



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 985 OF 2009**  
**IN THE MATTER OF THE ESTATE OF PAMELA ARWA MBOYA (DECEASED)**

**AND**

**IN THE MATTER OF SECTION 66 OF THE LAW OF SUCCESSION ACT AND RULE 73 OF  
THE PROBATE AND ADMINISTRATION RULES**

**AND**

**LUCAS OKUKU MBOYA.....1ST APPLICANT**

**TOM JOSEPH OKUKU MBOYA.....2ND APPLICANT**

**AND**

**ALAKIE MBOYA.....OBJECTOR/RESPONDENT**

**RULING**

The background information herein is that the applicant herein approached the seat of justice by way of a petition for a grant of representation with a **will** annexed dated 28th day of April 2009 and filed on the 29th day of April 2009. The **will** dated 29th day of August 2000 is annexed or attached to the petition.

The cause was duly advertised on the 12<sup>th</sup> day of June 2009 vide gazette notice number 1460 of the 8th day of July 2009. The Respondent to the application subject of this ruling presented objection to the making of grant dated 7th day of July 2009. For purposes of the record only, and in a summary form the objection was based on the fact that her name was misdescribed in the **will with** a view of misleading, material documents relating to the **will** have not been disclosed, the will is void in so far as it purports to bequeath property that did not belong to the deceased absolutely and in so far as it purports to bequeath property to persons who are not bonafide beneficiaries to the original and true owners, it unjustly excluded the objector who is a bonafide beneficiary there to, it does not make equitable provision for the objector, that the said **will** is in effect disinhering the objector from the estate of her late father Tom Joseph Mboya deceased without cause, reason or explanation, and lastly Tom Joseph Okuku Mboya the petitioner not being the son of Tom Joseph Mboya (deceased) is made to benefit and manage property that belonged to the late Tom Joseph Mboya illegally in priority of the objector without reasonable cause or explanation.

The filing of objection was followed shortly thereafter by the filing of interrogatories dated 11th

August, 2009 ,and filed the same date emanating from the objector directed to the petitioners seeking information and in a summary form, relating to whether the deceased was wife to late Tom Joseph Mboya, whether she remarried after his death, and had any children from the said subsequent union, whether the property forming the property subject of the **will** of the deceased herein were properties that formed the estate of the late Tom Joseph Mboya, whether the late Tom Joseph Mboya left a **will** , and if so whether this will was disclosed by the deceased subject of these proceedings, whether the said property belonging to the said late Tom Joseph Mboya were disposed off, bequeathed by the deceased subject of these proceedings during her life time, and if so details of such numbers, subdivisions, resulting of the subdivisions, and what became of those subdivisions and to whom given and their value and to give information as to whether one Tom Joseph Okuku Mboya is a son of the late Tom Joseph Mboya, and give his date of birth. Lastly whether the objector Alakie Mboya received her rightful share of the estate of the late Joseph Mboya, identification of the person who allegedly gave it to her, when she received the same and the details of what she purportedly received.

The interrogatories are given a backup from an affidavit deponed by the objector on the 11th day of August 2009, and filed the same date. In a summary form, and for purposes of the record, the content of the deponement is to the effect that she is a daughter of the late Tom Joseph Mboya ,and step daughter to the deceased subject of these proceedings. Despite living in the same house with the deceased subject to these proceedings, the deceased never informed the deponent as to whether the late Tom Joseph Mboya left a **will**, whether an application for letters of administration to the estate of the late Tom Joseph Mboya, were ever taken out ,details of such proceedings, who were the executors of the said **will** and to whom the grant of letters of administration to the said estate were ever issued. It is further her assertion that she assumed her late step mother would ensure equitable distribution of her late father's estate. She is not willing to co-oporate in the administration of the estate of the deceased subject of these proceedings because she has never been given partinent information regarding the extend of the estate of her late father Tom Joseph Mboya. Efforts through her lawyers to get the petitioners and their counsels respond to her requests yielded no fruits forcing her to resort to other means to carry out investigations with regard to the late father's estate spanning over a period of 30 years back .

Simultaneously with the filing of the interrogatories and deponement, was filed an application by way of chamber summons dated 11th day of August 2009, and filed the same date. It is brought under section 68 (1) and (2) of the law of succession Act cap 160 laws of Kenya rules 1 (2) 63 and 73 probate and administration rules and order XXVI rule 1 and 2 of the civil procedure rules. The reliefs sought are three namely:-

- 1. That the Honourable court be pleased to extend the time for the objector to file an answer to the application and cross application.***
- 2. That the applicant- petitioner be ordered to answer in writing interrogatories, deliver particulars and or produce documents pursuant to the form annexed thereto.***
- 3. That the costs of the application be provided for.***

The afore set out process provoked the filing of the application subject of this ruling. It is dated 14th day of October 2009, and filed on the 15th day of October 2009. It has been presented by way of, a chamber summons brought under rule 73 of the probate and administration rules. Three reliefs are sought namely:-

- 1. That the objection dated 7th day of July 2009, be struck out.***
- 2. That the chamber summons application dated 11th day of August 2009 be struck out.***
- 3. That the costs of this application be awarded to the applicant.***

The grounds in support are set out in the body of the application and content of the supporting affidavit and in a sumamry form the following have been stressed:-

- The current proceedings relate to the estate of Pamela Arwa Mboya.
- The deponent of the supporting affidavit is one of the appointed executors of the will subject of these proceedings.
- They have moved the court to strike out both the request for answer to interrogatories and the application for leave to file objection to the petition out of time for the following reasons:-
  - (i) Both have been presented in bad faith.
  - (ii) Both are an abuse of the due process of the court.
  - (iii) The current proceedings relate to the estate of the late Pamela Arwa Mboya whereas the complaints raised relate to the estate of the late Tom Joseph Mboya.
  - (iv) The said Tom Joseph Mboya died way back on the 5th day of July 1969, and by reason of this, the objector has had 39 years of knowledge that the estate of the late Tom Joseph Mboya was processed and distributed and she took her rightful share entitlement of the same.
  - (v) She has knowledge that she was represented by her own counsel who is currently representing her in the current proceedings.
  - (vi) It is the deponents stand that the deceased subject of these proceedings was not an administrator of the estate of the late Tom Joseph Mboya as that administration was undertaken by trustees.
  - (vii) That by reason of what has been stated in number (v) above if the objector has any complaint concerning the distribution of the estate of the late Tom Joseph Mboya, she should direct the same to the proceedings relating to that estate.
  - (viii) It is the deponents contention that the Respondent is undeserving of the court's indulgence as she has deliberately failed to disclose material particulars relating to the estate of the said late Tom Joseph Mboya and has therefore committed perjury and is guilty of undisclosed material particulars.
  - (ix) The deponent is rightfully appointed as an executor of the deceased's will as in doing so the late deceased exercised her mandate under the provisions of law in the law of succession Act cap 160 laws of Kenya.
  - (x) That the deponent Tom Joseph Okuku Mboya being a son of the deceased and duly appointed under the **will** has all the right to apply for probate because he has been properly appointed under the said will.
  - (xi) Contends that the issue of whether the will of the deceased made sufficient provision for her is not a ground of filing of objection proceedings herein.
  - (xii) There is reliance on the annexed exhibits.

