REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION CAUSE NO 2258 OF 1996

IN THE MATTER OF THE ESTATE OF ISHMAEL JUMA CHELANGA – DECEASED

JUDGMENT

Ishmael Juma Chelanga (hereinafter throughout to be referred to as "the deceased") died on the 27th July, 1996 in a helicopter crash in Marsabit, within Eastern Province where he was the Provincial Commissioner in- Charge. A certificate of death No.B 393052 issued by the Principal Registrar of Deaths on 2nd August, 1996 gave his age to be 40 years at the time of death, and the cause of death to be: crash injury of the body, injury of the internal organs, 100% burns of the body in plane crash.

On the 22nd October, 1996 Zaina Mukami Chelanga (hereinafter throughout to be referred to as " Zaina") and Swaleh Abubakar (to be referred throughout as"" Swaleh") filed a petition to letters of Administration intestate to be issued jointly to both of them through P& A Forms 80, in their respective capacities as the deceased's widow and Brother-in-law.

Along with Form P & A 80, Zaina and Swaleh filed a joint affidavit in support of their petition by filing form P & A 5. At clause 5 of form P & A 5 they named the deceased's surviving beneficiaries or dependants, namely.

(a) Zaina Mukami Chelanga - Wife

(b) Shamira Chepkemei Chelanga - Daughter aged 12 1/2 years

(c) Rhahila Cheruto Chelanga - Daughter aged 9 1/2 years

(d) Mohamed Kipkoskei Chelanga - Son aged 3 1/2 years

(e) Mrs Juma - Mother of the deceased.

Zaina and Swaleh then made a full inventory of all the assets and liabilities of the deceased at the date of his death and recorded them at clause 6 of form P & A 5 which in fact were they reflected as being only two assets, namely:

(a) Uasin Gishu/Kipkabus/Scheme 41 valued at Kshs.1.6 Million.

(b) Eldoret/Block 6/40B valued at Shs.400,000/= making the total value of the deceased's assets at the time of his death to be Shs.2 Million.

On the 13th November, 1996 Zaina alone filed a petition for Letters of Administration *Ad colligenda Bona* under section 67(1) of the Law of Succession Act Cap 160 Laws of Kenya and Rule 36(3) of P & A rules. She pleaded as follows in this petition:-

> "I present this petition in my capacity as the widow of the deceased and by reason of the fact that, owing to the special circumstances of the case, the urgency of the matter as appears from the affidavit filed herein is so great that it would not be possible for the court to make a full grant to the person who is by law entitled thereto in sufficient time to meet the necessities of the estate of the deceased"

In a supporting affidavit, Zaina deponed that, the deceased was the sole breadwinner of the family and was in that capacity responsible for, among other things, the day to day household expenditure, paying water, electricity, and telephone bills, paying wages to seven farm workers, drivers, house help and watchman, buying farm input such as fertilizers, seeds, cattle feeds and drugs, paying school fees for the children of the marriage and meeting their hospital bills, paying for car insurance cover and meeting the daily expenses of running two cars, purchasing family assets and paying off liabilities.

Zaina undertook to faithfully administer the estate, collect all the deceased's assets and apply it for the preservation, maintenance and improvement of the deceased's estate and for the upkeep and well being of the dependants of the deceased, especially that of the education of the minor children of the marriage.

On the 19th November, 1996 the petition for Letters of Administration *Ad Colligenda Bona* was heard by Hon. Mr. Justice Richard Kuloba, and a grant limited to purposes specified in Zaina's supporting affidavit was issued vide form P & A 47. This grant was issued:

> "limited to the purpose only of collecting and getting in and receiving the estate, and doing such things as may be necessary for the preservation of the same and until further representation be granted by this court to Zaina Mukami Chelanga"

On the 20th December 1996 Martha Cherop Juma (hereinafter to be referred throughout as "Martha Cherop") the mother of the deceased, filed an objection to the making of a grant as petitioned by Zaina and Swaleh on the 22nd October 1996 on grounds that Zaina and Swaleh did not inform her that they were petitioning for this grant, that Swaleh is not an heir to the deceased's estate and therefore is not entitled to apply, and that she Martha Cherop and two other children of the deceased, namely, Chebet Chelanga (to be referred to as "Chebet") and Nuru Chelanga (to be referred to as " Nuru") were also dependent on the deceased.

Along with that objection Martha Cherop filed a chamber summons under section 76 of the Law of Succession Act and Order 39 Rule 2 and 3 of the Civil Procedure Rules for revocation of the Letters of Administration *Ad colligenda bona* issued to Zaina on 19th December, 1996; for a permanent injunction to issue restraining Zaina and Swaleh, by themselves, their agents or servants from gathering, distributing or in any way dealing with the estate of the deceased and from withdrawing monies from the deceased's Bank Accounts.

Martha Cherop further prayed for an order that Zaina to render an account of all monies withdrawn and received by her on behalf of the Estate of the deceased. Martha Cherop supported her objection with a 20 clause affidavit. On 28th January, 1997 Zaina filed her grounds of objection to the prayers sought in the chambers summons dated 20th December, 1996 and a 23 clause Replying affidavit.

