



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**P&A CAUSE NO. 387 OF 2001**  
**IN THE MATTER OF THE ESTATE OF ALLOYCE M. OBIERO (DECEASED)**  
**JUDGEMENT**

The background information as gathered from a perusal the record and the documentation annexed to the replying affidavit of Patrice M. Odude deponed on the 14<sup>th</sup> day of June 2002, and filed on the same date in response to an application by one Jacqueline Moraa Obiero filed on 14<sup>th</sup> day of May 2002, seeking to have Patrice Odude removed as an administrator. Reveals that the first initiative to seek representation to the estate of the deceased one Alloyce Mellitus Obiero was made in HCCC P&A 430 of 2000 by Joseph Leo Ochieng and Fred Andago Ochieng in their capacity as a father and brother of the deceased. A citation dated 2/3/2000 was duly taken out and served on to the widow who entered appearance to the citation on 4/3/2000 but apparently took no other steps in the matter. The cause appears to have been advertised vide gazette notice number 6118 of 22<sup>nd</sup> December 2000, no objection was filed and a grant to that effect was issued to the applicants Joseph Leo Ochieng and Fred Andago Ochieng. The citee namely the widow appears to have filed an application for annulment on the 8<sup>th</sup> day of November 2000, whose results is not clear as the ruling which appears to have been delivered in the said file whose copy is annexed to the said affidavit is incomplete.

It is however clear from the bulk of the documentation on the record that there appears to have been a family consensus that the widow and another brother of the deceased do file a petition for a grant of representation and this court has no doubt that this is how the current proceedings in cause No. 387 of 2001 was presented by both Jacqueline Moraa Ochieng and (2) Patrice Odude. The same was advertised vide gazette notice number 1649 of 16<sup>th</sup> day of March 2001. In the said Initiating documents, there is a death certificate indicating that the deceased died at a young age of 36 years on the 30<sup>th</sup> day of January 2000 due to air crash in Abidjan code d'volre. The beneficiaries listed in the petition are:-

1. Jacqueline Moraa Obiero – widow (wife)
2. Albert Ober Obiero- son aged 6 years
3. Antonina Nyakara Obiero – daughter aged 5 years.
4. Joseph Leo Ochieng – father aged 73 years.
5. Felicita Owuor Ochieng – mother aged 64 years.

The grant of representation was issued to the two applicants on the 24<sup>th</sup> day of April 2001.

Other useful information gathered from the said replying affidavits which are relevant to the drafting of the judgment are as follows:-

- (i) That land parcel number Nairobi/Block 97/516 is owned jointly by one Alloyce Melitus Obiero the deceased and Victor Owino Ochieng meaning that the deceased's estate entitlement in this property is

only a half share.

(ii) That there is a settlement which was entered in favour of the deceased estate in civil case number 214 of 2000 (O.S) on the 14<sup>th</sup> day of December 2001 and an order to that effect issued on the 18<sup>th</sup> day of December 2001. The terms of the settlement read thus:-

- 1. That the parties compromise in the settlement terms be and is hereby approved in the sum of US 300,000 and Kshs. 510,000 being costs for the suit to be paid to the Applicant by the Respondent.**
- 2. That the Respondent be and is hereby discharged from all claims of whatsoever nature and howsoever arising in respect of the accident to Airbus A310 aircraft Reg. mark 57-Ben at Abidjan on 30/01/2000 comprising the deceased herein upon payment by Respondent to Applicant advocates.**
- 3. That all proceedings be and are hereby stayed except for the purpose of carrying the terms herein into effect and that there be liberty to apply for the said purpose generally.**
- 4. That the sum of Kshs. 1,000,000.00 be paid to the deceased's' father Mr. Joseph Leo Ochieng and mother Mrs. Philista Awuor Ochieng.**
- 5. That the sum of Kshs. 500,000 be paid to Mrs. Reginah Nyakara Mutende mother to the applicant.**
- 6. That the sum of US 85,128.21 be paid to the deceased widow Mrs. Jacqueline Moraa Obiero.**
- 7. That the sum of Kshs. 2,000,000.00 be deducted from the applicants share and be paid to Messer's Hayanga and company advocates.**
- 8. That a sum of US Dollars 170,000 be deposited in affixed account within Barclays Bank of Kenya limited Muindi Mbingu Street Branch, in the joint names of Jacqueline Obiero , and Patrice Odude and the Registrar High Court of Kenya and be paid to the minors automatically on attaining the age of 18 years and the interests there from be used in the upkeep of the minors.**
- 9. That Kshs. 510,000 costs be paid to the applicants advocates Messer's Hayanga and company advocates.**
- 10. That there be liberty for further or other orders generally.**
- 11. That each party to bear own costs of this application.**

It is evident from a perusal of the same documentation that the settlement resulted from an originating summons filed on the 6<sup>th</sup> day of December 2001. The settlement had been preceded by an undertaking filed by one Jacqueline Moraa Obiero executed on the 3<sup>rd</sup> day of December 2001. For purposes of the record this reads:-

**“ I Jacqueline Moraa Ochieng of P.O Box 11707 Nairobi being the widow and Administrator of the estate of the late Alloyce Mellitus Obiero (The deceased) for myself and on behalf of the estate of the members of the family of the deceased (who were his dependants, including but not limited to those set out in the schedule have to hereby acknowledge due receipt from Kenya Airways Limited of the sum of US Dollars 300,000 (US Dollars three hundred thousand only) and Kshs. 475,000 (Four hundred and seventy five thousands shillings ) in consideration of which payment, I for myself and on behalf of the estate and members of the family of the deceased (who were his dependants) hereof agree, undertake and acknowledge as follows:**

- 1. Such payment is in full and final settlement, release and discharge of all claims of whatsoever nature and howsoever arising whether now or in the future and whether known or unknown and whether against Kenya Airways limited, Air Afrique, Airbus industries, General electric Company and their respective parent associated or subsidiary companies and any and all respective directors, servants , agents and insurers (Together “ the releasees”) arising out of or in respect of the deceased's involvement in and death in and loss of registered baggage cabin luggage, and personal effects including cash in the accident to Air bus A310 aircraft registration mark 57-Ben at Abidjan on 30<sup>th</sup> January 2000, and I together with those set out in the schedule hereto will jointly and severally indemnify the Releasees from and against any and all future liability, actions, demands, Claims or costs however arising and by whomsoever brought arising from or in respect of the deceaseds' involvement in and death in and loss of registered baggage, cabin luggage and personal**

effects including cash in the accident on 30<sup>th</sup> January 2000 afore said.

2. I have the full and unfettered authority on behalf of the estate of the deceased to execute this release and discharge and to receive the amount payable hereunder.
3. This release and discharge and the settlement described herein is entered into following detailed and lengthy negotiations undertaken by my advocates for and on behalf of the estate of the deceased including the members of the family who were dependants of the deceased.
4. This release and discharge and any dispute arising from it will be governed by Kenyan law and the courts of Kenya shall have exclusive jurisdiction.

**Dated 3<sup>rd</sup> day of December 2001”**

A perusal of the affidavit in support of the originating summons has the following high lights:-

- It does not mention that there are two administrators of the estate of the deceased.
- It does not mention that the co-administrator was aware of the originating summons proceedings and that he had authorized the applicant to depone the supporting affidavit without disclosing that he has an interest in the proceedings as a co administrator.
- The list of beneficiaries listed in paragraph 4 differs from the list of beneficiaries or dependants in the petition with an additional one party namely Reginah Nyakara Mutende described as a mother in law of the deceased.
- Prayed that the apportionment be effected for the sake of the children.

In the same replying affidavit filed on 14<sup>TH</sup> June 2002, there is an annexure which appears to have been a discharge signed by one Jacqueline Achayo Moraa on the 28/8/2000, regarding proceeds from the employers of the deceased. For purposes of the record the content reads:-

**“ I Jacqueline Achayo Moraa the widow of the late Alloyce Mellitus Obiero who died intestate on the 30<sup>th</sup> day of January 2000, and having left behind myself as the only widow and our two children Albert Ober Obiero and Antonina Nyakara Obiero- both are below Eighteen years and having lawfully examined the accounts of NCR (Kenya) limited the employers of the late said Alloyce Melitus Obiero in relation to various payments to be made by them in respect of the death of the late Alloyce Mellitus Obiero do hereby approve the same and accept the same and accept the sum of Kenya shillings twenty eight million one thousand only (Kshs. 28,001,000.00) in full satisfaction and discharge of all claims on behalf of the said late Alloyce Mellitus Obiero and his estate against the said NCR (Kenya) limited and in accordance of the Trust Deed for NCR (Kenya) limited scheme the whole amount is transferred to Amo children’s Trust already established with Barclays Trust Investment services limited”**

As mentioned the orders were granted on 14<sup>th</sup> day of December 2001 and soon thereafter the co-administrator presented an application in the originating summons by way of a chamber summons dated 8<sup>th</sup> day of March 2002 and filed the same date seeking that the orders of 14<sup>th</sup> day of December 2001 be set aside and or varied and the settlement sum of US Dollars 300,000 be held by the administrators pending the confirmation of the grant issued on the 24<sup>th</sup> April 2001 and the distribution of the estate in H.C. Succession 387/2001 and that costs be provided for.

Shortly thereafter one Jacqueline Moraa Obiero presented an application in the succession cause dated 14<sup>th</sup> day of May 2002 , and filed on the 16<sup>th</sup> day of May 2002 seeking an order to relieve one Patrice Odude of his authority as an administrator for the reasons given in the body of the application and the supporting affidavit. This was resisted by the said Patrice Odude by a replying affidavit depone on the 14<sup>th</sup> day of June 2002 and filed the same date as well as the annexures annexed thereto.

When the parties appeared before Aluoch J as she then was now Her Highness Judge of the ICC on 19/6/2002 the learned judge on the motion of the court and in the exercise of the courts inherent power

enshrined in rule 73 of the probate and administration rules which is a saving clause to enable the court prevent abuse of the due process of the court and for ends of justice to be met to parties to the suit, made the following orders:-

- 1. The Advocate for the petitioner to move the court for confirmation of the grants as quickly as possible.**
- 2. The summons dated 14/5/2002 is stayed as the court pursues the possibility of having the grant confirmed by the two petitioners who are directed to show the mode of distribution of the estate including proceeds paid to the deceased's estate i.e US Dollars 300,000 vide HCCC NO. 21/4/2001 (O.S). These were paid to Messer's Hayanga and company advocate.**
- 3. The civil suit files i.e HCCC NO. 2114 of 2001 to be kept together with P&A 387/2001.**
- 4. Both files to be kept in the strong room.**

Following those directions, an application by way of a summons for confirmation was presented by one Jacqueline Moraa Obiero dated and filed the same date of 11<sup>th</sup> December 2002. The application has a mode of distribution. The further affidavit in support of the application for confirmation deponed by one Jacqueline Moraa Obiero deponed on 11<sup>th</sup> day of November 2002, depones that the Respondent had agreed to item 1,2,3,4 and 5 of her distribution list but had declined to agree on item 7 . Items 1,2,3,4 and 5 relate to the following properties as well as the suggested mode of distribution:-

- 1. Nairobi Block 97/516 (1/2 share) worth 2,500,000.00 to be distributed to Albert Ober Obiero and Antonina Nyakara Obiero Each is to get 50%.**
- 2. Item 2 is Kisumu/Koru 67/1252 worth 200,000.00 Jacqueline Obiero to get 50% share of this property.**
- 3. Ngong/Ngong/15201 worth 200,000.00 to go to Jacqueline M. Obiero to get 100 % shares.**
- 4. Motor vehicle Reg. No. KAH 333P Toyota work 400,000.00 to Jacqueline M. Obiero at 100%.**
- 5. Motor vehicle Reg. No. KUS884 Datusun worth 100,000.00 was to go to Jacqueline M. Obiero at 100%.**