In response to the application, the objector filed a replying affidavit deponed on the 13<sup>th</sup> day of November 2009, and filed on the same 13<sup>th</sup> day of November 2009. The salient features of the same are as follows:-

- Reiterates and stands by the contents of both her application dated 11/8/2009 as well as the contents of the supporting affidavit and annexures.
- Contends the deceased will had not been annexed and or exhibited to the petition filed.
- Contends there is no dispute that the deponent is a daughter of one deceased late Tom Joseph

Mboya and step daughter to one late Pamela Arwa Mboya ,deceased, subject of these proceedings.

- It is the deponents assertion that some of the properties subject of the will subject of these proceedings were the properties of the late Tom Joseph Mboya her late father.
- Vide paragraph 3(b) that during the life time of the deceased subject of these proceedings, the said deceased treated the deponent as a member of the Mboya family and when she was away in the USA the deceased subject of these proceedings regularly wrote to her.
- Vide paragraph 4, 5,6,7,8, and 9 thereof that the deponent takes issues with regard to the conduct of all aspects of the succession proceedings relating to the estate of the late Joseph Tom Mboya inclusive of issues of her entitlement from the said estate, list of properties, list of administrators, and mode of distribution.
- She is a stranger to the alleged sharing of her in the said estate of the late Joseph Tom Mboya.
- That she as a daughter of the late Joseph Tom Mboya has a right to exercise her right of tracing the late father's estate property into property forming the subject of the will subject of the current proceedings.
- That the deponent has genuine concerns which should be addressed by this court during the disposal of the objection proceedings on merit.
- Vide paragraph 11,12,13 and 14 that she is properly before the seat of justice, her objection proceedings is properly anchored on the correct provisions of the law and lastly that the move to strike out the objection is meant to stifle her efforts to try and find out full disclosure of the assets of the late Joseph Tom Mboya, how the late Mboya's estate was administered by the deceased subject of these proceedings, how the said assets were absolutely acquired by her to the exclusion of the deponent, and how the said assets are sought to be passed on to the current beneficiaries. Asserts that she has disclosed all that needs to be disclosed with regard to the objection application.

This replying affidavit has been responded to by the 2<sup>nd</sup> applicant Lucas Okuku Mboya's affidavit deponed on the 6<sup>th</sup> day of January 2010 and filed the same date. The salient features of the same are as follows:-

- Reiterates the content of the affidavit in support of the application.
- Relies on the annexures in support of the application which go to demonstrate that the objector received her rightful share of the estate of the late Joseph Tom Mboya.
- That the objector had knowledge of this fact all along but failed to disclose the same in her deponements in support of the objection.
- There has been no disclosure that although the objector asserts that she lived with the deceased subject of these proceedings, she has failed to disclose and demonstrate that the said relationship subsisted till the death of the deceased subject of these proceedings.
- That the property belonging to the estate subject of these proceedings, properties number S. Nyanza/Lambwe West/194, Lambwe Valley settlement scheme Plot 720 Ochol together with plot 552 Ochol, Lambwe valley settlement scheme- Plot No. 1A Iringa and Lambwe valley settlement scheme plot No 1B Iringa are all listed in the inventory of assets and liabilities.
- That Lambwe valley settlement scheme plot No. 72 Ochol and plot 552 Ochol is the family home of the deceased, where the deceased and the deponent's brother Peter Mboya were laid to rest.
- The deponent is a stranger to property LR NOs. LR. 3734/836, LR. NO. 3734/831 and LR. NO.

3734/835 and they do not form part of the estate of the deceased.

- LR. NO. 3734/834 comprises the current deceaseds' share from the estate of the late Tom Joseph Mboya and as such she could deal with the said property as she wished.
- Concedes that LR. 3734/832 and LR. NO. 3734/833 was part of the assets of the estate of Tom Joseph Mboya to which the objector received her entitlement.
- The deponent has knowledge that LR. NO. 3734/880 has never belonged to the estate of the late Tom Joseph Mboya
- The deponent has knowledge that LR. NO. 15243 Kisumu flat No. 4 on LR NO. 205/129 and Tranz Nzoia/Gidea/30 Kitale were acquired much later and never belonged to the estate of the late Tom Joseph Mboya.

Parties elected to go by way of written skeleton arguments. Those of the applicants are dated and filed 23/3/2010 and the salient features of the same are as follows:-

- Reiterate the contents of their deponements in support of the application filed herein.
- The objection claim is directed to the Estate of the late Tom Joseph Mboya who died on the 5<sup>th</sup> day of July 1969 and proceedings relating to his estate were processed vide probate and administration cause number 239 of 1970.
- The current applicants are incapable of responding to that claim as they are not seized of matters relating to the estate of the late Tom Joseph Mboya as the two estates are governed by two different legal provisions . That the estate of Tom Joseph Mboya was governed by the Indian succession Act X1865. Whereas that relating to the estate of the deceased subject of these proceedings is governed by the law of succession Act cap 160, laws of Kenya.
- That according to section 27 of the Indian succession Act X of 1865 it makes provision that where the deceased has left a widow and lineal descendants the widow shall be entitled to 1/3 of the deceaseds' property and the remaining 2/3rds shall go to his lineal descendants according to the rules therein.
- It is their stand that the deceased subject of these proceedings was rightfully entitled to the 1/3<sup>rd</sup> share of the late husband's estate. Whereas the rest of the remainder of the estate went to the lineal children of the late Tom Mboya deceased including the objector herein.
- They have exhibited documentation in support of the application for striking out, which goes to show that the estate of the late Tom Joseph Mboya was distributed and they also go to demonstrate that the objector herein received her share through her advocate then who is still the current advocate on record for her.
- The objector cannot purport to fault the current deceased's move to appoint executors of her last known will as well as to make the will as the law purported her to do so.
- Contends that this court has no jurisdiction to decide on the issue of property subject of these proceedings at this stage.
- That for the reasons stated above, they have demonstrated justification for the issuance of the relief sought.