On the 25th February, 1998 Martha Cherop, Chebet and Nuru formally filed a petition by way of cross-application for a grant of letters of administration under Rule 17(5) of Probate and Administration Rules in their respective capacities as the mother and children of the deceased. This petition by way of cross application for a grant is supported by Martha Cherop's affidavit.

On the 10th June, 1999 Martha Cherop, Chebet and Nuru filed a chamber summons under sections 26, 27, and 47 of the Law of Succession Act and Rule 45 (1) of Probate and Administration Rules essentially seeking reasonable provision to be made to them as the deceased's dependants out of the deceased's estate as the court thinks fit.

On the 4th May, 2000 another objection to making a grant to Zaina and Swaleh was filed by the

deceased's brothers and sister under section 66 and 68 of the law of Succession Act and Rules 7(17) and 17 of Probate and Administration Rules. These brothers are Saleh Kipkemoi Chepkole (to be referred to as "Chepkole") Isaac Kiprotich (to be referred to as "Kiprotich") Chelanga Juma Musa (to be referred to as "Musa") and Joseph Koech Juma (to be referred to as "Koech"). The deceased's sister is Mary Hadija (referred to as "Hadija") Their interests in the estate is that they are blood brothers and sisters of the deceased and therefore are beneficiaries and heirs of the estate of the deceased under the Islamic Law.

The parties to this cause agreed to hear the above petitions and objections together and further agreed that *viva voce* evidence be adduced to determine all the issues in dispute, and so it came to pass that the objectors and petitioners gave evidence and called witnesses to support their respective causes. The application for dependency was also heard together with the above.

The objectors' interests were prosecuted by Mrs. Abida Ali Aroni and Miss Margaret Ndwiga advocates, while the Petitioner's interests were prosecuted by Mr. Cecil Miller Junior Advocate.

The following issues were framed for determination in this cause.

OBJECTORS' ISSUES

1. Whether Zaina, as the deceased's widow, and Swaleh as the deceased's brother-in-law, are entitled to the grant of Letters of Administration Intestate.
2. Whether Martha Cherop, the deceased's mother, was a dependant of the deceased and entitled to a share of his estate.
3. Whether both Chebet and Nuru were the deceased's dependants entitled to a share of his estate.
4. Whether the deceased's brothers and sister are entitled to a share of the deceased's estate.
5. Whether Administrators with a limited grant of letters of administration *Ad Colligenda bona* ought to give accounts of the estate.
6. Whether Zaina and the deceased were married on the 23rd March, 1983 or on the 15th April, 1995.
7. Whether Zaina's children sired with the deceased before 15th April, 1995 are entitled to inherit the estate of the deceased.

PETITIONER'S ISSUES

1. Whether Martha Cherop is already sufficiently provided for in the estate of the deceased.
2. Whether there is any obligation by an administrator to provide any accounts to any person who comes to court under sections 26-29 of the Law of Succession Act Cap – 160 Laws of Kenya.
3. Whether, under section 3(2) of the Law of Succession Act both Chebet and Nuru are the deceased's children who are entitled to inherit his estate, whether or not the deceased had expressly recognized, accepted them and had voluntarily assumed permanent responsibility over them.

In this ruling I shall attempt to follow the pattern in which these issues have been recorded but where it is necessary to deal with the objectors and petitioners specific issues together, I shall do so.

The objectors' first issue for determination is whether Zaina and Swaleh are entitled to the grant of letters of administration intestate to jointly administer the estate of the deceased. As far as Zaina is concerned, these objectors have given evidence and have given their reasons why a grant ought not to be issued to Zaina. These objectors are Martha Cherop, Joseph Koech Juma and Saleh Kipkemoi Chepkole. They have essentially given three grounds of objection.

(i) That since the burial of the deceased in West Pokot, Kapenguria, Zaina has deserted the deceased's rural home. It is the objectors' case that Zaina, without just cause, has ran away from the deceased's home and has cut off all communication with the deceased's family members. They have each informed the court that Zaina is welcome back to Kapenguria, adding that should she return and resume her residence there, they will certainly have no objection to the issuance of a

grant of letters of administration to her.

(ii) That Zaina has taken away the deceased's children from the deceased's family and from Kapenguria. The objectors are on record saying that they will withdraw their objection the moment Zaina takes the deceased's children to Kapenguria, the deceased's ancestral home where he is buried.

(iii) That Zaina has mismanaged the estate of the deceased from the date a grant of letter of administration *ad colligenda bona* was issued to her.

In my view, from the recorded evidence, I have no hesitation whatsoever in holding that it has sufficiently been demonstrated and proved on the required legal standard that, at the time of the deceased's death on the 27th July, 1996, Zaina was the deceased's lawful wife. It matters not whether, as the objectors claim, that Zaina and the deceased conducted or contracted their *Nikaah* at Nakuru on the 15th April, 1995 or, as Zaina and her witnesses claim, at Embu on the 23rd March, 1983. The known and undisputed fact is that as at the date of the deceased's death, the 27th July, 1996, the *Nikaah* between Zaina and the deceased had been contracted, and Zaina was the deceased's lawful widow. In that capacity of a widow, Zaina is entitled to administrater her late husband's estate and is entitled to be issued with a grant of letters of administration intestate as petitioned, irrespective of whether she returns to her husband's ancestral home or not, and whether she takes her children to see their grandmother, uncles and aunt or not.