The disputed items number 6 and 7 relate to the following. Item 6 comprised Accrued benefits from NCR to the tune of Kshs. 28,001,000.00 which was proposed to be shared in whole by the two children of the deceased namely Albert Obiero and Antonina Nyakara Obiero with each getting 50% share. Whereas item 7 concerned insurance claim against Kenya Airways limited of US Dollars 300,000.00 to be shared as follows:-

- Jacqueline M. Obiero 28.37%
- Albert Ober Obiero 28.37%
- Antonina Nyakara Obiero 28.37%
- Joseph Leo Ochieng 4.99%
- Philista Awuor Ochieng 4.99%
- Reginah Nyakara Mutende 4.99%

It is not clear from the court proceedings as to what became of this first application for confirmation of grant filed on 11<sup>th</sup> November 2002. Its presence on the record notwithstanding counsel for the first Administrator presented another application for confirmation dated 11<sup>th</sup> day of December 2002, and filed the same date. The following reliefs were sought:-

- 1. That the letters of administration intestate made to the applicants on the 24<sup>th</sup> day of April 2001 be confirmed.**
- 2. That directions be given on the manner of sharing of the estate in respect to the funds from NCR, the Kenya Airways limited.**
- 3. That cost of the application be provided for.**
- 4. That the court be pleased to make further or other orders as may be in the interests of the estate”**

The application is supported by a supporting affidavit deponed by one Jacqueline Moraa Obiero on the same 11/12/2002 and filed simultaneously with the application vide paragraph 2 and 3. The beneficiaries of the estate are listed as:-

- (a) Albert Ober Obiero a son aged 6 years.
- (b) Antonina Nyakara Obiero a daughter aged 5 years.
- (c) Jacqueline Moraa Obiero wife (widow) aged 30 years.
- (d) Joseph Leo Ochieng father of the deceased aged 73 years.
- (e) Felicita Owuor Ochieng mother aged 64 years.
- (f) Reginah Nyakara Mutende mother in law aged 56 years.

Vide paragraph 6 the properties named in this paragraph were proposed to be shared as hereunder:-

- (a) LR. Number 97/516 was to be shared between Albert Obiero, Antonina Nyakara Obiero equally with each getting 50% share.
- (b) Parcel number Kisumu/Koru/67/1252 was to be shared by Albert Ober Obiero and Antonina Nyakara Obiero equally with each getting 50% share.
- (c) Property number Ngong/Ngong/1520, motor Vehicle Reg. No. KAH 339, Toyota and motor vehicle Reg. No. KUS 884 Datsun were to go to Jacqueline Moraa Obiero in their entirety with her getting their whole shares at 100%.

- Vide paragraph 7 it is deponed that there were proceeds of 28,001,000 which had accrued to the estate of the deceased from NCR and also a claim from Kenya Airways limited of US Dollars 300,000.00.

In the deponents' opinion these were to be distributed as hereunder:-

- (i) Jacqueline M. Obiero 28.37%
- (ii) Albert Ober Obiero – 28/37%
- (iii) Antonina Nyakara Obiero – 28.37%
- (iv) Joseph Leo Ocheing – 4.99%
- (v) Philista Awuor Ocieng 4.99%
- (vi) Regina Nyakar Mutende – 4.99%

There is a rider to paragraph 7 to the effect that the claim of the minors under (ii) and (iii) and the deponents mother under (vii) have been accepted while those of the deceased's parents under (iv) and (v) had been rejected as being too small.

- Vide paragraph 8 that by reason of the aforesaid, the deponent invited the court to determine the respective shares of the beneficiaries to the estate.

The filing of the application for confirmation and the showing of the mode of distribution by Jacqueline Obiero prompted the filing of an affidavit of protest by one of the beneficiaries named as the father of the deceased. The affidavit was deponed on the 24<sup>th</sup> day of January 2003, and filed on the 24<sup>th</sup> day of January 2003. The salient features of the same are as follows:-

- The deponements are made on behalf of the deponent as father of the deceased and one Felicita Owuor Ochieng as the mother of the deceased and for this reason they are beneficiaries of the estate of the deceased.

- Vide paragraph 3, enumerated the assets comprising the estate of the deceased which tally those ones enumerated by the applicant save that the 300,000US Dollars was given as an estimate in Kshs. as 24,000,000.00.

- Vide paragraph 4 that the deponent and his wife having been identified as parents of the deceased and beneficiaries of the estate of the deceased, it is not proper to allocate them only a mere 0.021% of the said estate.

- Vide paragraph 5 that the total value of the deceased's estate is Kshs. 56,000,000.00 inclusive of a cash value of Kshs. 52,000,000.00.

- Vide paragraph 6 thereof, that their dependence ratio to the deceased during his life time has been between 25%-60% of his income.

- Vide paragraph 7 that minutes of previous transactions annexed by the applicant to the applicants replying affidavit of 18<sup>th</sup> Mach 2002 in HCCC Number 2114/01 (OS) go to demonstrate that the deceased contribution for provisions for dependence of his parents was in the ranger of 42.5% of his annual income

and for this reason it is unfair for his widow to propose a mere 0.021 as the deceased parents entitlement.

- Vide paragraph 9 that the deceaseds' mother suffered a stroke in March 2001 due to inability to cope with the tragic loss of her son as a result of which she is now paraplegic and needs constant medication at a monthly bill of Kshs. 43,000/-
- Vide paragraph 10 thereof that although they believe that due to their position as parents of the deceased and their feeling that by reason of previous dependence percentage on the deceased income during the deceased life time was in the range of Kshs. 42.5% they ask the court to make reasonable provision for them.

There is a reply to the affidavit of protest by Jacqueline Moraa Obiero deponed on the 28<sup>th</sup> day of March 2003, and filed the same date. These are the highlights:-

- It was responding to an application dated 24<sup>th</sup> day of January 2003, not traced on the record and also response to the affidavit of protest by her father in law.
- Vide paragraph 4 thereof, that the funds from NCR being benefits accruing on behalf of the children are not within the control of the administrators herein since the said company has its own modalities of investing them.
- Vide paragraph 5 that the courts concern in so far as distribution of the deceased's estate is concerned should be the land, vehicles and the monies from Kenya Airways limited.
- Contends the father in law's assertion that the deceased used to give his parents up to 25%-60% of his income cannot hold as he had a family and his own upkeep to take care of.
- Vide paragraph 7, that although her parents in law are old they are greedy and selfish people who would like to take her husband's property without caring about the future of her small children and herself.
- Vide paragraph 8 that the deceased was not the only child of his parents. There are others who can take care of their parents and she wonders why her late husband should be followed to the grave to maintain them exorbitantly.
- Vide paragraph 9 that since the deponent and the co administrator do not get on along it is better to have the children's' money kept in the NCR trust.
- Vide paragraph 10 that in her opinion since her parents in law are aged over 75 and 66 years of age they do not deserve 42.5% of the estate for they are very old, her children are young and she also needs maintenance in order to continue steering her family from where her late husband left her.
- Vide paragraph 11 that in view of her assertion, the court should make a ruling considering her circumstances and that of her children vis-avis that of his parents in law.
- Vide paragraph 12 that the application dated 11<sup>th</sup> day of December 2002 should be allowed as prayed. There is reliance on annexures on documents from NCR the former employer of the deceased addressed to Barclays Trust instructing them to invest the funds from the employee for the benefit of the minor children of the deceased with a further request to include the mother of the children as a trustee. School fees, uniforms and other school related expenses were to be paid directly from the Trust Fund. The second annexure reveals that indeed a trust document for the investment of the said funds was prepared but the same was not executed.

Further from the record,, on 31<sup>st</sup> March 2003 Ang'awa J consolidated HCCC 2114/01 (OS)WITH HCCC P&A 387/01 proceedings in HCCC 2114/01 were stayed and all proceedings relating to the estate of the deceased were to proceed in P&A 387/01. It appears parties were directed to proceed by way of viva voce evidence.

The protestor was the first to take the witness stand. The summary of his evidence is as follows:-

- He is Joseph Leo Ochieng father of the deceased. He was aged 75 years while the wife was about 60 years old. The wife was not present because she suffered a stroke and was then confined to a wheel chair.
- He knows Jacqueline Moraa as a daughter in law, wife of a deceased son.
- Maintains he was a dependant of the deceased as the deceased used to support both him and his wife both materially and financially in the form of giving them financial support and repairs to his motor vehicle and tractor plus any other material services.
- That he used to work, bought a farm in 1965 put up a house on the farm in 1975 and moved into it in 1975 and after retirement he settled on the farm.
- That the deceased used to spent as much as Kshs. 100,000.00 on repairs on his motor vehicle and

tractor at any one particular time.

- He retired in 1979.
- That the deceased gave financial help according to his financial needs both for the family needs and his own personal needs.
- That there is a practice of holding family meetings, make notes of what the children of the family, agree on contribution to be made for the family upkeep and family project like the one held in 1999 where the deceased contributed Kshs. 59,000.00.
- He is also a sick man suffering from ulcers and amoeba and the deceased used to help him in the form of treatment.
- He narrated to court some of the projects in which the deceased had supported him immensely.
- The immense support to the family by the deceased is evidenced by the fact that the deceased and his brothers spent about kshs. 800,000.00 to take their mother to India for Arthritis treatment for a period of 8 months.
- Stated the family has suffered misfortunes as a result of losing the second last born son Tonny in 1996, lost the deceased subject of these proceedings in 2000, and then in the same 2000 the deceased's mother suffered a severe stroke and she is now confined to a wheel chair and is in hospital every now and then. She has also had been operated on twice. The family has to employ 2 girls to take care of her who are paid Kshs. 7,000 per month. She also requires to attend physiotherapy and they buy drugs in accordance with the Doctors prescriptions which are expensive, spending about Kshs. 15,000.0 monthly.
- Concedes the deceased died in 2000. Other family members have been contributing for his upkeep and that of his wife.
- With regard to own source of money the deceased's father said that besides contribution from family members, he has no other meaningful source of Finance as he is retired. He used to do sugarcane farming but that does not bring in any income as the factory is not functioning properly and for this reason the tractor is not bringing in any income.
- He is aware that funds came in from NCR of 28 million and 300,000 US Dollars from Kenyan Airways which he considers to be part of the estate of the deceased and yet the daughter in law is refusing to share those proceeds with him.
- It is his stand that they should receive a share of the said proceeds considering that the family contribution are not enough to meet their needs considering that he is very sickly.
- He asked the court to grant them 25% of the estate as he does not want to deprive his grandchildren their basic needs of.

When cross examined the witness gave the following responses:-

- Reiterated that his wife suffered stroke and she ran a bill of 3 million raised through Harambees and through struggles on the part of his sons. After discharge from hospital they have continuously needed money for nursing care for his wife.
- Conceded that his son Antony who died had been predeceased by his wife. They left behind a child and an unfinished house which was completed using proceeds from the deceased's employer. The property generates income which goes into a bank account and the same is applied towards the maintenance and upkeep of the daughter of Antony.
- Confirmed that he was given 20% of that estate.
- He does not know how much the deceased was earning at the time of his death.
- It is his testimony that the meetings were arranged by his children and he was not part of the arrangement.
- He receives money from his daughters whenever need arises.
- Maintained that the deceased used to send him financial support even when overseas.
- Concedes he used to make earnings from sugarcane and the tractor if operational on a monthly basis but as at the time of testimony he did not have the said income.
- He does not have dairy cattle but native cattle which does not yield any income.
- The wife used to do vegetable farming and that too no longer brings in income.
- He was firm that the deceased played a major role in the family projects but he has no detailed records.
- Was firm that no income comes from the farm. All their finances comes from contributions from the children.
- Denied suggestions that the deceased never made contributions towards their upkeep when he was alive.

