REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 9 OF 2018

IN THE MATTER OF THE ESTATE OF JECINTER NJOKI OKOTH – (DECEASED)

SIMON HAROLD SHIELS.....PETITIONER

VERSUS

MARY AKINYI OKOTH.....1ST OBJECTOR

ANTONY OTIENO OKOTH.....2ND OBJECTOR

CORAM: Hon. Justice Reuben Nyakundi

Khaminwa & Khaminwa Advocates for the Petitioner

Kinyondi Nyachae Munyao, Advocates for the Objectors

R U L I N G

This matter has had a chequered litigation history. As regard it was set for Confirmation proceedings on the distribution of the Estate of the late **JECINTER NJOKI OKOTH** who died intestate on 21.1.2018. The Petitioner **SIMON HAROLD SHIELS** is the widower while the objectors **MARY AKINYI OKOTH** and **ANTONY OTIENO OKOTH** are identifiable as the biological children of the deceased. There is also one very important angle to this case which is relevant and framed as follows;

> ***1) That a declaration ought to be made to the effect of recognizing MARY WAMBUI MUMBI, FRESHA NJERI MUTUA, ANTONY WAINANA WANJIKU, ALEX MAINA MUTUA AND SAMUEL NJENGA MAINA as heirs or dependants to the Estate to entitle each one of them a share respectively of the Estate. The affidavits dispositions which formed the bedrock of viva voce evidence on oath before Court provided as follows for example Terry Wanjiru deposed as follows; -***
>
> > *a) That I am sister to the late JECINTER NJOKI OKOTH who met her untimely demise on 21st January, 2018.*
> >
> > *b) That I know of her relationship with one SIMON SHIELS and marriage thereof and at some point, lived with them.*
> >
> > *c) That prior to her demise she had taken up nephews and nieces as her own who were orphaned upon the passing on of our sisters namely MARY WAMBUI MUMBI, FRESHIA NJERI MUTUA, FRESHIA NJERI WAMBUI, ANTHONY WAINANA WANJIKU, ALES MAINA MUTUA, NJENGA MAINA and SAMUEL NJENGA MAINA.*
> >
> > *d) That she took up parental responsibility and catered for their welfare.*
> >
> > *e) That they knew her as their mother as they were of tender age until her death when some of them realized she was not their biological mother.*
> >
> > *f) That after finishing secondary education they assisted in her business as a family and not employees.*
> >
> > *g) That she had always expressed her will to ensure they live well and provide for them according to her means.*
> >
> > *h) That I swear this affidavit conscientiously and in accordance with Oaths and Statutory Declarations Act.*
>
> ***2) Freshia Njeri Mutua an adult female of sound mind thereby competent and swore an affidavit and stated as follows;-***

i. ***That I know the late JECINTER NJOKI OKOTH who met her untimely demise on 21st January, 2018.***

ii. ***That I know of her relationship with one SIMON SHIELS as I happily lived with them since the passing on of my mother which information, I got from the deceased who treated me as her own, ensured that my welfare is guaranteed.***

iii. ***That prior to her demise she had taken up nephews and nieces as her own who were orphaned upon the passing on of her sisters namely FRESHIA NJERI MUTUA, FRESHIA NJERI WAMBUI, ANTHONY WAINANA WANJIKU, ALES MAINA MUTUA, NJENGA MAINA and SAMUEL NJENGA MAINA. We all resided in Naivasha.***

iv. ***That she took up parental responsibility and catered for our welfare as our mother.***

v. ***That they knew her as their mother as they were of tender age until her death when some of them realized she was not their biological mother.***

On the other hand, **Antony Otieno Okoth** objected in his affidavit for the grant of inheritance to his cousins and deponed as follows; -

1. That I am the only son of the deceased JECINTER NJOKI OKOTH who died at Malindi on 21st January, 2018, I have one sister by the name MARY AKINYI OKOTH and the two of us are the ONLY beneficiaries to the estate of our late mother.