Indeed throughout the testimony of Martha Cherop, Koech and Chepkole, their recognition of Zaina as the deceased's widow is adequately demonstrated.

In the case of Swaleh, the objectors' main objection to the issuance of a grant to him as Zaina's co-administrator of the deceased's estate is that, as the deceased's brother-in-law Swaleh is an outsider and does not rank in priority to the deceased's surviving blood brothers and blood sister. According to the testimony of Chepkole, it is against the customs and practices of the Kalenjin, and the teachings of Islam, to grant letters of administration to a deceased's brother-in-law as petitioned in this cause.

Zaina has explained the suitability and convenience of issuing a grant to Swaleh so that he can co-administer this estate with her. She gave evidence of several incidents when Martha Cherop and Selah Kipkemoi Chepkola allegedly showed open hostility to her soon after the death of the deceased; she claimed that Martha Cherop and her sons literally ransacked the deceased's official residence in Embu and took with them numerous title documents to several properties and other important documents; she claimed that at one occasion Martha Cherop, Saleh Chepkole and Mary Hadija removed a suitcase from the deceased's residence which was put into a vehicle and driven to unknown destination. She claimed that there was cash money Kshs.25 million in that suitcase; she complained of other incidents when Saleh Chepkole, both before and after the deceased's death, had threatened to beat her up, had threatened to shoot Swaleh with a gun in Embu but was disarmed in time; and that because of all these incidents she felt insecure and needed protection from Saleh. She concluded her evidence on this point by telling the court:-

"I feel that I can administer this estate with Swaleh Abubakar because (a) he is my brother (b) we have stayed together with him for the last seven years, with my late husband (c) He knows our family and was trusted by my late husband (d) He will not inherit the deceased's'estate by his appointment. I have no regrets putting him there as my co-administrator. I also do not want any other person to be appointed as my coadministrator. If I am forced to take on Saleh Chepkole as a co-administrator or any of the other in-laws, I do not think we will administer this estate properly."

The objectors countered that evidence through the testimony of Mr. Jinaro Kipkemoi Kibet, advocate of this court who was also the deceased's maternal cousin and was fairly his close confidant. On the issue of the proposed appointment of Swaleh as a co-administrator of the deceased's estate Mr. Jinaro Kibet had this to say in his evidence while under cross examination by Mr. Miller:

"Mr. Miller Q: My instructions from Swaleh Abubakar are that he wants to administer the estate of his late brother in-law for the following reasons:

(a) The deceased had during his life time asked him to move into the deceased's home in Eldoret to protect the deceased's children from the hostilities of Swaleh Chepkole.
(b) Swaleh Abubakar had been informed by the deceased of the hostilities towards Zaina Mukami by the deceased's brothers other than Swaleh Chepkole.
(c) For purposes of protecting the interests of the deceased.

Is there any reason therefore why Swaleh Abubakar should not be a co-administrator or trustee of the estate of the deceased?

KIBET: ANSWER:

With regard to the first reason, the deceased's premises were guarded by armed men at the time he was alive. It cannot be possible that he would ask somebody who is not even armed to protect his family. Knowing the deceased, he was a man fully in control of his family; including Swaleh Chepkole and I would be very surprised if he would seek outside force in the person of his brother in-law to come and protect his family. None of these three reasons, even if they were true, would give him reason to want to administer this estate. The deceased's estate is protected by law. Interests of children, through a continuing trust, is protected by law. Anyone administering the estate has to take care of the estate."

When Chepkole was called to testify, he was cross examined at length by Mr. Miller and all the issues and complaints raised by Zaina in her evidence were put to him but he denied them. He made it quite clear that he had not filed this objection because he wanted a share of his late brother's estate. He even told the court to issue a grant to Zaina and Martha Cherop, and to any other brother of the deceased without suggesting that a grant should be issued to him as a co-administrator. He admitted that he knew Swaleh, had talked to him as a person and had no problem with him as such. But he conceded that, when Swaleh wants to administer the estate of the deceased with his sister (Zania) that is where the problem is.

Though Swaleh petitioned to be appointed a co-administrator of the estate of the deceased, and attended several sessions of this court, he elected not to give evidence. He did not present himself to court for cross examination for purpose of establishing his suitability, credibility and ability as a coadministrator.

I am aware that Swaleh may, under the provisions of the Law of Succession Act Cap 160 Laws of Kenya and under Islamic Law, be entitled to be appointed a co-administrator of the estate of the deceased jointly with Zania. There is, in other words, no bar to his appointment as such. But I am not persuaded that he is a suitable person to be so appointed on the recorded evidence before me. I therefore decline to appoint him. I shall revert to this matter later on in this ruling.

The objectors' second issue for determination is whether Martha Cherop was a dependant of the deceased who is now entitled to a share of his estate.