- He does not know the deceaseds' monthly expenditure but all he knows is that he used to contribute towards their upkeep.
  - Denied any suggestions that he does not like the daughter in law. According to him it is the daughter in law who does not like them and she does not come home. She moved houses and cut off communication from them.
  - There is no other reason for their not getting on along except the succession proceedings pending in court and hopes that the family will be reunited once the proceedings are over.
  - He has asked for 25% of the net estate but leaves it to the court to make a final decision.
  - He was not aware of and was not party to the events which led to the release of funds from Kenya Airways and NCR for investment. It should have been brought to court for distribution first.
  - It is unfair to suggest that the funds at NCR should go solely to the children of the deceased.
  - Confirmed that him and his wife need financial help now more than before.
- Widow of the deceased who is the first administrator Jacqueline Moraa Obiero had this to say in her testimony in chief:-
- She lives with her children.
  - They go to school and she meets all their expenses.
  - It is her testimony that Kshs. 28,000,000.00 from NCR was not paid to her but it was to be put in an investment account for the children in accordance with NCR policy and relies on documents handed to her by the said NCR and according to her that money is safe.
  - Recalled the deceased died in Abidjan cote d'ivoire and she went to identify the body of the deceased.
  - Narrated her life with the deceased, financial matters right from the time of customary marriage upto formalization and death and how the deceased's finances grew.
  - They held separate bank accounts but she had access to the deceased's accounts.
  - She has knowledge that the family of the deceased used to have projects every year. These would be costed and costs shared amongst the sons.
  - Confirmed the holding of the family meetings.
  - They acquired property with the deceased. When he died he left outstanding loans which she cleared.
  - Funeral expenses were met by NCR.
  - Disagreed with her father in law over wife inheritance, the in-laws taking over her house in Embakasi, and the children from her.
  - Thereafter the father in-law and one other son took out and filed succession cause No. 340/00 and were granted a grant after she had been served with a citation but after discussion she chose to administer the estate with Patrice and they filed the current proceedings P&A 387/2001.
  - They at first worked smoothly with Patrice in the administration of the estate but later disagreed and that is why she decided to receive the proceeds from the Kenya Airways Insurance and had the same distributed but they intervened to stop the distribution from being effected.
  - Further disagreement arose when she suggested to the co-administrator that she wished the proceeds from NCR all to be invested for the benefit of the Education and the upkeep of the children.
  - She is willing to give her parents in law a portion of the funds realized from Kenya Airways in accordance with her proposal of distribution of the deceased's estate.
  - Maintains she has no access to the money held by NCR as the same will be available when the children attain the age of 24 years.
  - According to her, her offer is fair as the parents in law have other children to look after them as they are all in gainful employment.
  - In addition to contributions from their children (parents in laws children) the parents in law have income from a mill, tractor and one farm.
  - Was firm that what she gave the parents in law is enough because her children who are very young require that money for their Education.
- When cross-examined she had these responses to make:-
- Concedes she moved out from where they had been residing with her deceased husband to another location without informing her in-laws because they were not talking. Their relationship soured after the death of her husband and it had not improved as at the time of her testimony in court.
  - As at the time she relocated to a new residence, she did not know how much money she was going to get from the NCR.

- Concedes children are in a high cost school.
- That school fees and school levies as well as upkeep are paid for from funds invested by NCR and when this is not done school fees comes from funds paid by Kenya Airways.
- It is her testimony that it is her lawyers and those of Kenya Airways who worked out the percentages payable to beneficiaries and took them to court for effecting distribution as done.
- It is her testimony that the insurance money is still with the lawyers and was not invested as ordered inclusive of that of NCR because the co-administrators refused to cooperate by signing the necessary documents.
- It is her testimony that she decided to have all the money invested because NCR advised her that the money from them is not part of the estate.
- Concedes these funds were invented as being part of the estate because she was advised by her advocates to include everything before knowing what the NCR trust policy was, about investment of the said funds.
- Concedes she is the one who signed for the release of the NCR funds of Kshs. 28million.
- Maintains part of her disagreement with the in-laws arose from their insistence that she be cleansed and then be inherited and also their insistence that they wanted to take control of everything owned by her deceased husband.
- Concedes the deceased died leaving liabilities of one car loan he had purchased on his own and another purchased jointly with her which she settled with her own funds without involving her in-laws.
- It is her stand that her proposal of what her in-laws should get from the deceased estate is fair because their children (father in-law's children, will continue contributing to the upkeep of their parents.
- Turning to 1<sup>st</sup> administrator's own income, she said she gets rent from the rented premises of about Kshs. 15,000 per month. She earns very little from her business. The other properties invented by her are free from any encumbrances.
- She included her mother in the distribution because she was also a dependant.
- Concedes she was aware of the family meetings where funds were being contributed for the family projects and parents upkeep and that although the deceased did not attend some of them he did contribute.
- She was firm that she disclosed all material information relevant to the proceedings in her deponements.

Jacqueline's witness No. 1 is one Reuben Opondo Omamo a Financial and administration manager from NCR. He gave testimony derived from records held by them. The summary of his testimony is as follows:-

- The deceased joined the establishment as an attachée in 1987 at salary of Kshs. 2000.00 and rose through the ranks to senior management and at the time of his death he was earning Kshs. 166, 67.00 per month.
- He also had loans with them.
- Confirmed Jacquelines' evidence that they had a policy that upon death of an employee annual benefits are to be invested for the benefit of his dependants but where he dies leaving a will then these are disbursed according to the deceased's will.
- From their records, they had made such investments for three of their to management deceased staff members namely one Charles Ngatia who was a personnel manager and Wilson Mwafuge an ISS supervisor.
- According to him, the deceased had supplied details of his beneficiaries and they duly prepared to invest his benefits in trust for his children under the Title Amo Children's' Trust with the widow as an additional trustee.
- The entire funds from NCR were to be invested for the children's' Education and upkeep. The widow assured them that she was comfortable with the arrangements and would maintain herself from the business.
- Confirmed Jacquelines' testimony that the company paid for the funeral expenses and their staff attended the funeral.

When cross examined, the witness made the following responses in a summary form.

- The deceased made contribution to the retirement pension scheme through the check off system.
- That the total amount paid out by the employer, went to be invested was Kshs. 28,001,000.
- Concedes that if the deceased dies leaving a will then the employer would follow the restrictions in the will.
- The investments lasts till the child attains the age of 24 years.

- Confirms the deceased died on duty.
  - As at the time of testimony they had not revised the policy of investment of benefits upon death.
  - He has knowledge that the widow had been getting income for the benefit of the children.
  - That if not invested then the amount is to be distributed strictly in accordance with the information on the forms.
  - He does not know how often such an amount of money has been treated as being part of the Estate.
  - According to them whoever is not named in the beneficiaries form is not a beneficiary.
  - The aggregate amount sought to be invested by NCR was made up of funds from life assurance policy Kshs. 9,498,0481, group personal accident of Kshs. 13,950,660/= and then death benefits. The life Assurance and group accident policy had been taken out by the employer for the benefit of the employee.
  - The only document they have for authority to invest funds from NCR is the Trust Deed.
- The second administrators Patrice Odude took the stand after the testimony of Reuben and his evidence in a summary form is as follows:-
- Confirmed that he is aware one of his brothers and his father had applied for succession proceedings vide P&A 430/100 and cited the widow of the deceased.
  - That after holding family meetings and consultation it was agreed that him and the widow of deceased do take out letters of administration and that is when they filed the current proceedings P&A 387/2001.
  - The first grant was issued to them jointly on 24/4/2001. Thereafter directions were given that they file a joint application for confirmation but the co-administrator filed a separate application on 11/12/2002 and he also found it fit to file his on 24/1/2003 with a supporting affidavit sworn by the father.
- According to him the deceased distributable assets include the following:-
    - (a) House in Tasia Nairobi
    - (b) Land in Ngong
    - (c) Land in Muhoroni
    - (d) Claims from Kenya Airways Insurance.
    - (e) Dues expected from the employer NCR
  - He has knowledge that Jacqueline signed a release for Kshs. 28,000,000.00 from the employer.
  - Asserts that these were listed in form P&A as property forming the estate and he does not know why there is a change of mind.
  - That the trust document exhibited in court defines who a dependant is.
  - According to him since these were paid upon the deceased demise then they form part of his estate.
  - That according to clause 5(c), rule 10 on page 4,8 and 13, the construction is that if a beneficiary dies without a will the dependants become automatically the beneficiaries. By dependants is meant what the meaning has been as cribbed to that word in the said Trust Deed.
  - He was not involved in the creation of the trust with Barclays Trust .
  - Concedes they agreed on the distribution of assets other than monies from Kenya Airways and the employer.
  - Confirms the deceased parents who are also his parents are dependants of the deceased who used to give them (parents) about Kshs. 10,000 per month.
  - Concedes that they used to hold family meetings and then agree on how to look after their parents through monthly contributions from each earning family member.
  - Confirmed that his mother is sick and her financial requirements are higher.
  - Contended the death of the deceased reduced what the parents used to get.
  - Maintained that financial needs of his parents had increased.
  - Confirmed that family meetings to contribute towards the upkeep of the parents have continued without the participation of the widow of the deceased.
  - Maintains the tune of Kshs. 43,000 quoted by the father was for drugs and nursing care.
  - Confirmed that it is only the parents of the deceased who have laid a claim onto the deceaseds' estate and not his brothers and sisters.
  - He is aware that Kenya Airways funds were purportedly distributed in HCCC 2114/2001 (OS) whose proceedings he was not aware of. he protested. That file was consolidated with the probate

proceedings and the father of the deceased filed a protest.

In the course of the hearing the court made preservation orders on 9/10/2003 to the effect that:-

- 1. I direct the three firms of advocates i.e Messer's P.M. Ndungu and Co-advocates, messer's P.M. Kamara advocates and Hayanga and company advocates to open an interest earning account in an appropriate bank or finance house with best interest rates and use the account to invest the money from Kenya Airways amount, held in a current account by Messers Hayanga and company advocates.**
- 2. The petitioner widow Jacqueline Moraa Obiero is authorized to be paid interest from the invested sum quarterly for the payment of school fees and other expenses for the children.**
- 3. Parties are at liberty to apply for further orders from the court particularly if the interest granted quarterly is not sufficient to pay for the children's school fees and other expenses.**

PW1 Odude was duly cross examined by counsels on board and in a summary form responses are summarized as follows:-

- Concedes his father and brother had filed succession cause No. 340/00.
- That after family deliberations it was agreed that him and the widow of the deceased do file a succession cause together hence their filing of this succession cause No. 387/2001.
- Concedes they discussed distribution of the deceased's estate before messers Hayanga and company advocates and discussed distribution of the deceased's estate and agreed on the percentages at 10% for the parents, 40% for the widow and 40% for the children even before they knew what the estate was worth.
- Concedes before and after the death of the deceased, the deceased family has been meeting to agree on financial contributions for the upkeep of the parents.
- He is not sure about the exact earnings of the deceased as at the time of his death but what he is sure of is that he used to contribute about Kshs. 10,000.00 monthly for the upkeep of the parents.
- Confirms that all the properties of the deceased inclusive of benefits from the employer NCR and insurance claim from Kenya Airways were part of the deceaseds' estate and that is why they were invested and he was surprised at the change of mind.
- Maintains that since his appointment as an administrator, he has taken care of the deceased's estate as well as his children and attended to their needs.
- That the deceaseds' mother suffered a stroke and for this reason the financial upkeep has gone up.
- That it is the desire of the parents of the deceased that they share in the estate of the deceased.
- That the siblings of the deceased have no claims in the said estate.
- That the disagreement on mode of distribution is confined to the dues from the former employer of the deceased NCR and the Insurance claim from Kenya Airways.
- They do not agree on the percentage proposed by the 1<sup>st</sup> administrator because the percentage is small.
- Confirmed that the estate of the deceased has not been participating in the meetings for contribution towards the upkeep of parents of the deceased.
- Concedes that the relationship between him and the first administrator had become strained especially after she signed for the release of the funds. Since then the first administrator changed her contacts and whenever they meet she insults him.
- Maintains that despite their not appearing not to be in good contact with the first administrator, both of them to administer the estate until final distribution only if the first administrator is willing to be transparent in her dealings with the estate.
- Maintained that she has been keeping vital information from him.
- Maintains he had good relations with his deceased brother.
- It is his stand that if there will be a dead lock in the administration of the estate of the deceased, then they will inform the court to that effect.
- He does not see any need for creation of a trust for the children.
- Maintains that he did not sign the documents for the opening of the trust to receive funds from NCR because according to him these funds form part of the estate and that is why they were invented as

such.