2. That my late mother did not take any of my cousins as her own children nor did she maintain anyone other than ourselves.

3. That FRESHIA NJERI WAMBU and MARY MUMBI WAMBUI are sisters and are nieces to my mother hence our cousins. My late mother treated them as nieces and at no time did she maintain or adopt them.

4. That MARY MUMBI WAMBUI schooled at Mirera Girls Secondary where she completed high school and came to Malindi with FRESHIA NJIERI WAMBUI. She was employed at UK club as a waitress. She lived at our premises while working on a salary until late 2017 when she moved out to her boyfriend's house.

5. That FRESHIA NJERI MUTUA came to Malindi after she completed high school. She worked at UK club as a waitress. She lived in our premises (UK guest). She paid rent as a tenant. She would later move out after mum's death to her boyfriend's house.

6. That SAMUEL NJENGA MAINA came to Malindi as an adult and worked for my mum at UK club he was an employee and at no time was he treated as a son or maintained by our mum.

7. That ALEX MUTUA MAINA came in 2016 when he was already an adult, worked and paid through his sister as UK club worker. Had lots of stealing issues, prompted mum to get help from police through former OCPD Muchangi now deceased to be deported back to Kitui/Naivasha. Mum asked him never to return to Malindi. He was brought back by Simon after mum's death.

8. That TERRY WANJIRU SAMUEL has a disagreement with mum over a relationship with Simon and was chased never to get to UK lounge. They all came to Malindi as grownups and got employed at UK as workers. Mutua, Sammu and Njeri came to Malindi from Kitui in 2016.

9. That ANTHONY WANAINA WANJIKU came in Malindi the year 2015. He used to operate a boda boda in Naivasha. He was employed and worked as UK club watchman and was paid a salary. His mother died on 7th July, 2015 annexed photo of my late mother with a friend attending the burial.

10. That my mother did not at any time maintain and or provide for SIMON SHIELS as the Petitioner was able to provide for himself.

11. That the Petitioner claims to have bought plots, building properties, business on shipping goods from UK to Kenya should be proved as required by law, the extended family comprising of our late uncles and aunties had settled in Naivasha for ages way back before the presence of he Petitioner. The late uncles and aunties had bought plots in Naivasha, it is where our cousins were residing. The family home where our grandparents were buried in Nakuru.

Whereas the sister **MARY AKINYI AKOTH** deponed as follows; -

a) That I am the biological daughter of the deceased JECINTER NJOKI OKOTH.

b) That I used to help my mother manage her businesses to include among others, receiving of building materials and shipments at the port of Mombasa.

c) That my mother was a successful businesswoman right from 2008 in the United Kingdom even before she partnered with SIMON SHIELS.

d) That my mother's business premises christened "Africa Fashions" was opened by the barrow Mayor Councillor.

e) That it is this successful business woman that the Petitioner SIMON HAROLD SHIELS claims to have met working at a pub in order to proof he was the one financing all the assets yet Africa Fashions was still in operation when the deceased passed away.

f) That in paragraph 2 the petitioner admits that the deceased was his business partner in the United Kingdom and states to have contributed 30,000,000 Kenya Shilling to her and extended family to buy plots and construct properties.

g) That the receipts submitted by the Petitioner does not add up to the amount mentioned above and thus he should provide documentary evidence to support his claim of the amount he contributed that is Kshs.30,000,000.

h) That the Petitioner having admitted that the deceased was his partner and then the amount contributed must have been form the joint business.

i) That the Petitioner when submitting schedule of assets to the Court never mentioned that some assets were never put under the name of the decease now that he is stating that all assets bears the deceased name only.

j) That being my mother's confidant in her business, she never informed me of any plot she bought to her extended family and therefore the Petitioner should provide names to extended family he claims to have been bought plot.