Martha Cherop is a holder of a National identity card No. 0331737 giving the following particulars: born in 1930 in West Pokot District, Kapenguria Division, Kapkoris Location, Tilak Sublocation. She got married to Mzee Juma Chelanga, long deceased, in 1952. She is a retired prison's officer, rank not given, having worked in Nakuru and Langata Women's Prison, Nairobi. She retired in 1986 and is now earning a monthly pension of Kshs.1,400/=.

Martha Cherop testified that she is a mother of six children. There is Chepkole (1st born) who is a teacher at Kapenguria based at Makutano Primary School, with his own family to support. The second born was the deceased. The third born is Hadija who, unfortunately did not give evidence. However, from Martha Cherop's testimony, she owned a lorry before the deceased's death which used to transport molasses from Kisumu to Busia. The 4th born is Musa who also did not give evidence. The 5th born is Koech another primary school teacher and then the 6th born is Kiprotich.

The sum total of the recorded evidence is that Martha Cherop's surviving children do not have the financial capabilities to support her together with their respective families, that they heavily relied on the deceased's financial contributions and, more often than not, sought financial assistance even from Martha Cherop, their mother. This came out clearly from the testimony of Mr. Jinaro Kibet who is recorded to have told the court:

> "The children of Martha Cherop are incapable of assisting their mother financially. On the contrary she is the one who tries to help them. The deceased was a pillar to these people, including his immediate family. The deceased used to help his mother and in turn she used to help the other children."

On this point, Zaina's evidence is that the deceased secured jobs for all his brothers and sister, acquired properties for them and that these people are now independent. She named Kiprotich as a civil servant, working in the District Commissioner's office, Kapenguria as a clerical officer and that he was allotted several unsurveyed plots reflected in her exhibits 4, 5 and 6. She named Musa who now works with National Cereals & Produce Board, and that he was allotted a commercial plot by the Town Clerk Eldoret vide letter of allotment Exhibit 7; she named Chepkole who is a Deputy Headmaster of a primary school in Kapenguria and that he acquired properties including unsurveyed plot vide allotment letter exhibit 8; she named Koech who is also a teacher in one of the primary schools in Kapenguria and that the deceased helped him to acquire 60 acres at Olenguruone/Kiptaangact Tea Zone vide allotment letter exhibit 9.

Zaina's evidence is therefore that the deceased's brothers are much better off now than they were before, that they are in a position to continue supporting Martha Cherop as well. She said that it is incorrect to treat Martha Cherop and deceased's brothers and sister as people barely surviving. On the score, it is Zaina's testimony that Martha Cherop was already sufficiently provided for and was not the deceased's dependant.

Martha Cherop, on her part, testified that she used to stay with the deceased at his various stations of duty as and when she needed medical treatment. The period immediately preceding his death, she stated, she had gone to Embu to stay with the deceased for that medical care, and that Zaina was in Eldoret. It is Martha Cherop's testimony that the deceased used to provide her with everything for her maintenance and that all she desires from the deceased's estate is that she be given that same support which the deceased used to give to her.

Martha Cherop conceded while under cross examination, that she owns some properties. There is her residential house in Kapenguria, built on the family land; she had a plot at Kapsoya Estate in Eldoret but she sold it in 1999 for about Kshs.400,000/= and she used this money to settle Kiprotich's medical bill and medical needs; there is a ten acre farm in Cheranganyi which she exchanged with her Kipkabus farm; there is plot No.153 allocated to her in the month of September, 1993 but she has not developed it; there was plot No.5/145 Nakuru Municipality which she sold for Kshs.1,200,000/= after the deceased's death. She used the proceeds of this sale to pay school fees for Chebet and Nuru and to develop Dam Estate property, Langata Road Nairobi, which she has now rented out at Kshs.15000/=; there is finally her shop in Kapenguria which has been leased to Teachers SACCO.

In my view it is safe to infer from that evidence that Martha Cherop is in fact not receiving any financial assistance from any of her surviving children. She is living on her pension and rent from the properties she has leased. That income is definitely not sufficient to sustain her.

No doubt Martha Cherop is now more than 70 years old, sickly, and requires constant medical care. The deceased looked after her well during his life time. In my view the estate of the deceased should continue financing her medical care and general maintenance. Indeed Zaina appreciated this heavy responsibility and included Martha Cherop on the list of beneficiaries of the deceased's estate. In any case, as the surviving mother of the deceased, Martha is entitled to a share of this estate under the Islamic law.

I therefore hold that Martha Cherop was a dependant of the deceased who is now entitled to a share of his estate.

The third objectors' issue for determination is whether Chebet and Nuru were the deceased's dependants entitled to a share of his estate. It is necessary, first and foremost, to establish who exactly Chebet and Nuru are.

Chebet gave evidence. She informed the court that she was born on 23rd October, 1978 and named her parents as Ishmael Juma Chelanga (father) and Lydiah Chepkurui (mother). She produced her birth certificate as an exhibit I. She further said that her mother is now married to Alexander Kirui (step father).