- Maintains that he has gone through the Trust Deed of NCR and he is convinced that he is right that those dues are part of the estate and are not solely to be for the benefits of the children. They are meant to be for all dependants.
- Confirms that his parents have a genuine claim to get a share of the estate of the deceased.
- Concedes issues of distribution of the deceased's estate have been discussed at the family level with the involvement of their counsels with no agreement being reached on the mode of distribution and that is why they are in court.
- His stand is that each parent should get 5% of the net total monetary value of the deceased's estate. The 4<sup>th</sup> witness to take the stand is one Mr. Fred Nyayieka. A summary of his testimony is that he works for the corporate pension trust services limited a company registered under the company's Act as a trust corporation whose core business is trust keeping and administration of funds.
- He works as a division manager in charge of administration of funds.
- From the records NCR, established a trust via declaration of Trust known as the estate of Alloyce Melitus Obiero deceased dated 25/5/2000. It is one of the trusts he administers. The trust trustee is Barclays' Trust Investment services limited. It is an irrevocable trust established for the benefit of the children's of the late Alloyce Melitus Obiero namely:- Albert Ober Obiero born on 22/9/93 and Antonina Nyakara Obiero born on 18/1/95. These trusts are to hold till the children attain the age of 24 years with that of Albert ending on 2017 and of Antonina on 2019 and thereafter the assets would be transferred to the benefit of the children in equal shares.
- He has knowledge that Barclays trust did resign as trustee on 30/11/2001 and the corporate and pension trust services was appointed as the new trustee.
- Outlined their powers as trustees namely:-
  - (a) Power to invest irrespective of the amount of income produced.
  - (b) To apply as he thinks fit the assets for the benefit of the beneficiaries the whole or part of the income.
  - (c) To appropriate any part of the trust fund.
  - (d) To appoint new trustees.
  - (e) Ensure that the capital is preserved.
  - (f) When thinking of what action is to be taken, the trustee has to take into consideration the age of the beneficiaries, their current and future requirements, the investing environment, their risks profile and lastly the investment horizons.
- It is his testimony that according to him the trust under his care is an investment trust for the benefit of the two children.
- According to the witness, the trust matters are different from those of the estate because declared beneficiaries under a trust are different beneficiaries from those of the estate.
- The document from NCR showed that Jacqueline was a trustee also but the witness does not know why she was included in the documents as a trustee.
- As at the time of the witnesses first a testimony on 14/10/2004 funds held for the benefit of the trust established in favour of the beneficiaries of the deceased subject of these proceedings stood at Kshs. 38,182,996/30 but the witness could not tell how much of this was capital and how much of it was accrued income on the capital.
- Conceded that he had invested in a house in Brookside Nairobi occupied by the family of the deceased namely the wife and the children.
- He has also invested in government bonds but did not know their net worth at that time.
- Concedes he did not have the figures on how he has handled the trust.
- The larger family has not asked to benefit from the funds.
- Their major concern are two children.
- Part of the trust funds were invested in old mutual but they did not have the exact details of those funds as the net value changes every day.
- Confirmed that out of the Trust funds held the trustee pays management fees to Old Mutual the managers of the fund, they pay custody fees to Barclays bank of Kenya and they also pay taxes and the trustee fees as part of the management fees.

From the record the trial ended on 3/4/2006 before Aluoch J as she then was now Her Highness judge of the ICC. Written submissions were called for on the same date. From the date stamps those of the first administrator are dated 27<sup>th</sup> day of November 2007 and filed on the same date. Those of the 2<sup>nd</sup> administrator are dated 11<sup>th</sup> day of December 2007 and filed on the 13<sup>th</sup> day of December 2007. Those of

the protester are dated the 13<sup>th</sup> day of July 2009 and filed on 15<sup>th</sup> day of July 2009. By the time all submissions were on board Aluoch J who was the trial judge as she then was had been promoted to the court of Appeal in December 2007 and thereafter moved to the International Criminal Court as Her Highness the judge office. On 2/10/2009 parties appeared before Nambuye J and intimated that the matter do proceed from where it had reached. Submission to be filed, oral highlights to be made and then reserved for judgment. Later oral highlights were abandoned and matter reserved for judgment hence the drafting of the judgment by Nambuye J.

As mentioned the submissions of the first administrator are dated 27<sup>th</sup> day of November 2007 and filed on the same date. The following have been stressed:-

- Reiterated historical background information already set out herein namely, that proceedings relate to the estate of one Alloys Melitus Ochieng who died on the 30<sup>th</sup> day of January 2000 in Kenya Airbus A 310 Airbus flight KQ431 air crash in Abidjan Cote d'ivoire. Thereafter the deceased father and brothers were the first ones to apply for a grant of representation to the deceased's estate in P&A 430/2000 and were duly issued with the grant after serving the widow with a citation. She challenged the grant but later it was agreed that the current proceedings be filed which was accordingly done and a grant was duly issued to her and the co administrator.

- The deceased left behind two children one named Albert Ober Obiero born on 22/9/1993 and Antonina Nyakara Obiero born on 18/1/1995.

- First administrator decided to file a civil suit number HCCC 2114 of 2001 (O.S) to seek compensation from Kenya Airways for the death of the deceased.

- When a list of beneficiaries and mode of distribution were suggested by the 1<sup>st</sup> administrator, the second administrator protested asking for 10% entitlement of the net worth of the deceased's estate including funds from Kenya Airways and NCR.

- That NCR as a matter of policy invested funds due to the deceased in accordance with the deceased's wishes.

- That the 2<sup>nd</sup> administrator wants the parents of the deceased to get a share of the NCR funds.

- The court is invited to determine four issues namely:-

**(i) Whether the parents of the deceased were dependants of Alloyce Obiero and if so how much should they get from the estate?**

**(ii) Whether the NCR Trust funds form part of the deceased's estate and in the alternative whether the same can be shared among other persons other than the named beneficiaries.**

While commenting on the evidence adduced by the witnesses already set out in extensor herein, the following have been highlighted.

(i) The evidence of Leo Ochieng reveals that he admits that the deceased was not the only one supporting his parents during the deceased's life time. There were other children of the family who were supporting the family.

(ii) With regard to the evidence of Patrice Odude, the court is invited to take note that from the evidence, this was and still is a well organized family with able (6) brothers and two sisters including a high court judge who contribute to their parents upkeep. For this reason it was not the deceased's sole responsibility to look after their parents but it was a shared responsibility which continues to the present day.

(b) It is evident that the relationship between Mrs. Obiero and the deceased's family is not cordial evidenced by the fact that Odude stated that he was not involved in the civil case No. 2114/2001, and the investments of the funds from NCR.

(iii) With regard to the evidence of the widow Mrs. Jacqueline Obiero, the court is invited to note that the list of assets and liabilities enumerated by the first administrator have not been disputed by the family of the deceased.

(b) Concedes that while the deceased was away in Abidjan, it is the widow Mrs. Obiero who used to attend the family meeting and handover the contributions of the deceased.

(c) That the deceased was often in arrears in so far as family contributions were concerned because he had other financial personal needs to attend to.

(d) The court is invited to note that Odude was concealing material information from the court when he stated that he did not know how much the deceased used to contribute towards the family contribution and yet he said that minutes of the family meetings used to be recorded and kept.

(e) That the relationship between the widow and the deceased's family worsened when the widow was told by the father in law that she was going to be inherited, coupled with the fact that the deceased's

family had resented her because they had wanted the deceased to marry a Luo or a graduate demonstrated to exist by the fact that the deceased's family did not attend the formalization of the marriage ceremony between the deceased and the widow.

With regard to the evidence of one Reuben Opondo Omamo, the court is invited to note that the deceased was in arrears in his family contributions due to him having to meet his financial obligations with regard to the paying for the upkeep of his wife and children, repaying the car loan, corporate and mortgage loans and meeting his own upkeep expenses in Abidjan.

(b) The court is invited to believe the testimony of this witness to the effect that the benefits accruing from NCR were not to be treated as part of the deceased's estate upon his death. Instead if one dies before retirement as was the case of the deceased, then a trust would be set up for the benefit of the deceased's children. This was confirmed by undisputed evidence that since the coming into effect of the policy, three trusts had been set up one for Charles Ngatia set up in 1990, Wilson Mwasuge set up in 1991 and that of Obiero the deceased set up in 2000.

- With regard to the evidence of Fred Nyayieka, the court is invited to note that this witness corroborated the evidence of Reuben Opondo from NCR that since the deceased had died while still in active service his terminal benefits could not be treated as pension and were thus available for investment into trusts and for this reason it was clear that the Trust Funds were not to be mixed together with the deceased's estate assets.

(b) The court also to note that since the deceased only named his children as beneficiaries, the Trust Deed could only recognize the children which position should be upheld by the court.

- With regard to the share entitlement of the parents of the deceased from the estate of the deceased, the court is invited to note the following:-

(a) That upkeep of those parents comes from pool funds contributed by children of these parents.

(b) That the deceased had died leaving behind his siblings who have continued contribution for the upkeep of the parents.

(c) There was no proof that the parent got 20% share from the estate of another deceased brother of the deceased.

(d) That even if what has been stated in (c) above could be true, the court to note that the said deceased son Tonny had died with the wife having predeceased him and left only one daughter placed under the care of one Fred. Unlike the deceased herein who died leaving a wife and 2 small children who needed funds for their Educational and general upkeep.

(e) The court to note that though the parents of the deceased are now aged, they have other children who continue to support them, they also have their own property to depend on, the surviving children afforded to sent their parents for a holiday twice after the death of the deceased, they have been meeting the medical expenses of a mother who suffered a stroke, the financial contribution for the costs of the medical care, expenses for two nurses have continuously been being met by the deceased living sibling without any problem.

- The court is invited to believe the first administrator's assertion that the deceased's contribution to the welfare of his parents during his life time was minimal.

- The court also to note that so far, the parents of the deceased have benefited from the estate of the deceased to the tune of Kshs. 1,250,000/=.

- The court is invited to believe the testimony of the first administrator and her witnesses that the decision to invest the NCR funds was solely taken by the deceased's employers in accordance with the employers policy and neither administrator had a say over it and for this reason the said arrangement which is for the benefit of the children should not be upset by this court. Further this arrangement is not peculiar to this case as there is proof that beneficiaries of two other senior officers had similarly benefited from similar arrangements.

- The court is further invited to hold that by reason of the creation of a trust in favour of the children of the deceased, the court to hold that the said funds do not form part of the distributable estate of the deceased and should accordingly be excluded from distribution a situation confirmed by the testimony of the two witnesses namely Reuben Omamo and Nyayieka.

- In his concluding remarks counsel had this to stress:-

(i) There is no dispute on the distribution of the deceased's fixed assets.

(ii) The central nerve of the controversy is the current assets in the form of money from two sources namely Kshs. 28,000,000.00 from NCR and US. 300,000 Dollars paid to the estate by Kenya Airways Limited in compensation for the death of the deceased.

- (iii) That money from NCR is not pension money but money payable for the benefit of children, under a Trust, and its benefit is limited to those named under the Trust Deed and as such the same is not available for distribution.
- (iv) The opposition to the widows proposed mode of distribution should be rejected because the widow had made a fair distribution of the estate of the deceased to eligible beneficiaries.
- (v) The court is invited to take into consideration the provisions of section 28 of the L.S.A. cap 160 laws of Kenya and consider the current and future needs of the deceased children's and uphold the first administrator's mode of distribution and reject that of the protestors because they are elderly people whose present and future needs are less compared to those of the children of the deceased.
- (vi) There is demonstration by evidence on the record that the parents of the deceased have other able children who can fend for the parents of the deceased considering that the said children have been ably doing so since the deceased died in the year 2000.
- (vii) Contends that it will be unfair to uphold the protestor's insistence on a 42.5% share of the deceased's estate.
- (viii) The court is invited to hold that the acrimonious relationship between the deceased's extended family and the widow of the deceased is proof of existence of a concerted effort to disinherit the widow and the children of the deceased a matter the court should not allow.