k) That the Petitioner claim that he bought me a plot at Kijiwetanga is false I used money refunded to me by my mother after giving it to her sister TERRY WANJIKU Kshs.100,000/- as down payment for the plot.

l) That it is my mother who presented me the vehicle and not the Petitioner.

m) That the Petitioner's allegations about preparing a will and that they had "already established a will and they had established who should take over should one or both of us die" are mere allegations and are not supported by any documentary evidence, furthermore the deceased is not here to ascertain whether it is true thus our shared last names (OKOTH).

n) That the Petitioner's claim "though I was not informed of her status as a biological daughter until the demise of my wife" is FALSE since my mother had already introduced us as her daughter and her business partner in the United Kingdom.

o) That the nephews and nieces mentioned belonged to both the deceased sisters and brothers who were all married and no single parents, thus information in matters the names of both parents, the age of the children, death of their parents and any living parent should be provided.

p) That the nephews and nieces came back to Malindi in the year 2015/2016 and were employed by the deceased and paid as per the attached payroll, both FRESHIA NJERI MUTUA and MARY MUMBI WAMBUI were temporarily hosted in the white house but after the completion of the guest house moved out and rented rooms there. That fact that the deceased collected monthly rent of Kshs.3,000/- meant that they were not her dependants.

The Petitioner and administrator to the Estate of the deceased **SIMON SHIELS** swore an affidavit in reply that provides as follows; -

1. That during my time, both as partner then husband to JECINTER NJOKI OKOTH, I contributed Kshs.30,000,000/= to her and extended "family" to buy plots, build properties, run a business shipping goods from the United Kingdom to Kenya and providing allowances for the "children" and other relatives as a matter of expediency, certain assets, though not all were put into my wife's name.

2. That I also bought a plot in Kijiwetanga for MARY AKINYI and provided a care for her use whilst my wife and I were out of the Country.

3. That we were also in the process of adding my name as Co-Director of a limited company we created christened as ROHO YA SIMBA LIMITED so we could run all our properties and business jointly, through that entity.

4. That as more assets were amassed, I suggested to my wife that we prepare a will due to constant travelling and busy lives however the process being dilatory nonetheless we had already established who should reasonable provision should one both of us die.

5. That akin to the foregoing this included both her biological daughter MARY AKINYI OKOTH(though I was never informed of her status as biological daughter until the demise of my wife) and her "adopted" children namely those nieces and nephews she took responsibility for after their mothers(deceased sisters) passed away MARY WAMBUI, FRESHIA NJERI, FRESHIA NJERI WAMBUI, MUTUA MAINA, SAMUEL NJENGA and ANTHONY WAINANA WANJIKU.

6. That I was actually informed by the deceased that Mary Wambui was her biological daughter (Fridaus Ali is the name on Mary Wambui's birth certificate but my wife changed to reflect the fact that she wanted MARY WAMBUI to be recognized as her daughter and MARY AKINYI OKOTH looked after MARY WAMBUI MUMBI over a period whilst her mother was in the United Kingdom.

7. That I wish that this Honourable Court notes that my late wife also insisted that my two biological sons, her stepsons be

included in the list of beneficiaries in any ill. Given that they reside in the United Kingdom and have jobs and to avoid complicating matter I am not going to include them in this cause. I will make separate provision for them.

8. That further I did not know of the existence of a son to the deceased known as ANTHONY OTIENO OKOTH also until the passing on of my wife.

9. THAT it therefore follows that the persons listed in the petition are those my wife had wished to be included in the intended will as beneficiaries. Hence, I respectfully entreat and or implore the Honourable Court to recognize this fact and fulfil the will and wishes of my late wife.

10. That having being introduced to ANTHONY OTIENO OKOTH as the biological son to the deceased, this puzzled me greatly at the time as my wife never mentioned in the near (9) years we were together that she even had a biological son his subsequent behaviour gave me an insight as to why the deceased never introduced me to him. Since my wife's demise he has been persistent in his unreasonable claims on the Estate knowing little or nothing about how the Estate was funded or by whom. Nevertheless, upon ascertaining his status, I included him on the list of beneficiaries.