Chebet testified that she has never lived with her mother and step father, rather she lived with her maternal grandmother Bonace Belyon while attending Cheborge Primary School [1985-1987] Standard 1- and Holy Rosary Primary School [1988-1992] Standard IV- Standard VIII. The latter was a boarding Primary School. During holiday she would go to stay with her Aunt Mrs. Grace Chepkener, then wife of the Principal of Tambach T.T.C. She stayed with the Chepkener family throughout the School holidays for the period 1988-1992. She joined Kapropita Girls High School in 1993 and left it in Form IV in 1996.

Chebet recalled that she first met the deceased when she was aged between 5-6 years during the days she was living and studying at Cheborge Primary School. It is her evidence that it was in fact the deceased who took her to Boarding Primary School at Holy Rosary Primary School in 1988. Throughout her stay at this Primary School the deceased used to pay her school fees and used to visit her after every two weeks, providing her with all her school needs. The deceased then took her to Kapropita Girls High School to form I in 1993, paid her school fees right through to Form IV and often visited her at school. It is her evidence that, during her stay at Kapropita, the deceased met all her school needs. She recalled that the Headmistress of Kapropita Girls High School was then Mrs. Leah Rotich.

Chebet testified that the deceased took her in 1993 to his mother Martha Cherop when she was 14 years old. It was to Martha Cherop that she went during the School holidays between 1993-1996. She joined Kenyatta University College in the month of August, 1998 where she is studying for Bachelor of Arts Degree. It is her evidence that her school fees is being paid by Martha Cherop.

Chebet testified that, during his life time, the deceased introduced her to his brothers and sisters (her uncles and aunt) and also told her the names of her step sisters and brothers, Zaina's children. She said she met them all at the deceased's funeral. As for Zaina, Chebet testified that she first met her at a chemist shop in Eldoret and later at the deceased's funeral in Kapenguria.

Finally Chebet testified that the deceased was a man of means who provided for her needs, which Zaina and Swaleh had failed to do. This evidence is in support of her application for dependency filed vide a chamber summons on 10th June 1999 under Sections 26, 27 and 47 of the Law of Succession Act and Rule 45(1) of Probate and Administration Rules. It is also in support of her cross – petition for grant of letters of administration, which she jointly filed with Martha Cherop and Nuru on 25th February 1998.

Zaina has strongly contested both applications, through her evidence and through Mr. Miller's submissions. Simply put Zaina's position is that Chebet is the deceased's illegitimate child who professes the Catholic faith and is therefore excluded under Islamic Law from inheriting the deceased's estate. Chebet, by implication in her testimony, has conceded that she is the deceased's illegitimate child, and by express admission in her testimony, has further conceded that she is not a muslim but is a catholic.

Nuru was not called to testify in this cause. She was not even presented to court for purposes of identification. Nevertheless evidence about her has been put on record by Martha Cherop who testified that Nuru is the deceased's daughter, born by his girlfriend. It is her evidence that the deceased used to tell her about Nuru when the latter was learning at North Rift Education Centre, Kitale; and that before the deceased's death Nuru used to be staying with her mother, but moved to Kapenguria to stay with her after the deceased's death.

Martha Cherop, while under cross-examination, gave more information about Nuru's parentage i.e that Nuru's mother is called Ruth Bett working at Post Office Lodwar. A birth certificate Exhibit 3 was shown to Martha Cherop. It shows that Nuru was born on 11th March 1987 to Ismael Chelanga and Ruth Jelagat

Chepkong'a. Its serial No. is 399703366 issued by Mr. S.N. Kimotho, Registrar of Persons, on the 2nd May 1997. Another Birth Certificate having the same serial No. 399703366 issued by the same Registrar of Persons Mr. S.N. Kimotho on the same day 2nd May 1997 was shown to Martha Cherop. This second birth certificate is in the names of Lizah Waithera born on 6th June 1994 to Francis Nguru Kimotho and Rosemary Wambui Ndungu. Martha Cherop could not give an explanation for this double issuance of a birth certificate in the names of two different people. Mr. S.N. Kimotho, the Registrar of Persons, was not called to clear these material discrepancies in these two birth certificates.

It was necessary, as it became apparent that disputed details about Nuru in the Birth Certificate and her parentage were unresolved, to call Ruth Jelagat Chepkonga, Nuru's mother, as a witness. This was not done. The direct result of this omission is that the identity of Nuru was not sufficiently proved on the required legal standard.

Zaina in her evidence and through Mr. Miller's submissions, has stated that it has sufficiently been demonstrated that Nuru too is an illegitimate child of the deceased, and therefore one who is not entitled to a share of his estate.

Zaina contends further that the deceased died a Muslim, that Chebet is a practicing Catholic, while the religion of Nuru has not been established. It is her contention that, from the angle of religion, both Chebet and Nuru are again not entitled to a share of the deceased's estate for they are not Muslim.

I have given Zaina's evidence and Mr. Miller's submission serious consideration. I find it established from the recorded evidence that the deceased was born and raised as a Muslim, he was a Muslim at the time of his death and was buried according to Islamic practices at his ancestral land in Kapenguria, West Pokot District. Zaina subsequent to his burial observed the Islamic 40 days seclusion period known as "*eddat*". It was thus established to my satisfaction that the deceased was a muslim at the time of his death.

