly recognized as his own and whom he has voluntarily assumed permanent responsibility. Counsel contends that Section 66 of the Law of Succession Act allows the two parties to be appointed as joint administratrix. Counsel also relies on the cases of **ELIZABETH KAMEME NDOLO V MATATA NDOLO Nairobi Civil Appeal No. 128 of 1998** (unreported) and that of **RE THE ESTATE OF SOSPETER KIMANI WAITHAKA [2010] EKLR**. Counsel further submit that the deceased had already disposed of his property including land and motor vehicles. Counsel urged the court to consider the ruling of Justice Lenaola delivered on the 17.11.2010 where the judge noted that there was no evidence to show that the vehicles belonged to the deceased.

Counsel for the defendant submitted that the burial dispute in Kitale did not go for full hearing and the issue whether the plaintiff is the deceased's wife was not deliberated upon. The plaintiff's claim that she is the deceased's wife is based on cohabitation with the deceased. Since the plaintiff was already married to EOG she lacked capacity to enter into another marriage. The properties located in Matunda were jointly acquired by the deceased and the defendant. No evidence was adduced to prove that the deceased had adopted some of the alleged beneficiaries. The plaintiff alleges that the deceased died tested yet no Will was produced. The plaintiff has wasted the deceased's estate and the court should consider the ruling delivered by Justice Lenaola.

The main issues for determination are whether the deceased died testate or intestate, whether the objector was the deceased's widow, whether the objector's children were the deceased's dependants, whether the plaintiff is the deceased's dependant, who are the beneficiaries of the deceased's estate, what comprises the deceased's estate and who should be made the deceased's administrator. With regard to the first issue the plaintiff stated that the deceased left a Will. A document titled "**My wish fo the future in my life**" was produced as exhibit 5. The document is dated 23.6.2009. In the petition by way of cross-petition filed on 26.7.2010 by M/S Barongo Ombasa & Company Advocates the document states that the

deceased died intestate while domiciled in Kenya. This document was presented by the plaintiff and therefore establishes that the deceased died intestate. The document alleged to be a Will does not satisfy the requirements of a valid Will. I have gone through the document and some of the words added to it prove that indeed it was not written by the deceased. In one of the paragraphs the words "USHINDWE" is used. Some of the words have been cancelled and replaced with others. The deceased was the Director of Fisheries before he retired and there is no evidence that he could not have had a typed document in form of a Will. The alleged witnesses appear to have signed the document on different dates and they signed on the sides of the document. I do find that the deceased died intestate and left no Will.

The plaintiff in her objection dated 6.4.2010 indicate that she is the deceased's second wife. In her evidence she indicated that she got married to the deceased and on the 4.8.2007 the deceased paid dowry to her parents. Other than the payment of the dowry the deceased also swore an affidavit on the 25.9.2007 before Mr. Barongo Advocates stating that he was married to the plaintiff. The plaintiff and the deceased lived together at Matunda in Kitale as husband and wife since 2005. PW3 and PW4 also testified that the deceased told them that he had married the plaintiff as the defendant had assaulted him. The plaintiff's evidence is countered by the defence. It is the evidence of the defendant that the plaintiff was married to EOG (DW2). DW2 testified that he lawfully got married to the plaintiff on the 16.8.2002 and a marriage certificate was issued. DW2 used to work for the Kenya Government and he had included the plaintiff as his next of kin. On the 6.1.2007 he wrote to the Director of Pensions and removed the plaintiff's name as his beneficiary. The plaintiff categorically denied that she was married to DW2. It is the plaintiff's evidence that even the defendant in her own complaints such as the separation cause did indicate that the deceased had taken the plaintiff as his wife. The deceased's body was also given to the two parties to bury as the widows

The evidence on record shows that a marriage certificate number (PARTICULARS WITHELD) was issued on the 16.8.2002. The marriage was between EOG aged 60 years and AM Sebi aged 42 years. The marriage was presided over by Rev. Saul Lwoyero at the PAG Church Eldoret. There was another document dated 24.12.2009 that was produced indicating that the marriage was between the plaintiff and Elijah OG. It is the plaintiff's evidence that the document gives the name of AS who is her brother who died in the year 2000 and he could not have been alive in 2009. I have gone through the document and it is clear that somebody was extracting information from the register of marriages and this document is merely an extract and not the marriage certificate. From the evidence on record I am satisfied that the plaintiff was married to EOG and that marriage had not been dissolved. The said EO started complaining about his wife having left him before any divorce proceedings were done way back before the deceased passed on. On the 6.1.2007 he wrote a letter to the Director of Pensions removing the plaintiff as his next of kin. On the 16.1.2006 E O wrote to the OCPD Central Police station complaining that the deceased had taken the plaintiff as his wife yet the plaintiff was married to him. The two letters were copied to Matunda Police station where the plaintiff and the deceased used to reside. The evidence of DW2 was not made for purposes of this dispute. It is DW2's evidence that the plaintiff left his home in 2005 and that is the time she started living with the deceased.