The submission of the second administrator are dated 11<sup>th</sup> day of December 2007 and filed on the 13<sup>th</sup> day of December 2007 and the following have been highlighted.

- The assets forming the estate of the deceased according to them are as follows:-

- (i) Half share in Nairobi Block 97/516
- (ii) LR. Kisumu/Koru/67/1252
- (iii) LR. Ngong/Ngong/15201
- (iv) Motor vehicle KUS 884 Datsun and KAH 333P Toyota
- (v) Claim from Kenya Airways US Dollars 300,000 (Kshs. 21,300,000)
- (vi) Accrued benefits from NCR.
  - (i) Personal accident Kshs. 5,500,000/=
  - (ii) Life assurance Kshs. 25,000,000/=
  - (iii) NCRC (Kenya) civil retirement benefits of Kshs. 38,182,996.36
- (vii) Interest on f (g) (i) (g) (ii) and g (ii)
- (viii) NCR loan (car and house Kshs. 99,841.00)

The court is invited to go by the valuation for the assets of the deceased as given in evidence which stood then at Kshs. 93,382,996.36.

(ii) The assets from NCR stood at Kshs. 68,682,996.30 and continue to attract interest for the benefits of the estate.

4. The rightful beneficiaries of the estate of the deceased are those indicated in the affidavit in support of the petition.

5. With regard to distribution the court is invited to bear in mind the following:-

- (i) Liabilities to the deceased's estate have been settled.
- (ii) The widow has acknowledged at the close of her testimony that the deceased parents need financial support more now than when the deceased was alive.
- (iii) The court is invited to note that the children of the deceased have been receiving benefits from the invested funds in terms of monthly upkeep, school fees and school trips as well as other maintenance needs and have not been prejudiced in any way.
- (iv) The court is invited to be guided by the figures of the value of the net asset of the deceased as per the evidence and distribute the same equitably.
- (v) Further that the court is invited to note that the sole reason why the first administrator seeks to remove the second administrator from the administration is because of intermeddling which has been noted on the record.
- (vi) The court is invited to note that the funds from NCR are subject to distribution to dependants whose definition includes the parents.
- (vii) The court is invited to distribute these funds as well.

The submission for the protestor are dated 13<sup>th</sup> day of July 2009 and filed on the 15<sup>th</sup> day of July 2009. A perusal of the same reveals a reiteration of the evidence adduced that the deceased supported his parents. The ratio of dependence was in the range of 40.2%-60% of his income and by reason of this assertion, the court is invited to believe their testimony on this and then allow the protestor the percentage specified by

them from the net estate of the deceased.

No case law was referred to court by the parties. This court has given due consideration to the Rival depositions, rival testimonies, rival submissions and in its opinion the following are own framed questions for determination in the disposal of these proceedings.

**(1) What are this court's general observations of these proceedings this far?**

**(2) Are there any legal issues arising from the said general observations made by the court above? If so, what are this court's responses to them?**

**(3) What reliefs are the disputants seeking from the seat of justice?**

**(4) Are there any pre-requisites required to be established before the disputants can earn this relief?**

**(5) Have the disputants brought themselves within the ambit of the said pre requisites?**

**(6) What final orders is this court going to make in the final disposal of this matter?**

In response to own framed question 1, the following are this courts general observations of the proceedings herein:-

(i) With the exception of the first administrator including her mother who was mother in law of the deceased, as a beneficiary, the rest of the beneficiaries are not disputed. These are the widow, the two children of the deceased and the aged parents of the deceased who are the protestors herein.

(ii) The first grant in relation to the estate of the deceased was issued in P&A 430/100 to the protestor, father of the deceased, and a son-brother of the deceased to the exclusion of the widow. However after family negotiations it was agreed that the current succession proceedings in P&A 387/01 be taken out by the widow and a brother of the deceased. A grant to that effect was issued to the two on 24/4/2001.

(iii) The proceedings in HCCC 2114/00 (OS) have also featured prominently in this succession cause because these were initiated by the widow of the deceased who is the first administrator herein to the exclusion of the co-administrator and protestor. These proceedings resulted in negotiations between the lawyers of the first Administrator and Kenya Airways against whom the proceedings had been taken out resulting in an award of compensation to the tune of US Dollars, 300,000. It is on record that the 1<sup>st</sup> administrator widow was the sole signatory to the discharge voucher discharging Kenya Airways from any future liability. It is also clear from the content of the discharge voucher that she stated clearly that **"she was signing the discharge on behalf of the estate of the deceased and the dependants"**. The same first administrator went ahead to apportion the resultant compensation award. When the protestors and second Administrator came to learn of these transactions, they took steps to protest and halt the process from proceeding to finality, sought to have those funds made part of the estate property herein, had the two causes consolidated together and an order made to the effect that the distribution and or apportionment of the compensation award in HCCC 2114/00 (OS) be processed through succession, cause No 387/01.

(iv) It has been observed by the court that the mother of the widow who was a mother in law to the deceased appears in the list of those to be apportioned the compensation award in HCCC 2114/00 (OS), and in the mode of distribution suggested by the 1<sup>st</sup> administrator, but was not listed as a beneficiary in the petition. Neither is she recognized as such by the protestor. Apart from a mention by the first Administrator in her testimony that the deceased used to maintain her mother and that is why she listed her as a beneficiary, no evidence was led by the first petitioner to prove the level of dependency of her mother on to the deceased in the same way evidence was led to prove the dependence of the protestors on to the deceased. Neither did the said mother of the first administrator attend court to testify and defend her right of dependency on to the deceased and offer herself for cross-examination with reference to the same.

(v) It is undisputed that the protestors have not laid claim for a share nor disputed the 1<sup>st</sup> administrators suggested mode of distribution of ½ share in Nairobi Block 97/516, Kisumu Koru 62/1252, Ngong/Ngong/1520, motor vehicle KAH 333P, and Motor vehicle KUS 884. This means that all that is required of this court to confirm or not to confirm the said proposal is just a determination as to whether it complies with the relevant provisions of law considering that minors are involved.

(vi) The court's intervention has however been sought as a result of disagreement on distribution of funds from two sources namely the death compensation from Kenya Airways and the deceased employer NCR. It has already been observed elsewhere under general observation that the Kenya Airways funds are the subject of HCCC NO. 2114/2000 (OS). Further observation was that the said proceedings as well as the proposed apportionment, therein were ordered to be consolidated with this succession proceeding by Ang'awa J on the 31/3/2003 rightly so because the proceedings under HCCC 2114/00 had been initiated under the old Order 36 CPR which does not deal with distribution of deceased person's estate property. It is only in the succession proceedings where a deceased person's estate can be distributed.

The major reasons for disagreement which even led to the filing of two applications for confirmation stems from the different stands which both sides have taken with regard to the distribution of funds from Kenya Airways death compensation, and those from the employer. The stand of the protestor and the 2<sup>nd</sup> administrator is that both of these set of funds are part of the distributable estate of the deceased and that the protesters should get 25% of the same. Whereas the stand of the first administrator is that, although there is no dispute that the parents should get a share of the Kenya Airways compensation, the percentage proposed by her is enough and the bulk of that money should go to her and the children. As for the funds from the employer these should remain invested for the benefit of the children only.

(vii) It is not disputed that the deceased's liabilities are not contending for a share of the balance of the net estate.

(viii) It is not disputed that the deceased indeed teamed up with his siblings to contribute both financially and materially towards the general upkeep of the parents during his life time and there has been no suggestion that he would not have continued to do so support them had he not passed on.

(ix) That although the 2<sup>nd</sup> administrator gave a calculation of the current net value of the estate being in excess of 93 million Kenya shillings, the documentation the court has talks of US Dollars 300,000 and a sum of Kenya shillings 28,001,000.00 from the employer as per the discharge voucher signed by the widow. The other figures mentioned by the 2<sup>nd</sup> administrator were not borne out by the evidence in the discharge vouchers save that it is on record from the evidence of the two witnesses who gave evidence on behalf of the investment that the invested funds were generating income and as at 2004 when PW4 gave evidence the invested funds had reached 38 million. When stood down to bring the exact figure PW4 gave excuses. It is also noted that a copy of the Trust Deed annexed by the first administrator indicated that the sum which was to be invested was in the range of 38 million in the year 2000.

(x) That both sides have given different versions of their construction of the Trust Deed emanating from the deceased's employer with regard to who qualifies to be a dependant under the said Deed. According to the protestor, parents of the deceased qualify to be dependants. Whereas according to the first administrator only those named in the next of kin forms as dependants qualify to be dependants. There is therefore need for the court to construe the said Trust Deed.

(xi) Apparently the income generated from the Nairobi house which the first administrator conceded to have leased out plus any other income from the undisputed properties does not find its way to the protesters.

(xii) The widow who is the first administrator and her children have already benefited from the funds invested by NCR as it was admitted by the witnesses who testified on behalf of the Investment Trust Company that a house worth 12 million was purchased for the family and the widow and children have use of the same. The children's school expenses and upkeep also come from the same fund. Whereas the protesters have not benefited from this investment. On the other hand the protesters on account of the paraplegic mother has benefited from funds from Kenya Airways compensation payment to the tune of Kshs. 1,250,000.00.

(xiii) There appears to be a lack of consensus between the first administrator on the one hand and the protesters and the second administrator on the other hand on the way forward with regard to final distribution and winding up of the estate. The protesters and the 2<sup>nd</sup> administrator blame it on the 1<sup>st</sup> administrator whom they allege is bent on disinheriting the protesters where as the first administrator blames the protesters and other siblings of the deceased on their alleged move to force wife inheritance on her and also to disinherit her and her children.

(xiv) That both sides are in agreement that this court has the jurisdiction and the power to intervene and do justice to them by distributing the estate fairly.

With regard to own framed question 2, there are several legal issues which have arisen both from the entire documentation assessed in this judgment as well as the afore set out general observations made by this court. The first legal issue that arises for disposal is the need to define what is meant by intestacy and intestate property. This has arisen because firstly the deceased died intestate and 2<sup>ndly</sup> it is because it has been argued by the first administrator that funds from the employer NCR do not form part of the estate despite these having been invested at the time of the initiation of the petition.

In section 3(1) of the law of succession Act cap 160 laws of Kenya, "Estate" is defined as means **the free property of a deceased person**" whereas "**Free Property**" in the same section is defined as 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" Section 34 reads: "A person is deemed to die intestate in respect of all his free property of

**which he has not made a will which is capable of taking effect.”**

From the above definitions for purposes of the law of succession Act cap 160 laws of Kenya, free property means what the deceased could freely dispose off during his life time. This definition fits the description of the undisputed property. The funds forming the compensation from Kenya Airways and the employer were not at the disposal of the deceased as at the time of his death as they had not accrued to him. It therefore means that in order to bring the funds from Kenya Airways and the employers benefits under the estate property umbrella, it has to be demonstrated that there is another provision of law which donates that powers to this court.

Recourse is had to the Law Reform Act cap 26 which this court has judicial notice of. Section 2(1) thereof states:-

**“Section 2(1) subject to the provisions of this section on the death of any person after the commencement of this Act, all causes either subsisting against or vested in him shall survive against or as the case may be for the benefit of his estate....**

**3...**

This provision covers the accident compensation whose recovery has been demonstrated to have been recovered on account of the deceased’s death. It is therefore the finding of this court that funds from Kenya Airways are part of the benefits of the estate and are therefore distributable.