The provisions of the Law of Succession Act Chapter 160 Laws of Kenya do not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In lieu of those statutory provisions, the devolution of the estate of any such person has to be governed by Muslim Law. The provisions of Part VIII of the Law of Succession Act relating to the administration of estates shall, where they are not inconsistent with those of Muslim Law, apply to every muslim dying before, on or after the 1st January 1991. These are the statutory provisions of Section 2(3) and (4) of the Law of Succession Act enacted vide Act No. 21 of 1999.

Applying these legal principles to this cause, the deceased was a person who professed the religion of Islam, accepted the unity of God and Mohammed as his prophet. The deceased was a Muslim, his personal law was Muslim Law for purposes of intestate succession of his estate.

Under Islamic Law no non-Muslim is permitted to inherit the estate of a Muslim. This was ably verified in this court by the Kadhi of Nairobi Mr. Hammat Mohammed Kassim. It follows therefore that Chebet, who had conceded that she is a Catholic, cannot inherit a share of the estate of her deceased father, a Muslim, by reason of her being a non-Muslim.

Secondly, an illegitimate child does not inherit the estate of his or her father but is permitted to inherit from his or her mother. The reason for this can be found in the *Principles of Mohammedan Law* by Dr (Mrs) Nishi Patel 1995 CTS publication Cap XIII at page 251:

> "LAW OF PARENTAGE: INTRODUCTION
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> The Law of parentage which includes paternity and maternity, is the result of the institution of marriage. A Mohammedan marriage is a contract, which confers the status of husband and wife on the parties and of legitimacy on the children. Parentage gives rise to the concepts of legitimacy and illegitimacy. Illegitimacy is totally untolerated and sexual-relations outside marriage are condemned as illicit and the woman who involved in it, is punishable for *Zina* (fornication)".

It must then follow that, both Chebet and Nuru who are illegitimate children are not entitled to a share of the deceased's estate.

A supplementary issue is where Chebet and Nuru, who clearly the deceased was caring for during his lifetime, can inherit his estate as dependants. On this point the Kadhi of Nairobi Mr. Hammat Mohammed Kassim stated as follows:-

> "Children who may have been supported by the deceased are still excluded because that alone (the deceased's support) is not enough unless the deceased wrote out an acceptable will to include them".

I find favour with that testimony and I so hold that both Chebet and Nuru, as the deceased's dependants, are excluded from his estate and are not entitled to a share of the same by reason of the application of the principles of Islamic law.

I would have been prepared to hold that the provisions of section 82(1) and 82(4)(6) of the Constitution of Kenya, apply in the case of Chebet and Nuru.

There provisions read:-

> "S. 82 (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect. (4) Subsection (1) shall not apply to any law so far as that law make provision- (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law".

This means, with particular reference to this case, that Chebet and Nuru cannot be heard to say that the application of the personal law governing the intestate succession of the deceased's estate, which is Islamic law, is discriminatory against them and is inconsistent with the Constitution. It is my ruling that the application of Islamic law, embodied in section 2(3) and (4) of the Law of Succession Act, is not inconsistent with the provisions of the Constitution of Kenya.

I have, in so holding, answered the petitioner's issue NO.3 as to whether, under section 3(2) of the Law of Succession Act, both Chebet and Nuru are the deceased's children who are entitled to inherit his estate, whether or not the deceased had expressly recognized, accepted them and had voluntarily assumed permanent responsibility over them.

The objectors' fourth and fifth next issues for determination are whether Zaina and the deceased were married on the 23rd March, 1983 or on the 15th April, 1995; and whether Zaina's children sired with the deceased before the 15th April, 1995 are entitled to inherit the estate of the deceased.

I have already ruled that, for purposes of Zaina's inheritance of the deceased's estate or her entitlement to a share thereof, it matters not whether she and the deceased contracted a *Nikaa* on 23rd March, 1983 or on the 15th April, 1995 for the reason that, at the time of the deceased's death on 27th July, 1996, Zaina was the deceased's lawful wedded wife.

The date of the *Nikaa* becomes only relevant to the inheritance of the deceased's estate by the children sirred by Zaina and the deceased. The issue which then takes centre stage is whether or not Zaina's children are also illegitimate.

The objectors' case, as put on record by Marth Cherop, Koech and Chepkole is that the deceased and Zaina began to cohabit in 1983 but conducted the *Nikaa* on the 15th April, 1995. To this extent, that Zaina's children are illegitimate.

In his evidence-in-chief Chepkole testified that the he attended the *Nikaa* ceremony as a witness and indeed that he signed the marriage certificate (Exhibit 32) which was issued on the 5th of May 1995 as a witness. He testified that he was the main organizer of that *Nikaa* ceremony. And while under cross-

examination he testified that he approached the Kadhi of Nakuru to formalize this marriage upon request by Zaina and the deceased.