In response to those submissions the objectors counsel filed submissions dated 16<sup>th</sup> day of April 2010, and filed on the 19<sup>th</sup> day of April 2010. The salient features of the same are as follows:-

- The issues that the court is called upon to determine by virtue of the invocation of the courts inherent jurisdiction in rule 73 of the probate and administration rules are as follows:-
  - (i) Is there any substantial section of the Act or rules providing for applications that the petitioner has now made? If not;
  - (ii) Is the objectors application of 11<sup>th</sup> August 2009, in imical to ends of justice or an abuse of the court?;
- Contends that the objector was kept in the dark regarding the existence of the deceased's will, the filing of the petition and subsequent gazettelement of the cause.
- By reason of the above, the objector was entitled to raise objection because the applicants had been dishonest in refusing to answer correspondences sent to them by the objectors' counsels.
- Contends that their objection filed is in compliance with the relevant rules.
- Concede that upon their filing of the objection, they received a notice requiring her to file an Answer to petition and cross-petition within 30 days from the date of the notice, but could not do so because the applicants had not responded to the objector's request for particulars in time. Time ran out on the objector hence the need for her to put in an application seeking an opportunity to file the Answer to petition and cross petition out of time.
- That the objectors' other reason for not responding to the Registrars notice in time was that she had hoped to settle everything by agreement.
- The court is invited to note that the applicants herein although they have applied to strike out the objectors application filed on the 11/8/2009, they have not filed any replying affidavit to that application in order to controvert the contents of the objectors affidavit in support of the application for extention of time.
- Contends that since they have not filed an Answer to petition and cross application, they have not reached the stage of dispute resolution in order to go into the underlying facts of the case.
- The court is invited to hold that rule 73 of the probate and administration rules does not operate to oust the substantive provision in section 70(b) of the law of succession Act which entitles the court to call for evidence whenever there is a dispute concerning the grant.
- The applicants cannot purport to fault the objector's application because section 26, of the law of succession Act entitles an acknowledged beneficiary under a will to seek full disclosure of all the material particulars relating to the estate of the deceased.
- Contents that the objector is properly before the seat of justice as she is entitled to trace any property which had previously belonged to the estate of her late father Tom Joseph Mboya.
- The court is invited to take note that the further affidavit was triggered by the information contained in the objectors replying affidavit which the deponent Lukas Okuku Mboya had selectively responded to.
- The court is invited to note that the objector's objection proceeding is not an abuse of the due process of the court but a request for justice in respect of a genuine grievance.
- Contends that the counsel alleged to have acted for the objector during the succession proceedings relating to the late Tom Joseph Mboya was incapable of acting as such as he was still at college when the late Tom Joseph Mboya died.

In response to the objectors submissions, the applicants filed a reply filed on the 12<sup>th</sup> day of May 2010, and the following has been stressed:-

- The application for striking out is in response to the objection application.
- Still reiterates their stand that the court has no jurisdiction to entertain the issues raised by the objection proceedings herein, and for this reason, the proper order to be made is the striking out order sought herein as it is aimed at objection to the making of a grant whose sole purpose is simply to confer a right of representation to the estate and not the conferring of a competing right.
- Still maintains that the request for interrogatories are misplaced as the same are not provided for in the law of succession Act procedures on the one hand, on the other hand, it is their stand that failure to respond to interrogatories is not a bar to the granting of the probate sought. 3rdly these can only be resorted to if they are relevant to the proceedings under consideration. It is their stand that interrogatories laid are not relevant to the proceedings under consideration.
- It is their stand that powers donated to the court under section 70(b) are merely discretionary and are to be employed by the court only where the court is in doubt as to the matters set out in the cause a situation which does not exist herein.
- The primary consideration of this court is a determination as to whether the probate applied for is to issue or not and if the same is to issue to whom it is to be issued.
- That the right of tracing assets belonging to an estate of a deceased person, only arises where there is allegation of the property being traced having landed in the hands of persons who were not entitled to receive them, a situation not prevailing herein because none of the beneficiaries of the estate of the late Tom Joseph Mboya received anything that they are not entitled to receive as their share inclusive of the deceased subject of these proceedings.
- Still maintains their earlier stand that the objector obtained her entitlement of the proceeds of the estate of the late Tom Joseph Mboya and she has therefore approached the seat of justice with unclean hands by not being candid enough with regard to this issue.
- The court is urged to distinguish the case law relied upon by the objector and uphold what they have relied upon as good guides for this court in the disposal of this matter.

On case law the applicant relies on the case of **IN THE MATTER OF THE ESTATE OF CHANDRAKANT SHAMJIBHAI GHEEWAL NAIROBI SUCCESSION CAUSE No. 264 of 1994** decided by GS Pall as he then was on the 14/2/1996. Scheming through the content on page 1 reveals that ***“there were two wills one made on 28/8/74 which favoured one of the objectors, and the one of 4/5/76 the basis of which probate had been sought by the widow of the deceased. Further objection was based on the fact that the property alleged to be estate property are joint property forming property which should not be a subject of succession.*”**

***At pages 2-4 there is allegation of “the alleged estate property having originally belonged in whole to the father of the deceased subject of the proceedings under review and when the deceased subject of the proceedings was made an executor of the entire estate on behalf of their mother, the understanding was that the property became so held for the benefit of the entire family and as such upon the death of the said executor such family property could not form part of the estate of the executor in his individual capacity.”***

***At pages 4-5 there is observation to the effect that “arguments had been presented to the effect that upon presentation of an application for probate with the will annexed, the only issues that could arise is whether the will is genuine as the main issue and whether the executor will be up to the task as a secondary issue.”***

At page 5 it is observed that **“an objector to the issuance of a grant of probate is obligated to respond by way of Answer to petition and petition by way of cross-petition within the stipulated time in addition to admission that the objector is in law entitled to apply for a grant. Non compliance is an invitation to striking out of the objection”**

At pages 5-6 further observed that **“it is only after the Answer and petition by way of cross-petition are filed is when the dispute can be determined”** and then at page 6 line 8 from the top the learned judge as he then was had this to say:-

**“I agree with Mr. Inmadar that every objector should not only file his affidavit opposing a grant in favour of the petitioner but should also file an answer in the prescribed form and a cross-application for a grant of representation to be made to the objector (rule 17 (5). Otherwise his objection will not be valid....”** And then at page 8 line 10 from the top the learned judge as he then was went on:-

**“However as I have held that in the absence of cross-application by their clients, they could not oppose the grant of probate in favour of the petitioner”**

At the same page line 11 from the bottom, the learned judge as he then was went on to observe thus:-

**“However I must mention that Mr. Sehmi relied extensively on the judgement OF JESSEL M.R. IN THARP VERSUS MC DONALD (1878) 3.P.D. In which it was held that when the will of a married woman tendered for probate is contested, if the court is satisfied that there is separate property, it has however to grant probate of all such property without deciding what that separate property is. But in general duty of the court so far as the evidence and the pleadings enable it to do so is to decide judicially of what such property consists of....”**

At page 9 line 9 from the bottom, the learned judge as he then was set out the preamble of the Act (The law of succession Act cap 160 laws of Kenya) and then at line 4 from the bottom construed the preamble as hereunder:-

**“ It follows therefore that only those matters which relate to succession or administration of the estate of a deceased person or matters connected there with or incidental thereto could be entertained under the Act”**