With regard to the benefits from NCR, all that the court has is the Trust Deed traced in the bundle of documents marked A annexed to the first administrator’s affidavit deponed on the 28<sup>th</sup> day of November 2003 and filed on the same date. Clause 2 thereof makes provision that **“The main purpose of the scheme is the provision of cash provision of each benefit and pensions for members upon their retirement at a specified age and relief for the dependants ( as defined in the rules) of the deceased members.”** A dependant is defined under rule 1, of the Rules of NCR (Kenya) Limited Retirement benefits scheme as:-

**“Dependants shall mean the members spouse, children grandchildren, great grandchildren, adopted children, step children, parents and grandparents and such other person or persons as were in the opinion of the Trustees, immediately before the members death substantially dependent upon the member (whether alone or with others, for the provision of the necessaries of life and the class of dependants shall be closed at the death of a member except that it shall include persons entvenures a mere who if born would have been dependants”**

Rule 2 specifies the object of the scheme as:-

**“Rule 2 the object of the scheme is the provision of pension and other cash benefits for the members on their retirement on or after the normal retirement date or relief for their dependants in the event of a members earlier death and of such other or ancillary benefits as are secured to members or their dependants under the rules”**

Rule 5(c ) on pension benefits provides:-

**“Should a pensioner die before 120 monthly installments of pension shall have been paid, then subject to Rule 17 and 20, the Trustees shall hold a sum equivalent in value to the difference between the total of monthly installments of such pension and the total of the monthly installments paid prior to the date of death of such pensioner upon trust for the members personal representatives to be distributed by them in the case of a member leaving a will , not as part of his estate but in accordance with those provisions of his will applicable to his residue estate or in the case of intestacy not estate but to the persons entitled and in the shares laid down by the laws of intestacy applicable to such”**

Rule 7 on the death of a member provides:-

**“Rule 7: Upon the death of a member**

**(a) The whole of the contribution paid under the scheme towards the members pension up to his date of death together with such interests as may have accrued thereon and**

**(b) Such sum as shall be received by the Trustees from the insurance company with whom a life assurance cover was effected in respect of such member pursuant to the provisions of rule 6 shall be held by the Trustees upon trust to be paid by the Trustees in accordance with rule 5(c ) Mutatis Mutandis”**

This court has given due consideration to the afore set out relevant provisions of the Trust Deed and duly construed the same and the court proceeds to make the following findings on the same:-

(i) The substantive provisions of the Trust Deed are the main or parent clauses and not the rules. The rules in this courts opinion are subsidiary;-

(ii) The main clause 2 specifies clearly that the main reason for pooling of funds under the named scheme is to benefit the member upon his/her leaving the employment either upon retirement or otherwise on the one hand, and on the other hand to provide relief to the dependants of the deceased.

(iii) In the circumstances of the case subject of this judgment main clause operates to provide relief to the dependants since the deceased died.

(iv) Under rule 1 of the said Trust Deed, the definition of a “**dependant**” includes parents of the deceased, meaning that the protesters are covered. Nowhere is it specified in the main clause and in the definition in rule 1 that any set of dependants enjoys bigger leverage over the others.

(v) It is common ground that the deceased was indeed a member of the said scheme.

(vi) A proper construction of clause 5(c) is that where a deceased member has died leaving a will, then distribution of benefits accruing to his dependants for the relief of those dependants would be distributed in accordance with the dictates of the will. However where there is no will, then the said resulting funds are to be held “**upon trust**” for the members personal representative to be distributed by them according to the will if one exists and according to the law of intestacy. There is therefore nothing in clause 5(c) which tends to prohibit the distribution of the funds which have accrued from NCR.

(vii) Rule 7(b) on the other hand makes it mandatory that the resultant benefits both from the employer and the group insurance benefits are to be held upon trust by the Trustees and the same are to be dealt with as provided for in Rule 5(c). It is the same rule 5(c) which recognizes disposition of the said funds by will if one exists and where no will exists then the same is to be disposed off in accordance with the rules of intestacy. Nowhere in rule 5(c) as read with rule 7 does it state that all the benefits were to be held for the benefit of the children and widow of the deceased only.

(viii) Nowhere in the assessed main clause (2) and the attendant definition rule 1 does it say that dependants referred to are only those that the deceased had named in his next of kin form. The very fact that clause 2, rule 1 and rule 5(c) and 7 referred to rules pertaining to wills and intestacy, it means that the next of kin forms though it cannot be trashed holds for purposes of the record and as long as the employee lives, upon his or her death the said next of kin form cannot ward off other lawful claims under a will or on intestacy.

(ix) There is no provision in the main clauses or the rules which prohibit the operation of law to shield lawful claims on the said benefits such as claims championed through the law of succession Act.

(x) It is on record that the issue of the employer’s policy was stressed both by the first administrator, and the witnesses who testified on her behalf. Nowhere in the main clauses as well as the rules does it state that the employer’s policy on the investment of the funds has primacy over the prescription in the Trust Deed. In fact the converse is the position as the employer is bound by the terms of the said Deed upon endorsing the same.

(xi) There is annexed to the said Trust Deed a trust creation document which is unsigned, which was intended to invest all funds from the employer for the benefit of the children of the deceased. This is alleged to have been effected under rule 5(c) of the Trust Deed. Bearing in mind what this court has opined above, such an arrangement can lawfully be passed and upheld by the employer and this court if there were no other lawful competing claims against those funds. Where there are lawful competing claims like in this case primacy of the entitlement by a section of the beneficiaries over another section of the beneficiaries does not hold. It is subject to scrutiny by the court and where appropriate can be faulted.

(xii) This court is alive to the evidence adduced herein to the effect that despite protests from the 2<sup>nd</sup> administrator and the protester, the employer went ahead to invest the said amount in whole for the benefit of the two minor children of the deceased. It has been argued by counsel for the first administrator that these funds are not available for distribution and no lawful orders can be made against them. The findings of this court is that there is nothing in the prescriptions of the said Trust Deed which prevents a court of law from following such invested funds and direct that the Trustees do pay out certain sums for the benefit of other lawful claimants to the said funds.

For the reasons given in (i-xii), this court is satisfied that the NCR funds are part of the distributable estate of the deceased. Further that if the whole funds were invested as it was revealed by the evidence on the record, then nothing precludes this court from making an order with regard to apportionment of the same in favour of persons who have lawful claims against the said funds. Or alternatively make an order that these do take into consideration the benefit of these funds to the minor children by reason of the said children being the sole beneficiaries of the said immense funds and by reason of there being difficulty of accessing those funds by reason of the investment being said to be irrevocable and order that other beneficiaries with lawful claims on those funds be compensated from other sources to which the same

minors are entitled.

(b) Issues arise for interrogation as to whether the mother of the first administrator who was mother in law of the deceased qualifies to be a dependant. This has arisen because she was included as a beneficiary of the Kenya Airways compensation apportionment in HCCC 2114/00 (OS). She has also been included on equal footing as the parents of the deceased in the 1<sup>st</sup> administrator's mode of distribution. The protesters have argued that the mother of the first administrator does not qualify to be termed as a dependant in terms of the provisions of the relevant law. It should be noted that the definition of a "**dependant**" in clause 2 and rule 1 of the Trust Deed does not include parents in law. This means that the said mother of the first administrator is ruled out as a contending beneficiary of the benefits from NCR. She has not laid any claim over the other free assets of the deceased meaning that by exclusion she can only lay claim as a beneficiary on the compensation funds. As found by the court earlier on, these were funds which accrued for the benefit of the estate of the deceased under section 2(1) of the Law Reform Act cap 26 laws of Kenya. This was an acknowledged fact by the widow at the time of the execution of the discharge voucher. By reason of these funds accruing for the benefit of the deceased's estate, they became a candidate for the application of the law of succession Act provisions. The prescriptions dealing with dependants in section 29 thereof reads:-

**"Section 29: For the purposes of this part, dependant means:**

- (a) The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.**
- (b) Such of the deceased's parents, step parents, grandparents, grand children , step children, children whom the deceased had taken into his family as his own, brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and**
- (c) Where the deceased was a woman her husband if he was being maintained by her immediately prior to the date of her death"**

This definition excludes parents in law. It means the claim of the mother of the 1<sup>st</sup> petitioner to the deceased's estate has been locked out by operation of law. Further to this, unlike the protester's she was not presented to court both to assert and defend her claim. Neither did she put in even a deponment to that effect. Neither did the 1<sup>st</sup> administrator provide proof of such dependency in her testimony while it is proper and easy to assume the dependency of the widow and her children on the deceased, without production of documentary proof because the dependency can be assumed, where the contrary has not been alleged, the same assumption does not operate in favour of the extended family. This court has no doubt this is the reason as to why the protesters went to great length to call both oral and documentary proof to solidify their dependency on the deceased while alive and justify their just claims to a share of the proceeds of his estate.

Issue also arise as to what are the guiding principles on the mode of distribution. This has arisen because of a disagreement on what is to be termed as a just distribution for the benefit of the protesters who are parents of the deceased. This court is alive to the fact that the law on this has now been crystallized by virtue of the provision of 28 of the law of succession Act and case law both from the court of appeal and superior court construing the same. [See the case of in Re Estate of Kittany {2008} 1 KLR (G&F) decided by Nambuye J. in November, 22, 2002 where in holding number 12 the prerequisites in section 28 L.S.A are reiterated.

**"Section 28: In considering whether any order should be made under this part and if so what order, this court shall have regard to.**

- (a) The nature and amount of the deceased's property.**
- (b) Any past, present or future capital or income from any source of the defendants.**
- (c) The existing and future means and needs of the dependant**
- (d) Whether the deceased had made any advancement or other gift to the dependant during his life time.**
- (e) The conduct of the dependant in relation to the deceased.**
- (f) The situation and circumstances of the deceased's other dependant and the beneficiaries under any will.**
- (g) The general circumstances of the case, including so far as can be ascertained, the testators reason for not making provision for the dependant"**

When applied to the rival arguments herein, this court proceeds to make the following general findings on the same:-

- (i) After excluding the mother of the first administrator and mother in law of the deceased from contesting as a beneficiary the only lawful dependants of the deceased are the widow, her two minor children and protesters who are parents of the deceased.
- (ii) There has been demonstration that the identified dependants were indeed being maintained by the deceased prior to his death.
- (iii) Other than material and financial support rendered by the deceased during his life time, there is no evidence of an advancement of gift to the dependants
- (iv) The protesters who are the deceased's parents are now of advanced age one of them is now paraplegic and confined to a wheel chair. It had not been argued that in this state of condition they are capable of making any earnings on their own.
- (v) It has been admitted by both sides that the financial support to the parents is largely from their surviving children who dutifully contribute monthly for the upkeep of their parents. It is admitted that all of them are in gainful employment although the extent of their respective incomes was not stated.
- (vi) The state of affairs as in number (v) above is not one that can be said to be of a permanent nature. If the whole lot of the surviving children of the protesters were to conspire (and may the Good Lord forbid that they do so) and decide to join the deceased subject of these proceedings in one go, or even just decide to pay him a brief visit protesters would be left in a situation of desperation.
- (vii) A dependant's income which is supposed to be taken into consideration is one which is readily available to the dependant, one over which the dependant has a free hand to apply to his own benefit. It does not include hand outs however generous these may have been given, however readily available and irrespective of the amount of the handout. It is not correct to say that a handout is a situation of permanency. It is not available on call. It depends on the good will and willingness to give of the donor.
- (viii) It should be noted that the protesters have not laid a claim on the fixed and movable assets of the deceased and that is a benefit to the widow and her children.
- (ix) It has to be borne in mind that the widow and the children have benefited substantially from the estate by reason of having free use of the fixed as well as the movable assets of the deceased with the exception of the Koru properties. They have also benefited from the employer's funds as part of these funds were used to purchase a house worth 12 million in which, the widow and the children reside. The children are said to be going to high cost schools. They enjoy school trips, some overseas. The widow and children receive monthly upkeep, financial support from the invested funds. On the other hand the protesters are documented to have received only 1.2 million from funds held on account of the estate and as such they have not substantially benefited from the said estate despite the fact that they are recognized dependents of the deceased.
- (x) The children of the deceased are still minors and there is necessity to secure both their Educational and future capital income flow to cushion them against a situation of hopelessness and desperation in future because of lack of a father's financial support.
- (xi) There has been no indication that the deceased contemplated to stop supporting his parents and not to continue so up to their grave had he not passed on.
- (xii) The nature and amount of the deceased's property which is in contest ranges from millions of Kenya Shillings. The funds from Kenya Airways was 300,000 US Dollars estimated to have been convertible to Kshs.25,000,000.00 at time released. It is believed to be held in a bank account generating income and definitely it has appreciated in value. The funds from the employer are indicated to have been Kshs.28,000,000.00 as per the discharge voucher, and about Kshs.38,000,000.00 as per the unsigned investment instrument. As at 2004 after discounting Kshs.12,000,000.00 for a house, there was a balance of Kshs.38,000,000.00. Efforts to get the exact amount as at the time of the close of the trial yielded no fruits as the witness declined to divulge that information. But one thing which is clear is that the amount is invested and is appreciating in value. The assets disputed over can be safely be said to range in millions of Kenya Shillings.
- (xiii) The widow of the deceased had been engaged in business but said at the trial that it was not doing well. No statement of accounts were tendered in evidence. No other evidence of source of income except the rented property formerly resided in. The minors had no past income by reason of their vulnerability. The protester said they had earnings but that was dwindled due to incapacity due to old age and sickness. The protesters future income is zero due to incapacity by reason of old age and sickness. On the contrary the widow, widowed at 30 years, and one who had been involved in business even managed to mobilize funds to pay off liabilities owed by her deceased husband, all she needs is financial empowerment to continue on her feet. As for the protesters, for the reason of old age the curtain of their

future income is drawn and is zero.