While under, re-examination Chepkole gave more information about that occasion when he said:

> "Zaina and the deceased were living together as husband and wife and it was my wish that they formalise their marriage. I saw the deceased signing the marriage certificate. Zaina also signed the same. In fact each one of them signed in my presence. The deceased signed the marriage certificate in Nakuru while Zaina signed it in Eldoret"

Salim Mohammed Salim, the Kadhi of Nakuru, testified in his evidence that on 10th April, 1995 Chepkole approached him to conduct the *Nikaa* between Zaina and the deceased on 15th April, 1995. But since he was busy on that day he sent a *Maalim*, one Sheikh Adam Swaleh Musa to solemnize that Marriage on his behalf. After three weeks the deceased phoned him to avail himself on 5th May, 1995 to issue a marriage certificate. He went to the deceased's residence and accordingly issued this exhibit 32. He testified that the information he entered into exhibit 32 (marriage certificate) was from the spouses, but in particulars from the deceased, including the entry that Zaina was a virgin at the time of the *Nikaa* on 15th April, 1995, which was not only incorrect but ridiculous as she had by then given birth to all her present children.

It is correct to say that, though Salim Mohammed Salim issued this marriage certificate, he did not in fact solemise this *Nikaa* on that 15th April, 1995. The *Maalim* who did so, and ought to have been called as a witness, was Sheikh Adam Swaleh Musa.

There is also a serious omission in the Marriage Certificate Exhibit 32. Zaina's guardian, who was her father and who had allegedly consented to this marriage, did not sign it. The only people who signed it as witnesses are Sheikh Adam Musa, the high priest, and Chepkole.

There is a further serious omission. This Marriage Certificate (Exhibit 32) was not forwarded to the Registrar of Mohamedan Marriages and Divorce in Kenya, who is also the Chief Kadhi of the Republic of Kenya, Nassoz Nakannad Nahdy, who gave evidence in this court. While commenting on the marriage of Zaina and the deceased which the objectors say was solemnized on the 15th April, 1995, the Chief Kadhi of Kenya testified as follows:

> "I see objectors' exhibit No.32 which is a Marriage Certificate. This certificate is not correct. Before I issued my letter of certification Exhibit 3,1 went through my record. There was no return for the marriage said to have taken place on 15/4/1995. I wrote to the Kadhi who issued Exhibit 32 to explain why he did not submit a return with regard to the marriage of 15/4/1995 but he has not even responded to my letter. Returns are required to be filed and submitted to me monthly as required under section 16 of Cap 155. This requirement is mandatory. Section 11 thereof sets out the duties of Assistant Registrars of Marriages.
>
> The Kadhi of Nakuru had no power to delegate his duties under section 11 of the Act to anybody else. He could not therefore have sent a representative to conduct a valid marriage on that 15.4.95. In my view this certificate of marriage exhibit 32 is invalid".

The petitioner's case, on the other hand, is that the *Nikaa* was conducted on the 23rd March, 1983 which was done by Mr. Maalim Mohammed Al Hatat, who gave evidence and identified the *Nikaa* sheet which he wrote out after conducting the *Nikaa*. He explained to the court that he sought and obtained Zaina's consent and that of her guardian/father prior to officiating over the *Nikaa*, and that he conducted the marriage ceremony and all requirements relating to Islamic marriages were fulfilled; he identified the signature of the deceased, that of Zaina's father, Rajab Ali, the witness and his own on the *Nikaa* sheet. He then gave out the *Nikaa* sheet to Swaleh Dorman to process the certificate of marriage.

Rajabu Ali gave evidence of how Zaina's father invited him on 23.3.1983 to witness this *Nikaa*, and verified one testimony of Maalim Al Hatat. Rajabu Ali identified his signature on the *Nikaa* sheet.

Mr. Kaimu Abubakar Karwirwa, Zaina's eldest brother, clarified the confusion in the issuance of the two marriage certificates (of 23rd March, 1983 and 15th April, 1995). His explanation was brief. Sometimes in 1995 he visited the deceased in Nakuru and found Martha Cherop Chepkole and his own parents had coincindentally paid the deceased a visit at Nakuru. It was on that occasion that the deceased handed over to Sheikh Adam Musa the *Nikaa* sheet of 23rd March, 1983 and asked him to issue a marriage certificate with details as shown in the said *Nikaa* sheet. The confusion arose when date of the *Nikaa* was entered on the marriage certifcate (Ex.32) as the15.4.95 and not 23.3.1983.

I have already taken note of the fact that Sheikh Adam Musa was not called to give evidence in this cause to explain the events of the 15th April, 1995. Martha Cherop and Chepkole did not come out clearly on this aspect of the case. That leaves the evidence of Zaina and Mr. Karwirwa on record virtually uncontroverted.

Then there is the evidence of Mr. Hammat Mohammed Kassim, the Kadhi of Nairobi, to the effect that the *Nikaa* sheet produced in court by Maalim Mohamed Al Hatat was not irregular because it was a common practice of issuing such *Nikaa* sheets in areas where no *Kadhi's* and Assistant Registrar were stationed.