11. That I hereby append affidavits from the nieces and nephews of my late wife save for SAMEUL NJEGA MAINA who is a special child.

The affidavits and oral evidence were objected to with that of Antony Otieno Okoth filed on 7th June, 2021 and **MARY AKINYI OKOTH** dated 2nd June, 2021. In very many words the gist of the two affidavits are quite clear that before the demise of the deceased they were the only biological children and dependants to the deceased as their biological parent. That despite there being support to the objectors in the form of financial resources and offers of employment opportunities by the deceased they never qualified as legal heirs or dependants as such of the survived estate. The children of the deceased further deposed that as matters lay within their knowledge the question of the objectors being recognized as heirs or dependants to their mother is too remote to entitle them of any share of the inheritance.

Counsel Nyachae for the objectors **MARY AKOTH AND ANTONY AKOTH** submitted that the distribution proposed by the petitioner Simon Shiels is not a fair one in that it gives due weight to the nephews and nieces of the deceased at the expense of the biological children. Counsel Nyachae also drew the Court's attention to section 29 of the Law of Succession which provides inter alia that nephews and nieces are not automatic dependants to inherit the intestate estate of the deceased. Counsel Nyachae further submitted that the objectors classified as nieces and nephews have failed to discharge the burden of proof under section 29 (a) and (b) of the Act on dependency or establish any special circumstances to specifically place them within the legal framework of heirs to the deceased. As regards the evidence of those other objectors, Counsel Nyachae submitted that no iota of credible evidence has been forthcoming of the deceased intention or will to distribute her estate to anyone of those nephews and nieces as purported in their affidavits. Counsel Nyachae argued and submitted that the fact of the matter, being alleged of the deceased paying school fees and employment opportunities to "her nephews and nieces" does not stand on the same footing with inheritance model. Counsel Nyachae argued and reiterated that the application by the Petitioner to include them as heirs is ill conceived with no basis in law. Counsel Nyachae cited and relied on the following case law to buttress his submissions on the unlawfulness of including the nephews and nieces as dependants of the deceased. In the Estate ***of John Musambayi Katumanga[2014]eKLR,*** In ***Re Estate of Fares Michael Kuindwa(Deceased) [2019]eKLR***. With that Counsel Nyachae urged the Court to dismiss the objection as premised in the evidence of the objectors.

On the part of Counsel Mwadilo for the Petitioner, submissions the purpose of inheritance and distribution of the Estate herein is being conflicted due to the animosity amongst the biological children of the deceased and the Petitioner. Counsel Mwadilo contended that the Petitioner has stated on Oath that during the lifetime and subsistence of their marriage, the deceased drew his attention as who was entitled to inherit the Estate in case of her death. Those considerations even, gave rise to *"a draft will"* which however never saw the Light of the day. Counsel Mwadilo further submitted that for the reasons given by the deceased to the Petitioner due allowance should be given to that wish for the nephews and nieces positions identified by the Estate to be part of heirs without any restrictions.

Having considered the evidence and submissions by both counsels it is now my task to answer the question surrounding this objection on "dependency" and inheritance of Intestate Estate. At the end of it all is whether the "nephews" and "nieces'' of the deceased qualify to inherit her Estate as legal heirs.

Determination

The petitioner **SIMON SHIELS**, together with **MARY ATIENO OKOTH** and **ANTONY OKOTH** being the widower and biological children of the deceased canvassed their respective positions at cross purposes on the purported claim of inheritance of the objectors, duly referenced as "nephews" and "nieces". It is therefore time-honoured principle that the burden of proof lies on the "objectors" to satisfactorily demonstrate existence of that fact of dependency and inheritance to the Estate of the deceased. That is as expressly stated under section 107(1) of the Evidence Act that ***"whoever desires any Court to give judgment as to any legal right or liability dependence on the existence of facts which he asserts must prove that those facts exist and further section 108 states "the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side (See also section 109 of the Evidence Act***. It is trite that many of the problems involved in the law of descent and distribution of intestate property are among the most difficult problems of our probate and administration cases. While the Law of Succession covers generally and specific guidelines distinguishing modes of dependency, sometimes has proved to be an onerous task.