(xiv) With regard to the conduct of the dependant towards the deceased, the evidence on record portrays existence of a cordial relationship between the deceased and all dependants. There is evidence that he supported and maintained all his dependants.

(xv) The reason for the deceased's non-specific provision for dependants was because at the age of 36 years, he was too young to think of death on the one hand, and on the other hand death came suddenly and unexpectedly.

The last legal issue to be considered is whether the protesters have any legitimate financial expectation from the deceased both while a live and in death. This arises from the assertion of the widow of the deceased who is the first administrator, in the deponement in response to the affidavit of protest by way of paragraph 7,8,9 and 10, thereof that **“protesters are propelled by greed and have no right to follow her late husband to the grave to seek that he maintains them when they have other children supporting them in addition to their own income from their properties”**. Whereas on the other hand the protesters have maintained that the deceased along with his siblings made them comfortable and now that the deceased's death benefits are available, the protesters as parents should receive a fair share of the same while at the same time considering that the deceased's children have a lawful and genuine right to a better future and life a head of them. To resolve this, this court draws inspiration from the reasoning of Nyarangi JA as he then was in the case of **SHEIKH MUSHTAQ HASSAN VERSUS NATHAN MWANGI KAMAU TRANSPORTERS AND FIVE OTHERS (1982-88) 1KAR 946**. At page 953 line 2 from the top the learned judge of Appeal as he then was, had this to say:-

**“In the context of Kenya, and that is the relevant context here, parents of a deceased young man who would have been preparing highly for a career with a view to looking after his parents in their old age suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expenses of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents and where it applies to young brothers and sisters of the deceased as the deceased matured physically and materially are extinguished. Now almost all assistance of this kind would in the condition of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case...”**

After the above reasoning, the learned judge as he then was went on to hold inter alia under holding number 3 that:-

**(3) The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expenses of his/her education is lost never to be redeemed. All the benefits that would accrue to the parents and where it applies to younger brothers and sisters of the deceased as the deceased matured physically and materially are extinguished. Now almost all assistance of this kind would in the conditions of Kenya be almost wholly economically in substance so much so that the loss caused by the death could never be adequately compensated in monetary terms**

This court has given due consideration to his reasoning and holding and applied the same to the rival arguments herein with regard to the protesters entitlement and this court proceeds to make the following findings on the same: -

(i) Although the principle referred to by the above stated and cited case relates to a case of damages arising out of a tortuous action based on negligence, the central theme in the principle, is that in the Kenyan context, a parent has a legitimate claim to seek compensation for the loss of his child as a result of a tortuous action. By extension of this principle, to succession claims, it is safe to hold that a parent who has lost a child through whatever course has a legitimate claim on to any resulting death benefits accruing for the benefit of the estate of such a child. It cannot therefore be stated that a parent pursuing such interests can be stated to be pursuing his/her son or daughter to the grave to seek maintenance from him.

(ii) Even if it can be stated that indeed the parent was following the deceased child to the grave to maintain him/her (the parent) the law permits it and that is why Section 2(1) of the Law Reform Act Cap 26, and the Law of Succession Act Cap 160 Laws of Kenya weve put in place to enable dependants follow deceased persons to the grave, in pursuit of dependant's benefits from such deceased persons estate. There is therefore no justification for the widow to attempt to justify her right and that of her minor

children to follow the deceased to the grave in seeking to get a substantial share of the deceased's estate, and then try to unjustify those of the deceased's parents. In the eyes of the law all dependants are equal and that is why Section 28 and 29 of the Law of Succession Act did not create hierarchies and primacies of dependants over others. What matters is for the court to ensure fair distribution of the estate to the deserving dependants.

(iii) With regard to strong sentiments such as allegations of **“greed and attempts to disinherit the widow and the children”**, this is not a remote allegation in court litigation scenarios. They do happen and were indeed anticipated by the legislatures and that is why there are courts established and operationalized to assist in resolving disagreements amongst dependants who have failed to agree on the mode of distribution. Secondly, this is why the law has been put in place to set parameters to guide the courts on how to go about resolving any disputes as to inheritance as those put in place vide section 28 of the Law of Succession Act Cap 160 Laws of Kenya to counter any inclinations to greed or inclinations to try and outmatch other dependants.

From the above assessment and findings as to whether the protestors have a legitimate expectation of benefiting from a deceased child's estate, the court is satisfied that indeed they have a lawful and legitimate claim and for this reason they cannot be accused of following their son to the grave when seeking to benefit from a share of the deceased's lawful and legitimate estate. If there is any intention of greed and desire to disinherit the widow and minor children, this will be moderated by application of guiding principles of law governing distribution of the deceased person's estate set out in Section 28 L.S.A. The court wishes however to state that such intention has not been displayed herein by the conduct of the protestors evidenced by the existence of the following factors: -

- (a) They have not laid a claim on to the fixed and movable assets of the deceased. These were left for and are in use by the widow and the children of the deceased.
- (b) They did not block the widow and the children access to the use of the deceased's property before the determination of the succession proceedings.
- (c) The deceased's siblings have not laid a claim to the said property despite its immense value as it is valued in millions of Kenya Shillings..
- (d) It is on record that they made an attempt to have the matter resolved amicably.
- (e) All that they are objecting to is being given a meager share of the deceased's estate considering its value.
- (f) This court has found that they have a legitimate, lawful expectation, protected by law to claim a fair share of their deceased son's estate.

Turning to own framed question 3, 4 and 5 these are interrelated and they will be dealt with together. The relief that the disputants are seeking from the court is one of confirmation of a grant issued herein. It is on record as already set out in the assessment that a disagreement arose on the mode of distribution of the estate of the deceased and the court advised that instead of dealing with interlocutory applications a joint application for confirmation be put in place. This did not work resulting in each administrator filing his/hers application for confirmation. It is however noted that only one of them has been traced on the record which is the one filed by the first administrator. That of the second administrator has not been traced on the file. Its absence notwithstanding, it is clear that both were seeking confirmation and distribution of the estate of the deceased with modes and distribution proposed which have been testified on and supported by respective deponements. There is therefore sufficient material on the record on the basis of which the application of the first administrator which was on record can be used to dispose off the issues in controversy between the disputants finally.

The prerequisites or ingredients that the disputants are required to establish before seeking confirmation of grant are those set out in Section 71 of the Law of Succession Act Cap 160 Laws of Kenya. It reads in part: -

**“Section 71(1) – After the expiration of a period of six months or shorter period as the court may direct under sub section (3) from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets: -**

- (2) subject to subsection (2A) the court to which the application is made or to which any dispute in respect thereof is referred may-**
  - a) If the court is satisfied that the grant was rightly made to the applicant, and that he is administering and will administer the estate according to law, confirm the grant, or**
  - b) .....**

- c) .....
- d) .....

**Provided that in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all person, beneficially entitled, and when confirmed the grant shall specify all such persons and their respective shares.**

2A .....

3 .....

This court has duly construed this provision and applied it to the facts assessed herein, and the court proceeds to make a finding that the grant issued herein is ripe for confirmation because of the following factors: -

- (i) A period of six months have since passed since the issuance of the same on 24<sup>th</sup> April, 2001.
- (ii) There is a demonstration that the grant herein was lawfully granted and there are no objections to the issuance of the same which are still pending.
- (iii) The properties forming the distributable estate of the deceased have been identified.
- (iv) Beneficiaries have been identified. The court has discounted only one for the reasons given.
- (v) Each side has given their proposed mode of distribution and the court has been called upon to consider these proposed mode of distribution of each side and consider them in the light of the applicable guiding principles of law and distribution of a deceased person's estate and then make a fair and just distribution of the deceased's disputed assets.

Other prerequisites to be borne in mind are those set out in Section 35, 41 and 42 of the Law of Succession Act. The prerequisites in Section 35 are as follows: -

- (i) It is applicable where the deceased has died leaving a spouse and one child or children.
- (ii) The household effects of the deceased go to the widow absolutely.
- (iii) The widow has a life interest in the residue of the net intestate estate.
- (iv) The widow's life interest terminates upon her remarriage.
- (v) There is a power of appointment vested in the widow over the property which has devolved on to the children.
- (vi) There is power vested in the children to take legal action where the said power has been unreasonably exercised or withheld and there is leave to apply to court for relief if need arises.
- (vii) Where recourse is had to the court for a relief under this Section, the court is enjoined to be guided by similar guidelines similar to those prescribed in section 28 of the Law of Succession Act Cap 160 of the Laws of Kenya with the only exception that where as in the prescriptions in Section 28 apply as between competing beneficiaries, those under Section 35 apply between competing siblings, children of the deceased after property forming the estate has been settled upon them.
- (viii) Where there is death or remarriage of the widow the share of the widow devolves upon the surviving children. Whereas in the case of death of a child the share of the deceased child devolves upon her siblings or that deceased's child or children.
- (ix) The prescription under this section are subject to the prescriptions in Sections 41 and 42 of the same Act.

The afore set out identified ingredients in Section 35 have been applied to the facts herein and the court proceeds to make the following findings on the same: -

- (a) There has been no mention that there was dispute over household effects of the deceased. Although the widow alleged in her evidence that the source of disharmony between her and the in-laws was because they wanted to take everything owned by the deceased, from her, neither the protesters nor the deceased's siblings have laid a formal claim on the deceased's households. The court therefore rules that these are not in contest and are with the widow. There is also no allegation of any of these having been taken from her.
- (b) The widow of the deceased is still a contender as a beneficiary as she has not remarried.
- (c) There has been no application for advancement because the children are still minors.
- (d) Prescriptions in Section 35(4) Law of Succession Act with regard to balancing the shares of the property devolved amongst the children has not yet arisen.
- (e) Section 35(5) has no application as both the widow and children of the deceased are all alive and are entitled to their respective shares of the distributable estate.

The prerequisites in section 41 of the Act are as follows: -

- (a) Where children benefitting from a deceased person's estate are minors their respective shares are to be held upon Trust.

(b) The mode of sharing of devolved property where the intestate has left more than one child is in equal sharing.

(c) Where a deceased child left issues surviving him or her, then the respective issues are entitled to the shareholding of their deceased parent and thereafter likewise share it in equal shares if there be more than one.

(d) Those who attain the age of majority are entitled to have full control of the property devolved to them.

When the ingredients in Section 41 are applied to the facts assessed herein, it is revealed that of concern here is that all the children are currently minors and their shares will be required to be held upon Trust.