Taking into account all the recorded evidence, particularly the evidence of Maalim Mohammed Al Hatat, Mr. Hammat Mohammed Kassim and of the Chief Kadhi of Kenya, I hold that the marriage (*Nikaa*) between Zaina and the deceased was solemnized on the 23rd March, 1983. Consequently Shamira Chepkemoi Chelanga, Rhahila Cheruto Chelanga, Ibrahim Kipkorir Chelanga and Mohamed Kipkoskei Chelanga are legitimate children of the deceased entitled to inherit and have a share of his estate. The objectors' sixth issue is whether the deceased's brothers and sister are entitled to a share of his estate.

I have read the objector's submissions filed by Miss Margaret Ndwiga where she concedes that Kiprotich and Hadija being Christians, cannot inherit the estate of a muslim (the deceased). This is in keeping with Islamic law practices and I accept it.

The other of the deceased's brothers are Muslims. They are, however, again caught up by the Islamic law which was correctly stated by Mr. Hammat Mohammed Kassim, the Kadhi of Nairobi, that as long as the deceased is survived by his widow, parents or parents and his children, then under Islamic law his surviving brothers and sisters are not entitled to a share of his estate, even if they are of the Islamic faith. I do so hold in this ruling.

For these reasons the objections to the grant of letters of administration, and application for a share of the deceased's estate filed by the deceased's brothers and sister on the 4th May, 2000, namely, by Chepkole, Kiprotich, Musa, Koech and Mary Hadija, are hereby dismissed with costs.

The application dated 25th February, 1998 by Joyce Chebet and Nuru for a grant of letters of administration intestate to the estate of the deceased, and application for dependency, are also hereby dismissed with costs.

The objection to the making of a grant of letters of administration to Zaina and Swaleh filed by Martha Cherop on the 20th December, 1996 succeeds to the extent limited that Swaleh Abubakar shall not be appointed a coadministrator of the deceased's estate. His petition for such appointment is hereby rejected and dismissed, with costs. The petition by Zaina for grant of letters of administration intestate to the estate of the deceased is hereby granted and she is hereby appointed the administratrix of this estate.

In her objection to the making of a grant to Zaina, Martha Cherop was exercising her share to the estate of the deceased, and eventually which share she will pass to her children who will be entitled to inherit her estate after her demise. My understanding of the Islamic Law is that it has fixed shares of each heir to the estate of a deceased person, nobody having the right to make changes, modifications, additions or deletion in it. It is this share which, in my view, which must be protected by those entitled to it or will be entitled to it.

It is a fallacy on the part of many widows Zaina included to hold the view, expressed by Dr. Mohammed Abdi Hai Ariti in the book *Death and Inheritance* (*The Islamic Way*) Edition 1968 at page 194, that after the death of their husbands, they shall take possession of all immovable property left by them, under the false impression that they are the owners of everything. The fact is that: anything their late husbands gifted them during their lifetime and handed over to them as being theirs, is no doubt theirs. But the rest of it is combined inheritance and, according to the rules of *Shariah*, this will be distributed among all heirs as a matter of obligation. A widow does not therefore own the whole of a deceased husband's property. She owns only that share which she is entitled under the law.

During the hearing of this cause both Jinaro Kibet and Saleh Kipkemboi Chepkole made references to certain properties which were registered in the joint names of the deceased and Saleh Chepkole or in which Saleh Chepkole has an interest. Such properties are not entirely and exclusively the property of the deceased but would be property held jointly by them. The finer details of these properties will be known by the court when a full inventory of all the assets of the deceased are filed.

Martha Cherop is aged 70 years and above, is sickly and no doubt cannot be expected to administer the deceased's vast estate jointly with Zaina for purposes of overseeing her interest or share of the estate and those to inherit through her.

For the above reasons I do hereby appoint Saleh Kipkemboi Chepkole as a co-administrator of the estate of the deceased forthwith. I therefore direct a grant of letters of administration intestate to issue in the joint names of Zaina Mukami Chelanga and Saleh Kipkemboi Chepkole.

In a chamber summons filed on 20th December, 1996 Martha Cherop applied for revocation of the grant of letters of administration *Ad Collingenda Bona* issued to Zaina on 19th November, 1996. In view of my order today directing the issuance of a grant of letters of administration intestate to Zaina Mukami Chelanga and Saleh Kipkemboi Chepkole, the letter of administration *Ad Collingenda Bona* issued by this court on 19th November 1996 has today expired and is hereby vacated.

It is not now necessary to answer issues raised by both objectors and petitioners as to whether there is any obligation by an administrator holding a grant of letters of administration *ad Collingenda Bona* to give an account of the estate to any person who has come to court under Sections 26 – 29 of the Law of Succession Act.

After today's appointment of Zaina Mukami Chelanga and Saleh Kipkemboi Chepkole as joint administrators of the deceased's estate, the law expects of them now to file a full and accurate inventory of the deceased's entire estate, made up of his assets and liabilities, for distribution to the persons entitled thereto. The joint exercise to establish that entire estate begins today. These joint administrators are at liberty to engage the service of legal experts to facilitate the completion of this exercise within the shortest time possible. I direct that this cause be mentioned before me on the 5th August, 2002 at 9.00 a.m.

It is so ordered.

Dated and delivered at Nairobi this 24th day of May , 2002

A.G.A ETYANG

JUDGE