Section 13 of the Matrimonial Causes Act states that a husband or a wife may present a petition to the court seeking to have his or her marriage declared null and void. **Section 14 (1)** of the Matrimonial Causes Act chapter 152 Laws of Kenya states as follows:-

"14 (1) The following are the grounds on which a decree of nullity of marriage may be made-

- a)
- b)
- c)

d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force."

It is clear from the evidence on record that the plaintiff was married to EOG who is still alive and therefore the plaintiff lacked the capacity to enter into a second valid marriage. The act of having more than one husband has been defined as Polyandry. It is clear from the provisions of **sections 13 and 14** of the Matrimonial Causes Act that polyandry is not permitted by the Kenya Law. Counsel for the plaintiff relies on the provisions of **section 3(5)** of the Law of Succession Act which states as follows:-

“3(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

The above section is mainly meant to benefit widows whose husbands had already contracted another marriage. The purpose of **section 3(5)** is to take into account women who are married to men who do not disclose their previous marriages. However the same situation cannot be applied to circumstances where the woman had already contracted another marriage which has not been dissolved. I therefore do hold that the plaintiff was not the deceased's widow and no presumption of marriage can be made despite the period of about five years of cohabitation. Similarly I am not convinced that indeed the deceased paid dowry to the parents of the plaintiff or that he swore an affidavit before Barongo Advocates. It is the evidence of DW4, ESA that some of the documents were done after the death of the deceased and he is the one who used to take them to Barongo Advocate. DW4 testified that the dowry agreement was done after the deceased had passed on. The deceased's body was released to both parties by consent. The burial dispute before the Kitale Court was not fully heard and determined. The consent cannot be used as a final determination as to the plaintiff's status as the deceased's widow. Similarly, the letter written by the defendant complaining that the deceased was living with the plaintiff as his wife cannot confer widowhood to the plaintiff. The plaintiff was already married and lacked capacity to enter into a second marriage. There was no marriage in any case. In the case of **NIRMAL SINGA JUTTLA V HAFSA ATHMAN KIRAO, Matrimonial Cause No. 11 of 2004 (Mombasa)**, the marriage was declared a nullity after the plaintiff informed the court that his previous marriage in the United Kingdom had not been dissolved and his first wife was still alive.

It is the plaintiff's evidence that she had no children with the deceased. The plaintiff had her own three children who the deceased took as his. There were other four children who were also depending on the deceased, one of them being DW4. It is the plaintiff's case that three of those children were the deceased's children with one M who is deceased. The evidence on record shows that the deceased was living at Matunda with the plaintiff. The plaintiff's children were also living with her. It is the submissions by the plaintiff's counsel that section 29 of the Law of Succession Act defines a dependant to include someone whom the deceased had taken into his family as his own child or somebody who was being maintained by the deceased immediately prior to his death. It is the evidence of DW4 that all the children mentioned by the plaintiff have their fathers who are still alive. It is clear that it is the plaintiff who took these children to live with the deceased. The deceased had no option but to cater for their needs. Even if the deceased took care of those children I do find that he had no option but to do so and that should not be taken that those children are the deceased's dependants. Indeed these are not children but they are adults. According to the evidence of DW4 GT's father is called B. EK is the plaintiff's grandchild and son of DK. S C is the plaintiff's daughter who is married. DK is the plaintiff's son who is also married with his own children. It is DW4's evidence that one CM was brought to the homestead to claim that she is the deceased's child with a maid which is not the case. Even DW4 was to be made as the deceased's child but he refused. The plaintiff went a great length to obtain birth certificates showing that all those children were the deceased's children. From the evidence on record I do hold that other than the defendant's children all the other people claimed to have been under the care of the deceased were not the deceased's dependants. The term “dependant”, if interpreted widely can include person who was living with the deceased. In the African concept of extended families, adults live with children of their relatives for one reason or another and such assistance cannot confer dependency status to those being assisted. A good example is where a deceased would have taken his relative's children for purposes of educating them and thereafter to return to their parents. If the deceased dies before that mission is complete, one cannot claim that he is also a dependant.