The ingredients in Section 42 of the same Act on the other hand, are as follows: -

(i) Any property granted to a child by way of will, advancement under Section 35 of the Act; or by provision by the court under section 26 of the Act dealing with provision for dependants not provided for adequately under the will, when applied to the facts assessed herein, it is clear that this requirement does not apply to the scenario herein because: -

(a) There is no will in place.

(b) The deceased made no advancement of property upon his children during his lifetime.

The last issue to be dealt with before the making of the concluding orders herein is the issue of double application for the orders of confirmation. It is undisputed that directions were given by Aluoch J as she then was now her highness Judge of the ICC that a joint application for confirmation be made by both joint administrators. Instead of doing so, the first administrator moved ahead of the co-administrator and presented hers on 11/12/2002. This application has been traced on the record. The 2<sup>nd</sup> administrator presented his on 24/1/2003. As observed this has not been traced on the record. It is therefore not easy for this court to know the framing of the reliefs sought therein. This court is however satisfied that failure to have the 2<sup>nd</sup> administrator's application on the record has not prejudiced either the proceedings or the disputants because of the following reasons: -

(i) From the record, it is clear that both applications were necessitated by both sides failure to agree to present a joint application.

(ii) Both are aimed at asking the court to distribute the disputed assets of the deceased's estate.

(iii) Both appear to have been consolidated evidenced by the fact that only one single trial was held. Not separate trials.

(iv) The end result of the assessment of facts relating to both will be confirmation of the joint grant upon distribution of the disputed assets of the deceased's estate.

For these reasons the court will use the reliefs sought in the application presented by the 1<sup>st</sup> administrator to resolve the issues herein.

For the reasons given in the assessment, the court proceeds to make the following final orders in the disposal of the application dated 11<sup>th</sup> December, 2002 and filed the same date.

### **1. Prayer 1:**

The grant issued to the first and 2<sup>nd</sup> administrators herein is ripe for confirmation because it complies with the prerequisites in Sections 71 of the LSA because of the following reasons: -

(a) The statutory 6 months period required to be established to have lapsed before a grant is confirmed have long passed.

(b) With the exception of the mother of the widow and first administrator who has been discounted by the court as a beneficiary for the reasons given in the assessment, the rest of the contending beneficiaries have been confirmed by the court. These are the widow, 2 minor children, and the protesters who are the parents of the deceased.

(c) Properties forming the distributable assets of the deceased's estate have been identified. These are the movable assets comprising two vehicles, and fixed assets comprising three pieces of landed property. Proceeds from Kenya Airways death compensation and proceeds from NCR the former employer of the deceased.

(d) There is no dispute with regard to the proposed mode of distribution of the movable and fixed assets of the deceased and all that the court is required to do is to ensure that the proposed mode of distribution is in agreement with the prescription in sections 35, 41 and 42 of the Law of Succession Act.

(e) The court is properly seized of this matter and it has jurisdiction and the competence to resolve all the issues raised herein effectively.

### **2. Prayer 2**

The court's directions on the issues raised are as follows: -

(A) With regard to funds from death compensation for the deceased's death given by the Kenya Airways the same is a proper candidate for distribution in these succession proceedings because of the following reasons: -

- (i) The apportionment of the said funds in HCCC No.2114/2004(OS) cannot hold for the reasons given in the assessment that the forum for dealing with issues touching on the distribution of a deceased person's estate property is not an originating summons commenced under the old Order 36 CPR but proceedings initiated under the Law of Succession Act Cap 160 Laws of Kenya like the proceedings under consideration in this judgment.
- (ii) They were paid by the said Airline in pursuance to the provisions of Section 2(1) of the Law of Reform Act and as such they rightly belong to the deceased's estate and they are distributable as such.
- (iii) The first administrator though solely released them by signing off the discharge voucher, it is clear from the content of the discharge voucher, that the same were received as funds belonging to the estate of the deceased and on behalf of the lawful dependants of the deceased.
- (iv) Both sides of the divide are in agreement that these are distributable as such for the benefit of the deceased's lawful dependants. What is in disagreement is the proportions of the specific entitlement of each beneficiary.

(B) **NCR Funds:**

There is no dispute that these were also paid as a result of the deceased's death. A disagreement arises because the first administrator and her witnesses allege that these are solely for the benefit of the minor children of the deceased as per the provisions of the Trust Deed and the employer's policy as well as the deceased's wishes. Whereas the stand of the protesters and the 2<sup>nd</sup> administrator is that these form part of the deceased's assets and therefore distributable. The court's findings after construing the Trust Deed and the Rules made there under, are as follows: -

- (i) Clause 2 of the Trust Deed specifies clearly that main reasons for the setting up of the Trust Deed to govern the Trust Funds is two-fold:
  - (a) To benefit the member employee, upon leaving the employment prematurely on condition that he had made contributions for the requisite period on the one hand and upon retirement, on the other hand.
  - (b) Where the member contributor however dies prematurely, the Funds are to be applied towards the relief of the dependants.
- (ii) Rule 1 of the Trust Deed Rules defines a "**dependant**" as including parents of the deceased and for this reason the protesters as parents of the deceased are covered under that definition.
  - (b) There is no specific mention in the said Rule 1 that only those named in the next of kin forms filled by the employee are the only ones to be considered as dependants.
  - (c) Although there was mention that it was the wish of the deceased that funds from NCR should be invested for the benefit of the children, a part from the alleged next of kin forms, there is no other proof of the existence of this wish.
  - (d) This court's construction of rule 5(c) with rule 7 of the Trust Deed is that by reason of the said provisions stating clearly that a deceased's "**will**" if in existence would have primacy over the NCR's internal policy on investment and since intestacy is the opposite of testacy, it is this court's view that where lawful intestacy claims against NCR funds exist. these too would have primacy over the internal NCR Policy over investment of such funds.
  - (e) Nowhere in the said Trust Deed main clauses and Rules does it say that in house investment policy has primacy over the provisions of the main clauses and the rules prescribed there under.
  - (f) Nowhere in the said Trust Deed does it say that the provision of the succession law has no primacy over the prescriptions in the Trust Deed.
  - (g) It is on record that despite protests, the deceased's former employers went ahead to invest the said funds for the benefit of the minor children of the deceased. The amount as per the discharge voucher was Kshs.28,001,000.00. However, in the unexecuted investment deed, the figure reads 38,000,000.00 while in the course of testimony of PW4 it transpired that besides Kshs.12 million of the said amount used to secure a house for the use of the widow and the minor children of the deceased, there was admission that the invested figure stood at Kshs.38,000,000.00. However, efforts by the trial judge Aluoch J as she then was now her Highness, Judge of the ICC to stand down PW4 to bring the correct figure standing to the benefit of the minors yielded no fruits as the witness came back with excuses which could be construed as a deliberate resistance to disclose the correct standing of the invested funds as at that time. It is however

clear from the evidence that the invested funds were in safe hands and were appreciating in value.

(h) By reason of what has been stated in number (g) above should the court find it fit to distribute these funds the benefitting beneficiary might have problems enforcing the realization of that benefit.

(i) The observation in (h) above notwithstanding should the court decide to distribute a portion of those funds to other lawful competing beneficiaries, then the court has jurisdiction to offset the apportioned amount in favour of those other competing interests, against the minors' share, in the Kenya Airways Compensation Funds.

(j) Reginah Nyakara Mutende who is the mother of the widow and first administrator and who is mother in law of the deceased has been discounted as a beneficiary because a mother in law does not fall into the category of dependents as defined in Section 29 of the Law of Succession Act and Rule 1 of the Trust Deed.

### **3. DISTRIBUTION**

The applicable guiding principles are those set out in Section 28 of the LSA as assessed herein and bearing them in mind the court proceeds to distribute the deceased's distributable estate as hereunder:

#### **(a) Movable Assets**

M/V Registration number KAH 333 P Toyota and MV Registration NO.KUS 884 Datsun are distributed to the widow Jacqueline Moraa Obiero absolutely as proposed.

#### **(b) Fixed Assets**

(i) LR Ngong/Ngong/1520 distributed to the widow Jacqueline Moraa Obiero absolutely as proposed

(ii) ½ share of LR Nairobi 97/516 and Kisumu/Koru 67/1252 to go to the minor children of the deceased namely Albert Ober Obiero and Antonina Nyakara Obiero in equal shares of each property.

(iii) The said properties are to be held by the two joint administrators in trust for the said minors until they attain the age of majority when the properties will be transferred into the matured minors' respective names.

(iv) The said properties are not to be sold, mortgaged and or divested from the ownership of the said minors under the Trustship of the administrators without authority from the court.

(v) Funds generated from LR Nairobi 97/576 or any other minors' property to be paid into an interest earning account to be opened by the joint administrators in any sound financial institution of their choice. The account details of the account so opened to be furnished to court and the resulting Funds to be held for the benefit of the minors. The mother is at liberty to withdraw the interest generated from the said invested funds for the upkeep and the general maintenance of the minors.

#### **(c) NCR Funds**

(i) These to remain invested for the benefit of the minor children of the deceased. The aid house is not to be mortgaged, sold transferred or divested from the registration of the said Trustees without Authority from the Court.

(ii) The house purchased with a portion of the invested funds from NCR to be registered in the joint names of the widow, the 2<sup>nd</sup> administrator and the trustees of NCR Funds for the benefit of the widow and the minor children of the deceased.

(iii) The trustees of the said NCR funds have 60 days from the reading of this judgment to file a correct statement of account of the invested Funds as at the date of the reading of this judgment to enable this court effect that amount both capital and accrued interest in this judgment as the amount distributed and invested for the minor children of the deceased for completeness of the judgment.

(iv) The interest accrued on the invested funds to continue being availed to the widow and the same to be applied towards the educational, and general upkeep of the minors as previously done.

(v) The joint administrators to be made joint trustees of the said funds alongside the Trust Corporation for purposes of proper safeguarding, protection and accountability with regard to the said minors' funds.

(vi) There is liberty to invest the capital funds in other income generating fixed assets for the benefit of the minors but since these will be being undertaken after distribution of the estate of the deceased, these will have to receive the sanctioning of the court.

#### **D. Kenya Airways Compensation Funds 3000,000 US Dollars**

(i) 150,000.00 US Dollars distributed to the widow Jacqueline Moraa Obiero.

(ii) 150,000.00 us Dollars to Joseph Leo Ochieng and Phillister Awuor Ochieng in equal shares.

(iii) The share of 1,250,000.00 already paid out to the protesters to be reduced from their apportioned

share of 150,000.00 US Dollars.

(iv) Interest accrued from the said Kenya Airways compensation Funds to be reduced by any such amount applied towards the maintenance of the minors as at the time of the delivery of this Judgment.

(v) The resultant balance of the accrued interest to be shared equally between the widow Jacqueline Moraa Obiero and the protesters Joseph Leo Ochieng and Phillister Awuor Ochieng with the widow getting half the accrued interest and the protesters sharing the other half of the accrued interest equally.

**E COSTS**

The widow Jacqueline Moraa Obiero to pay her own costs of the proceedings from her share entitlement. Likewise the protesters and the second administrator will also meet their own costs from the share entitlement of the protesters.

**F. Enforcement**

The Deputy Registrar Family Division is authorized to execute documents on behalf of any defaulting administrator in order to give effect to the judgment.

**G.** A copy of the Judgment as well as the extracted order to be served upon the Advocate holding the Kenya Airways Funds has 60 days from the date of the reading of this Judgment to furnish to court a true statement of account of both the Capital and Interest accrued on the said Funds to enable the court reflect the said figure in the Judgment as the correct figure distributed.

**H.** Likewise, a copy of the judgment as well as the extracted order to be served upon the Trustees of NCR Funds for the minors for them to forward a true account of those invested Funds for the date of receipt up to the date of judgment to enable the court reflect the figure as the amount distributed to the minors.

**I. Liberty to apply**

There will be general liberty to apply to either party should any need arise.

**Dated, read and delivered at Nairobi this 18<sup>th</sup> day of October, 2011**

**R.N. NAMBUYE  
JUDGE**