At page 10 line 1 from the top the judge went on thus:-

**“Estate has been defined under section 3 of the Act as the free property of a deceased person” and free property in relation to a deceased person means the property of which that person was legally competent freely to dispose during his life time and in respect of which his interest has not been terminated by his death”**

At page 11 line 1 from the top the learned judge defined probate as follows:-

**“A probate has been defined under section 3 of the Act as “The certificate of a court of competent jurisdiction that a will of which a certified copy is attached in the care of a written will has been proved and grant of representation to the executor in respect of the estate issued”. Then went on at line 6 thus:-**

**“ It follows therefore that a grant of probate to the executor does not confirm in him or her favour any title to the property of the estate of the deceased generally. Thus a grant of probate cannot prejudice the rights of any person who claims an interest in any property of the deceased. The object of a grant of probate is to confer a right of representation to the estate of the deceased upon the executor named in the will. A probate granted under the Act does not profess to determine any issue as to the title of the testator to the property with which the will propounded purports to deal. On an application for probate, it is not within the province of the court to go into the question of title of the testator to the property which the executor is to administer in accordance with the will..”**

At pages 12-16 the learned judge drew inspiration from case law first from Indian Jurisdiction and then English Jurisdiction. The case of **BALGANGADHAR TILAK VERSUS GANESH SRIKRISHNA KHAPARDE 26 ILR BAMBAY 792** in which it was held inter alia that *“The grant of probate only perfects the representative title of the executor to the property which belonged to the testator and over which he had disposing power”*

The case of **HORMUSJI NOVROJI VERSUS DHANBAI JAMSETJI DOSAIBHAI 12 ILR MOMBAY 164** where it had been held inter alia that *“Probate is only conclusive as to the appointment of the executors and validity and contents of the will and in an application for probate it is not the province of court to go into the question of title with reference to the property on which will purports to dispose or the validity of such disposition”*

The case of **RAMCHANDRA VERSUS RAMABAI AIR 1937 BAMBAY 341** in which it was held inter alia that:-

*“Probate is decisive only as to genuineness of the will and the right of the executor to represent the estate. It decides no questions of the disposing power or the existence of disposable property. It is not in the province of the court in probate proceedings to go into questions of title and it has been the settled practice of this court, not to enter into the question whether the deceaseds’ property is joint or separate”*

At page 13 the learned judge as he then was quoted with approval paragraph 775 of Hallis burys laws of England Vol. 17 4<sup>th</sup> Edition thus:-

*“The principal duty of a probate court is to decide whether or not a document is entitled to probate as a testamentary paper who is entitled to be constituted the personal representative of the deceased whether he died testate or intestate ....”*

The concluding remarks of the learned judge are found at page 14 line 7 from the bottom thus:-

*“ In view of section 68 and 69 of the Act and rule 17 of the Rules, I hold that only that objector who has made across application for a grant of representation in his favour can validly object to the petition for a grant.... All matters raised by the objector which oppose the petition on grounds other than validity of the will propounded by the petitioner or un suitability of the petitioner as defined under section 56 of the Act cannot be considered in the present probate cause...”*

There is also reliance on section 27 of the Indian succession Act X, of 1865. It reads: **“Section 27: where the intestate has left a widow if he has also left any lineal descendants, one third of his property shall belong to his widow, and the remaining two thirds shall go to his lineal descendants according to the rules herein contained. Section 29 the rules for the distribution of the intestate property after deducting the widows share if he has left a widow amongst his lineal descendants are as follows:...**

***Section 30 where the intestate has left surviving him a child or children but no more remote lineal descendants, through a deceased child, the property shall belong to his surviving child if there be only one, or shall be equally divided among all his surviving children”***

There is also reliance placed on the provisions of sections 5, 6, 7 and 11 of the law of succession Act cap 160 laws of Kenya. These reads:-

***‘Section 5(1) subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose off all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.***

***(2) A female person, whether married or unmarried has the same capacity to make a will as does a male person.***

**(3) Any person making or purporting to make a will shall be deemed to be of sound mind for this section unless he is at the time of executing the will in such a state of mind, whether arising from mental or physical illness, drunkenness or from any other cause as not to know what he is doing.**

**(4) The burden of proof that a testator was at the time he made any will not of sound mind, shall be upon the person who so alleges.**

**Section 6: A person may by will appoint an executor or executors .**

**Section 7: A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agent of the testator or has been induced by mistake, is void.**

**Section 11 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 acknowledgement of his signature or mark, or of the signature of the 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”**

The objector Respondent on the other hand urged the court to be guided by the following guiding authorities.

There is the case of **SALEH BINMOHAMED BIN OMAR BIKOR VERSUS NOOR BINTI SHEIKH MOHAMED BIN OMAR BAKOR (1951) EA CA 30.**

In which the court of appeal held inter alia that

**“A beneficiary was entitled to follow the assets into the hands of the person wrongfully receiving them without necessarily revoking the letters of administration”**

The case of **HOWE VERSUS EARL OF DORTMOUTH HOWE VERSUS COUNTESS OF ANYLESBIN (1775-1802) All ER Rep. 24?** In which it was held inter alia that **“Where a residuary personal estate is settled, it is to be assumed in the absence of evidence of a contrary intention, that the testator intended that his legatees should enjoy the thing in succession. To give effect to this intention such parts of the estate as are of a wasting or reversionary character ought to be converted and invested in permanent investment of a recognized character”**

Sections 12, 26, 67, 68, 61 rule 17 orders X rule 1 and rule 73 of the probate and administration rules have also featured.

Section 12 L.S.A makes provision to the effect that where a document makes reference to the content of a **will** then that document should be taken to be forming part of the **will**. Section 26 on the other hand is a safety valve for dependant who has not been adequately provided for by a will through which to seek adequate provision. Section 67 (1) donates jurisdiction and or power to the court to grant only a limited grant of representation to a deceased persons estate before publication of the notice of application for grant. Section 68 (1) on the other hand makes provisions for the lodging of a notice of objection to the application for a grant of representation to the court within the prescribed period whereas vide section 68 (2) once the notice of objection has been filed, the court is required to issue a notice to the objector to file an answer to the application and cross application within a specified period. While section

69 (1) makes provisions that:- ***“ Where a notice of objection has been lodged under sub section (1) of section 68 but no answer or no cross application has been filed as required under sub section (2) of that section, a grant may be made in accordance with the original application. Whereas vide section 69 (2) where an Answer and cross application, has been filed under sub section (2) of section 68, the court should proceed to determine the dispute.***

Section 70 on the other hand provides guide lines for the court on how to proceed to determine a dispute as to the making of the grant by way of examination of applicant or deponent of any affidavit or by way of calling for further evidence with regard to the making of the will in issue making of an oral will, the rights of any person claiming an interest in the estate concerned and any other matter concerning the will or grant which requires further investigations.