The plaintiff's children are adults and some are even married. They cannot be taken to have been depending on the deceased who was a pensioner. Even those of the plaintiff's children who are not married were living with the deceased courtesy of their mother and the deceased could not have chased them away. Let them benefit from their own father's estate as it is clear their fathers are alive. The other so-called children were mainly brought for purposes of being dependants. The industry of the plaintiff to reap from the estate is unrivalled. I am certain all the so-called children's shares would have gone to the plaintiff.

The next issue is whether the plaintiff can be taken to be the deceased's dependant. Counsel for the plaintiff submits that the deceased provided for the plaintiff during his lifetime immediately before he passed on. It is the defendant's evidence that the plaintiff was living with the deceased at their Matunda house in Kitale. Some of the witnesses also saw the plaintiff living with the deceased. It is therefore not in doubt that the deceased and the plaintiff used to live together. I will hold that the plaintiff was the deceased's dependant but not as a wife but as dependant.

Having held that the plaintiff's children and those other children who are alleged to have been under the care of the deceased are not the deceased's beneficiaries, I do find that the deceased's beneficiaries are the following:-

(PARTICULARS WITHELD)

The next issue is to determine the deceased's estate. In her petition documents the defendant indicated that the deceased left the following properties:-

(PARTICULARS WITHELD)

Counsels for both parties urged the court to consider the ruling delivered by Justice Lenaola on the 17.11.2010. It is the plaintiff's position that the court held that there was no evidence to prove that the three vehicles belonged to the deceased. It is the defendant's evidence they bought the vehicles together as well as the land. The house in Nairobi is registered in the joint names of the deceased and the defendant. The defendant also testified that they did a foundation for the residential house at Matunda and developed the house up to lental level. A photograph was produced as defence exhibit 5A showing the building which was not complete. The plaintiff produced the purported Will that indicate that the above three vehicles belonged to the deceased. In the said document the deceased was giving his share of the Nairobi house to the plaintiff. Justice Lenaola held that there was no evidence on the ownership of the vehicles as by then the vehicles had already been sold and no documents were provided to prove ownership. After hearing the case it is clear that the three vehicles belonged to the deceased. It is also not true that the deceased sold all the vehicles before he died. I am satisfied with the evidence of DW4 that the vehicles were sold by the plaintiff immediately after the deceased's death. I am also satisfied that the sale of the vehicle to one Mutuku, the interested party was done after the deceased's death and the vehicle sold to Mutuku registration number (PARTICULARS WITHELD) was the deceased's property and it was sold after his death. It is therefore my finding that the deceased's estate comprised of the three real properties, the three vehicles as well as the death gratuity. The plaintiff's son, DK transferred the Subaru vehicle into his own name and thereafter sold it to one M. The evidence shows that the vehicle belonged to the deceased.

The defendant herein has been working as a(PARTICULARS WITHELD) She had the capacity to contribute financially to the acquisition of the estate. I do find that the estate comprising of the three vehicles and three real properties were bought and developed by both the deceased and the defendant. A grant has not been issued herein and I will not proceed to distribute the estate. However, taking into account the fact that the plaintiff sold the three vehicles as well as part of the land and having held that she is a dependant of the deceased, I do order that the plaintiff vacates the residential house in Matunda located on plot number (PARTICULARS WITHELD) . The defendant and her family to take over possession of the said property. The plaintiff's share of the estate shall be calculated after taking into account the sale proceeds of the three vehicles as well as part of the land. If there shall be anything payable to the plaintiff in form of her share of the estate then the same shall be curved out of plot number

(PARTICULARS WITHELD) . The computation of the plaintiff's share should take into account the fact that the defendant owns part of the deceased's estate and it should not be taken that the three properties and the vehicles belonged to the deceased alone. The plaintiff shall obtain a share equal to each dependant of the Death gratuity after taking into account the sale proceeds of the properties she sold.

No grant has been issued herein. Having found that the plaintiff is not the deceased widow and since all the deceased's children are adults I do order that the defendant herein be the administratrix of the deceased's estate alone. In the end the plaintiff's objection dated 6.4.2010 is hereby dismissed. The cross-petition dated 28.7.2010 by the plaintiff is also dismissed. The defendant shall be issued with a grant of letters of administration intestate and shall apply to have the grant confirmed stating her proposed mode of distribution. Each party shall bear her own costs.

Delivered, dated and signed at Kakamega this 29th day of May 2013

SAID J. CHITEMBWE
J U D G E