The probate and administration rules have also featured. Rule 17(1) makes provision for the presentation and disposal of an objection to the making of the grant. These are that:-

- (i) Objection proceedings can only arise and are permitted where there is an application for the making of a grant in place.***
- (ii) The said application for grant must have been gazetted.***
- (iii) The gazette notice must have specified a period within which to lodge objection if any.***
- (iv) It is mandatory that objection if any is lodged within the period prescribed in the gazette notice usually 30 days from the date of gazette.***
- (v) There is a mandatory requirement that the objection be lodged within the time prescribed by the rules and mentioned in the gazette notice.***
- (vi) If the time line in number (v) above has not been complied with there is jurisdiction donated to the court to extend the time within which to lodge objection proceedings out of time. This jurisdiction on the part of the court is invoked by way of presentation of an application by way of chamber summons supported by an affidavit.***
- (vii) Where an objection has been presented procedurally, this is entered in an appropriate register after which the Registrar is duty bound to have the same served on to the presenter of the petition.***
- (viii) Upon compliance with the requirements in number (vi) above, the Registrar is mandated to notify the objector to file an answer to petition and petition by way of cross-application.***
- (ix) Where an answer to petition and cross application by way of petition has been filed, the file is to be referred to a judge for direction on the mode of procedure.***

Rule 73 of the probate and administration rules makes provision that:-

***“Rule 73. Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”***

*There is also the presence of section 47 of the L.S.A. which donates a wide jurisdiction to the high court to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders , therein as may be expedient...*

Lastly there is a rule 63 (1) of the probate and administration rules which imports the provisions of the old order V,X,XI,XV, XVIII, XLIV and XLIX of the old Civil Procedure Rules procedures into the L.S.A procedures. This court is alive to the fact that these orders have now been re arranged with the advent of new civil procedure rules under the old arrangement order (five) V stood for issue of summons and it has been retained as such under the current arrangement. Order X(10) was for interrogatories,

discovery and inspection. There is no such arrangement for these under the new rules, but the court has no doubt that these will be catered for under the pre trials under the current order XI. The old order XI was for consolidation of suits which appear to have been phased out under the current arrangement and may be fall under the pre trial procedures under the current order XI. The old order XB was for? summons and attendance of witnesses which has been re numbered as XVI. Order XVIII dealt with affidavits and it has been renumbered as XIX (19) order XLIV was on review and it has been renumbered as XLV (45) whereas XLIX dealt with time and it has been re numbered as L (50). Rule 63 L.S.A. is yet to be amended to indicate which of those new orders still apply to it with the exception of these which have been renumbered.

This court has given due consideration to the a fore set out rival pleadings and the same considered in the light of principles of law cited to court as well as principles of case law also cited to court and in this court's opinion, the following are own framed questions for determinations in the disposal of this matter:-

- a. What are this courts general observations on the proceedings herein this far?
- b. What relief is the applicant seeking from the seat of justice?
- c. What strong points has the applicant put forward in support of that relief?
- d. What strong points has the respondent put up in opposition to that relief?
- e. What principles of law is this court enjoined to apply and or employ in the determination of questions 2,3 and 4 above?
- f. Have the applicants brought themselves within the ambit of those principles? or alternatively is the applicants plea for this relief properly anchored on those principles?
- g. What final orders is this court going to make in the disposal of this matter?

In response to own framed question one (1) these are own general observations on the proceedings this far:-

- (i) The proceedings have been initiated as testate proceedings with the will annexed.
- (ii) The appointed executors are described as biological sons of the deceased.
- (iii) The inventory of property bequeathed through the will as well as beneficiaries of the said property has also been disclosed.
- (iv) The cause was duly gazetted in accordance with the rules.
- (v) Objections to the making of the said grant was duly filed within the stipulated time.
- (vi) The Registrar duly issued the requisite notice to the objector under rule 17 (5) of the probate and administration rules requiring the said objector to file an answer to petition as well as petition by way of cross-application for a grant of representation within the time specified of 30 days. The notice is dated 13<sup>th</sup> day of July 2009.
- (vii) It is on record that the objector respondent herein did not file the Answer to petition and petition by way of cross-application within the time stipulated in the notice of 30 days. 30 days expired on 8/8/2009. After the expiry of the 30 days objector/Respondent filed a list of interrogatories directed at the applicant on the 11<sup>th</sup> day of August 2009.
- (viii) Simultaneously with the filing of the interrogatories was filed an application under sections 68 (1)

(2) of the L.S.A. Rules 1 (2), 63 (1) and 73 of the probate and administration rules. It was brought by way of chamber summons. Of importance to this ruling is that the said application sought leave to file Answer to petition and petition by way of cross-application out of time and also an order directed at the petitioner /applicants requiring them to answer the interrogatories served.

(ix) It is on record that the said application for extension of time and for an order to direct the petitioners/applicants to answer interrogatories has not been disposed off. Instead the petitioners/applicants moved the court by way of application subject of this ruling to strike out both the objection dated 7<sup>th</sup> day of July 2009 as well as the application for both extension of time to file objection out of time and the request for an order to be directed at the petitioner to answer interrogatories.

(x) The thread running through the objection for purposes of the record and since it is one of the grounds for seeking to have the objection struck out is that it seeks to introduce into these proceedings issues relating to the estate of the late Tom Joseph Mboya with a central allegation that some of the properties forming the estate of the deceased subject of these proceedings form part of the properties of the estate of the said late Tom Joseph Mboya, that the objector has been kept in the dark regarding the estate of the said late Tom Joseph Mboya, that the will has not adequately provided for her, and lastly that her name was misdescribed with a view to misleading the court to her disadvantage, that one of the executors not being a biological son of the late Tom Joseph Mboya should not have been given priority in administering the estate in relation to the properties of the late Tom Joseph Mboya in priority over her.

(xi) The thread through the response to the said objection paper work and which seems to be forming the central core of the reason for seeking to strike out both the objection and the request for interrogatories is because the issues raised in these proceedings are distinct from those that related to the estate of the late Tom Joseph Mboya, that those issues cannot be addressed in these proceedings. Alternatively that the said estate was wound up and the objector has not been candid in disclosing that she received her share from the estate of the said late Tom Joseph Mboya.

In response to own framed questions 2, 3 and 4 , the relief that the applicant is seeking from this court the strong points advanced by either side both for and against the application have already been reflected on the record in the form of affidavits and submissions of each side and briefly summarized in the general observations made by this court in response to own framed question one (1).

In response to own framed question 5 the principles that this court is enjoined to apply to the rival arguments are those from provisions of law cited as well as case law cited and these are as follows:-

(a)Vide section 5 of the L.S.A. capacity to make a will is anchored on the following ingredients.

(i) That one is of sound mind.

(ii) That one is not a minor.

(iii) That the will is in respect of the testators free property.

(iv) This capacity is granted to persons of both genders on equal footing without distinction.

(v) Capacity granted by this section can only be negated by reason of proven existence of mental instability, physical illness, drunkenness or any other cause negating existence of knowledge of what the testator is doing and exercise of one free will.

(vi) The onus to prove lack of capacity is on the person who alleges existence of the said lack of capacity.

(b)Vide section 6 there is a discretion to appoint an executor or executors.

(c)Vide section 7, voidability arises where there exists allegations of proven, fraud, coercion importunity

or induced mistake which are shown to have operated to take away the free agency of the testator.

(d) Vide section 11, that in order to be valid, a written will has to have the signature or mark of the testator whose putting has to be witnessed by two or more competent witnesses.

(e) Vide section 12, that any document making reference to a will in existence has to be taken to be part of the will and should be treated as such.

(f) Vide section 26, that there is room for provision for a dependant of a will by a court of law and where the inadequacy is established provision will accordingly be ordered.

(g) Vide section 47, thereof that the court has a wide discretion to entertain any application presented under the Act and to make appropriate orders.

(h) Vide section 56, there of the only caveat to the making of the grant are as follows:-

(i) The beneficiaries have to be persons of sound minds.

(j) There is a limitation to the number of beneficiaries of a grant which should not exceed 4.

(k) Jurisdict entities qualify for the grant of letters of administration only if they fall into the category of a public trustee or a trust corporation.

(l) Vide section 68 that in order for the objection to be valid, it has to be lodged in the prescribed form and also within the time prescribed and after this has been complied with, is when the Registrar can issue a requisite notice to the objector inviting him/her to file an Answer to petition and petition by way of a cross application.

(m) Vide section 69, in the absence of the filing of an Answer to petition and petition by way of cross-application, the court is called upon to issue a grant to the original applicant. But where an Answer to petition and petition by way of application to grant has been filed, the court is enjoined to proceed to determine the dispute. The mode of procedure to be followed is found in the rules which the court will revert to shortly.

(n) Vide section 70, it is only after the court has been called upon to determine the dispute in accordance with section 69 (2) of the said Act that the court can exercise its powers under section 70 thereof by examining an applicant on oath or affirmation, call for further evidence by way of affidavit or otherwise with regard to the execution of the will, content of the will, the rights of dependants and of persons claiming an interest in the willed property, investigate any matter which require investigation or issue a citation to any person who appears to have a reason to object to the application.

(o) Vide rule 17 of the probate and administration which lays down pre requisites of the steps to be taken when objection to the making of a grant has been filed which steps have already been set out herein earlier.

(4) Vide section 63(1) of the same probate and administration rules, there is imported into the law of succession Act procedure the old order X Civil Procedure Rules which permitted the serving of interrogatories and a request for an order of court directed to the addressee of the said interrogatories to respond to the same.

(p) Vide rule 73 of the same probate and administration rules in which the guiding and cardinal principle is that the prescribed rules do not otherwise limit the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Turning to case law, from the case of **IN THE MATTER OF THE ESTATE OF CHANDRAKANT SHAMJI BHAI GCHEEWA LA (SUPRA)** the following principles have been stated:-

- (i) Grant of probate to an executor does not confer title of the property subject of the grant to the executor.
- (ii) Grant of probate to an executor will not prejudice the rights of any person who had a claim or interests in the said property of the deceased.
- (iii) The grant of representation to an executor only confers a right of representation to the estate of the deceased upon the executor named in the will.
- (iv) Probate granted does not profess to determine any issue as to the title of the property.
- (v) When dealing with issues of objection to the making of the grant, the court is not called upon at this stage of the proceedings to go into the title of the testator to the property.
- (vi) Probate only perfects the title of the executor to the property which belonged to the testator and over which he had a disposing power.
- (vii) Probate is only conclusive as to the appointment of the executor and validity of the content of the will.
- (viii) In the application for probate, it is not in the province of the court to go into the question of title with reference to the property of which the will purports to dispose or the validity of such disposition.
- (ix) Probate is only decisive as to the genuineness of the will and the right of the executor to represent the estate. It decides no question of disposing power or the existence of the disposable property.
- (x) It is not the business of the court when dealing with issuance of probate to entertain issues as to whether the willed property is joint or not.

Vide Halisburrys laws of England (supra) the purpose of probate is to determine whether a document provided or presented to court is entitled to be titled as a testamentary paper on the one hand, and on the other hand is simply to determine who is entitled to be vested with the title of executor or personal representative with regard to the testamentary paper of the intended probate.

- (ii) It is only that objector who has filed an Answer to petition and cross application by way of petition who has a right of audience in an objection proceeding.
- (iii) All matters of the objection which oppose the petition on grounds other than those of the validity of the will and the suitability of the executor should not be entertained in an objection proceeding.

Vide the case of **SAHEL BIN MOHAMED BIN OMAR BAKAR VERSUS SHEIKH MOHAMED BIN OMAR BARAR (SUPRA)** the guiding principles is that a beneficiary of an estate property is entitled to pursue estate property to which he is entitled to from the hands of a person who has unlawfully taken the same.

Vide the provisions of the Indian Succession Act cited herein the guiding principle is that the estate of a deceased person who has died leaving a widow and lineal descendants, namely children is distributed amongst the widow with lineal children, with the widow getting 1/3<sup>rd</sup> of the value of the estate and the children getting 2/3rds in equal shares.

Also for consideration are Article 22 (3) (d) and Article 159 (2) (d) of the current constitution. These reads:-

**“Article 22 (3) (d):- The court while observing the rules of natural justice shall not unreasonably be restricted by procedural technicalities. Article 159 (2) (d) Justice shall be administered without undue regard to procedural technicality”**

This court, has given due consideration to the afore set out principles of law and applied them to the rival arguments herein in regard to each of the reliefs being sought herein in particular and the totality of the facts on the record in general and proceeds to make findings on the reliefs being sought.

With regard to the relief in prayer 1, namely the striking out of the objection dated 7<sup>th</sup> day of July 2009, it is not disputed that indeed the objector filed this objection within time following the gazetment of the petition. It is not also disputed that the Registrar complied with the pre requisites in section 68 of the L.S.A. and rule 17 of the probate and administration rules by issuing notice to the objector dated 13<sup>th</sup> day of July 2009. The notice required the objector within 30 days **“from the date thereof”** to file Answer to petition and cross- application by way of petition. This courts construction of the wards **“from the date thereof”** meant that the 30 days stipulated were to start running from the date of the notice of objection which was 8/7/2009 meaning that time for filing of the objection proceedings lapsed on the 8/8/2009, and this accounts for the presentation of the application for extension of time within which to comply on 13/8/2009. This application had not been heard as at the time the petitioner/applicants presented their application for striking out on 15<sup>th</sup> October 2009, which application was in fact fixed and heard a head of the application for extension of time.

In the absence of the objector complying with the section 68 L.S.A. and rules 17 of the probate and administration rules procedures, and in the absence of an order on the objectors application for a plea for an extension of time within which to comply having been granted, which plea for extension of time within which to comply though filed earlier in time on 13/8/2009, was none the less forestalled by the application for striking out both objection and the plea for leave to comply out of time , by the application for striking out being heard a head of the plea for extension of time, the objection on the record is nothing but an empty shell by operation of the substantive provision of section 68 and 69 L.S.A. cap 160 laws of Kenya and is therefore a proper candidate for striking out.

The expoused for striking out can only be withheld if it can be demonstrated that the striking out action is a procedural technicality. In this court’s opinion, the requirement to comply within the prescribed time is not only procedural but also substantive evidenced by the use of the word **“shall”** in respect of compliance with both the filing of the objection by the objector and the issuance of the notice by the Registrar.

It is appreciated that there is a discretion donated to the court in section 69 of the court by the use of the word **“a grant may be made...”** but in this court’s, opinion, this discretion is limited to the election to issue or not to issue a grant. It does not operate to oust the substantive mandatory requirement for compliance in section 68 of the Act. This means that the constitutional provisions cited prohibiting denial of justice on grounds of technicalities cannot be called into play as the breach herein is not technical but substantive.

The faulting of the objection currently on record on account of failure to file an answer to petition and cross –application by way of petition notwithstanding, the objector is not left remediless. There is room for her to amend the application for leave on record if not axed and include a prayer for leave to file an objection out of time or alternatively if axed she can seek a fresh mandate.

Turning to the merits of the prayer it is clear from the arguments advanced against it by the petitioner/applicants that the attack was on two fronts namely the technical front and the merit front. The technical front arises because of the assertion that once the objection currently on record is struck out then the second application for leave will serve no purposes as there will be no objection in place in respect of which the objector could be seeking leave to file Answer to petition and cross-application by way of petition out of time because once is faulted and struck out, the application for leave will be left hanging and also a proper candidate for striking out because the subject matter for which an order for leave was seeking to cure would have become extinct.

It has ALSO been argued by the petitionerS/applicants that the leave to file objection on the basis of the grounds raised will not serve any purpose because as the same are misplaced s already reflected on the record herein.

This court having given due consideration to the rival arguments herein proceeds to make the following findings on the same:-

(a) From the case law principles already reflected on the record objections to the making of the grant of probate has to be confined to issues of validity of the will and the suitability of the executor, misdescription of a name is therefore not one of the grounds capable of being advanced as a ground of objection.

(b) Issues of lack of adequate provision as a dependant is not one of the grounds for moving to fault or prevent the issuance of a grant as to this can be cured by directing an application for provision of a dependant directed to the grant holder.

(c) Capacity to make a will can only be faulted if the testator acted outside the provisions of section 5 and 7 of the L.S.A. on account of being a person not of sound mind or a minor on the one hand or alternatively by demonstrating that the will is tainted with fraud, coercion, importunity, and mistake which negatives the exercise of the free will and agency of the deceased something which has not been asserted by the objector.

(d) Disqualification from executorship is limited to matters outside the province of the prescription of section 6 and 56 (1) (a) of the L.S.A. In that the testator is denied the exercise of his/her discretion of appointing an executor under section 6 only on account of the appointee being proven to be of unsound mind, a minor and or a bankrupt, matters not attributed to the affected executor. Blood relationship or lack of it is not one of the disqualifying factors. This is so because as per the principles highlighted herein executorship does not confer any right to title to meaning that even if Tom Joseph Okuku Mboya were to stand as an executor, no prejudice will be suffered by the objector as that blood relationship will not confer any title to his name with respect to any of the property sought to be administered or sought to be excluded from the current administrator.

(e) The right to trace a beneficial interest entitle to by a beneficiary has been stated to exist by virtue of principles in the case law cited herein. But that right can only arise from allegations that the property sought to be traced is being traced from the hands of a person who has wrongfully taken the same.

(f) The wrongfulness advanced by the objector with regard to the testator subject of these proceedings including properties complained of is because the said property allegedly belong to the estate of the late Tom Joseph Mboya. As submitted by the petitioner/applicants, the proper forum to raise the said issues is the succession cause in which the said property devolved to the deceased subject of these proceedings. The court is alive that it has been argued by the applicants that the said property forms or formed 1/3<sup>rd</sup> of the deceased's entitlement from the said estate of the late Tom Joseph Mboya in her capacity as the widow. A matter disputed by the objector. It therefore follows that these issues can only be reopened in the succession cause relating to the estate of the late Tom Joseph Mboya first. It is only after the said proceedings have been reopened and a caveat placed against those properties that the objector can move to this court to lodge objection to the said property forming part of the free property of the estate of the deceased herein. That is when the court will be in a position either to exclude them all together from this estate or put their distribution on hold pending the determination of the inquiry in the succession proceedings relating to the estate of the late Tom Joseph Mboya.

(g) On lack of proof of receipt of benefits by the objector on account of the distribution done in the succession cause relating to the estate of the late Tom Joseph Mboya, and allegation that the alleged counsel who acted for the objector and received the benefits on her behalf for onward transmission to her, was not yet practicing as an advocate but still a student, can only hold as a ground of objection firstly in the same succession cause, where the benefits are alleged to have been paid. Secondly by a denial by the alleged counsel that he never received the said benefits directed to the cause where the benefits are alleged to have been paid or not paid before being imported into these procedure.

(h) Issue arose about the inordinate delay on the part of the objector in raising issues concerning the estate of the late Tom Joseph Mboya. Indeed from the record it is over 30 years since those issues were dealt

with. However since the court has ruled that these are matters to be revisited in the succession cause relating to the estate of the late Tom Joseph Mboya , the court will not make any comments on the issue of inordinate delay.

Turning to the second limb of the application forming the relief in prayer 2, arguments in support for striking out has been that interrogatories are misplaced in these succession proceedings as these are common in the civil procedure rules procedures. The objector response to this assertion has been that these have been properly laid and the petitioner/applicant should be directed by an order of this court to respond to the same.

This court has revisited Rule 63 (1) of the probate and administration rules vide which certain procedure of the civil procedure rules have been imported into the law of succession procedure rules and as pointed out earlier on herein the court finds that the old order X Civil Procedure Rule which made provision for interrogatories is one of the orders of the Civil Procedure Rules imported into the succession procedures.

This being the case, the court finds that these were properly laid and had the application for leave survived the axe. The Petitioner/applicants would have been obligated to respond to the same.

As for their merits, in so far as they seek to get details of the property relating to the estate of the late Tom Joseph Mboya, they are misplaced in the current proceedings. They should be directed to the succession cause relating to the estate of the late Tom Joseph Mboya first and thereafter as observed herein them they can be directed to these proceedings under cover of tracing order

As to whether the current executor have capacity to be addressed by the objector with regard to tracing of any property forming the estate of the late Tom Joseph Mboya which might have found its way into the property forming the estate of the deceased subject of these proceedings, the court is of the opinion, there is right to so follow the current executors subject to them being properly laid because in terms of the provision in section 79 of the L.S.A there is provision that “ *the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for the purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in his as a personal representative*”

When this provisions is considered in relation to the property alleged to have belonged to the estate of the late Tom Joseph Mboya as opined earlier on by this court, complaints relating to these have to be addressed to the concerned succession cause first and orders of tracing made therein and then thereafter such orders of tracing have been made, is when the executors of the estate of the deceased subject of these proceedings can be called upon to give an account of those properties for the benefit of the estate of late Tom Joseph Mboya and beneficiaries entitled to benefit from the same.

For the reasons given in the assessment this court proceeds to make the following findings in the disposal of the application dated 14<sup>th</sup> day of October 2009 and filed on the 15<sup>th</sup> day of October 2009.

1. Prayer 1 of the said application seeking the striking out of the objection filed on the 7<sup>th</sup> day of July 2009 is allowed for the following reasons:-

(i)The Registrars’ notice to the objector of 13/7/2009 gave the objector 30 days from the date of the filing of the objection to file an Answer to petition and cross-application by way of petition within 30 days lapsed on 8/8/2009. The lapsing of time ushered in the operation of the provisions of section 68 (1)(2) and 69 (1) (2) whereby the court could issue the grant.

(ii) The court is alive to the effect that there is jurisdiction within the sub rule of rule 17 of the probate and administration rules to extend time within which to file answer to petition and cross –application by way of petition which right the objector sought to exercise by filing the application dated 13/8/2009, whose, disposal was fore stalled by the filing and fixing of the application for striking out subject of this ruling a head of the application seeking extention of time. The fixing and disposal of the application for

striking out a head of the application for extension of time for closed the objectors objection making the objection filed a proper candidate for striking out because, the objection became spent at the expiry of the 30 days and could only be injected with life upon an extension of time within which to comply which extension was fore stalled by the fixing and disposal of the application for striking out a heard of the application for extension of time.

2. Prayer 2 of the current application is also allowed on two fronts on both limbs of the application sought to be struck out dated and filed on the 11/8/2009 namely on the technical front and the merit front.

(i) On the technical front, the first limb of extension of time stand faulted in that, once the objection has been faulted and struck out as in number 1 above, there exists no valid objection on the record. As such, there is no basis for extending time within which to file an Answer to petition and cross-application by way of petition. This could only have been possible if the application for leave to extend time would have been fixed and heard a head of the application for striking out.

(b) As for the request for interrogatories, though this court has ruled that the process was available to a litigant in the succession proceedings by virtue of the importation of the old order X into the succession procedures via rule 63 (1) of the probate and administration rules, a perusal of the interrogatories sought to be responded to relate to issues touching on the estate of one late Tom Joseph Mboya not subject of these proceedings. These should be directed to the executors and or administrators in the said succession cause of the late Tom Joseph Mboya first, and it is only after directions have been given therein to the effect that those properties be traced to the deceased subject of these proceedings, is when they can be directed to the executors and or administrators herein.

(ii) As for the merits , the first limb stands faulted because principle of law assessed herein go to demonstrate that valid objection to a testate probate can only arise where the objector is seeking to fault the validity of the will and the suitability of the executor to administer the estate issues raised by the current objector as a basis for raising the objection will not serve any useful purpose even if allowed to proceed to trial as these fall outside the ambit of the above cardinal principle for the following reasons:-

(a)Capacity to make a will is negative only by proven existence of the testator having been of an unsound mind or a minor, proven fraud, coercion, importunity or mistake directed at the testator issues not alleged by the objector as a against the testator, The alleged fraud is not in the making of the will but against the objector with regard to property alleged to belong to the estate of the late Tom Joseph Mboya, and not the subject deceased herein. Also on capacity to make a will the right to name an executor can only be faulted in terms of section 6 and 56 of the L.S.A on account of being unsound mind, of minority age or bankruptcy, matters not attributed to Tom Joseph Okuku Mboya. The faulting of the said executors executorships is on account of not being a blood son of the late Tom Joseph Mboya and as such cannot have priority over the objector as administrator with regard to the property forming the estate of the late Tom Joseph Mboya not subject of these proceedings. The issue of blood relationship and rank in priority to administer property belonging to the estate of late Tom Joseph Mboya can only arise in that cause.

(b)Misdescription of the objectors name is curable and it needs no trial to establish it. What is required is production of identification documents.

(c)Failure to inform the objector of the filing of the cause is not a ground for faulting the will or right to executorship. The same is curable by a requirement that the objector be served with the relevant paper work relating to the cause.

(d)Failure to make adequate provision for the objector as a dependant can be addressed under section 26 of the L.S.A. procedures and need no trial to establish the right to seek provision. The only trial needed is one for the adequate provision itself.

(e)Non disclosure of property relating to the estate of the late Tom Joseph Mboya has to be addressed in the relevant cause first and if established to exist, then a tracing order can issue therein directed to the executors in the current cause directing them to disclose the said property. It also requires the filing of

material evidence linking the property subject of these proceedings alleged to be linked to the estate of the late Tom Joseph Mboya and proved to be falling outside the entitlement by the deceased as a child.

(f) Failure of the will to disclose all the property forming the estate can be cured by the objector furnishing the details of the property affected and if found to be forming part of the free property of the deceased subject of these proceedings, but left out by the will, these can be processed by way of an intestate proceeding.

(g) The merit aspect of the interrogatories limb also fails for the same reasons that the interrogatories address issues touching the estate of the late Tom Joseph Mboya and are therefore misplaced in the absence of a tracing order having been issued in the said proceedings first before being directed to these proceedings.

3. The faulting of the objection as well as the reliefs sought in the application sought to be struck out of 11/8/2009 on technical grounds is not in contravention of the provision of Article 22(3) (d) and 159(2) (d) because these provisions are a cure to procedural technicalities only and not substantive technicalities. Herein the requirement that objection and answer to petition and cross-application by way of petition be filed in time and that where compliance was not within time, such processes can only be injected with life upon an extension being obtained on the one hand, and on the other hand that issues pertaining to ones succession cause should not be unprocedurally imported into another cause are substantive matters of law and not procedural technicalities. This is fortified by the fact that this court has judicial notice of that even in instances where husband and wife die the same day separate causes of succession have to be filed for each separate (death) deceased person.

4. The petitioner/applicants will have costs of the application.

**DATED, READ AND DELIVERED AT NAIROBI 21<sup>ST</sup> DAY OF OCTOBER, 2011.**

**R.N. NAMBUYE  
JUDGE**