In this case the battle ground between the deceased biological children with that of the "nephews" and "nieces" is on contra- distinguished of acquisition of right of inheritance acquired by right of blood as opposed to general maintenance or dependency during the life time of the deceased. What is at stake is the intestate succession where the deceased had no valid will to dispose of her property, thereby requiring the Court to step in and make the grant of representation to the spouse – Simon Shiels.

Succession here denotes the transmission of the rights and obligations of a deceased person to his/her or heirs. In construing survival and the

phrase dependants Section 29 of the Law of Succession Act defines it to mean; -

> ***a) The 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 parents, step-parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own brothers and sisters and half - sisters as were being maintained by the deceased immediately prior to his death.***

Similarly, under section 3 of the Act the definition of a child is stated to be thus; -

> ***"Child or Children shall include a child conceived but not yet born as long as that child is subsequently born alive, and in relation to a female person, a child born out of wedlock and in relation to a male person, a child whom he has expressly recognized or infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."***

Going by this broad definition the persons entitled to inherit the intestate property fall within the ranking of immediate family members and dependants in the second degree or third degree of consanguinity or as the case may be within affinity to the deceased. Thereafter, followed with dependants who proof that they were maintained by the deceased during his or her lifetime as buttressed in clause (a) and (b) of the Section 29 of the Law of Succession Act. The inquiry in these proceedings involved as to who are the heirs of the intestate estate of the deceased on whom the estate devolves.

Giving effect to section 29 of the Act persons capable of inheriting are either those who are classified as lineal descendants such as wife or wives, children of the deceased whether or not maintained by the deceased or lineal ascendants such as parents, step-parents, grandparents, grandchildren, step children, sisters, nephews or nieces.

This principle as applied to the facts of the case, the relationship between the deceased and the petitioner **SIMON SHIELS** gave rise to consanguinity and affinity form of dependency. ***Consanguinity derives its meaning from the Latin word consanguinanitas which translates as blood relationship. Consanguinity is calculated in several ways. If the two persons are related in a direct line, such as father to son – that is first degree of consanguinity whereas in the case of grandchild, brother, sister or grandparent, etc are in the second degree, third degree great grandchild, niece, nephew, aunt, uncle etc. (See http://www.statues.legis.state.tx.us/Docs/GV/htm/GV.573.htm).*** Affinity is the tie which exists between one of the spouses and the other. In this regard the children of the Petitioner Samuel James Shiels and Alexander Shiels are entitled to the intestate Estate of the deceased by virtue of affinity which is a connection formed by the marriage union. Whereas, **Antony Otieno** and **Mary Akinyi Akoth** inheritance flows from kindred relations by blood as biological children of the deceased. The gradual and parentelic scheme sought by the nephews and nieces is for the Court to reckon and ascertain their heirship by drawing inference from the genealogical degree of kinship. By this submissions is meant the sum total of their claim is to trace their blood line with that of the deceased. Now in our succession law under section 29 of the Act the scheme takes into account the various parentalae of inheritance in the order of proximity to the deceased.

Generally, the question is one of interpreting the expression test of kin or determining who the heirs are or who is the heir that is entitled to succeed intestate property. In our jurisdiction as a general rule the right to inherit property or to succeed to property is mostly a question to be answered by a creature of the statute as a natural right and not a civil right. There are prescribed lines of descent under section 29 of the Act limiting the persons who may take up inheritance as heirs or devisees and it includes collateral heirs. My understanding of these provisions is that when a person therefore dies, so seised the inheritance first goes to his or her spouse and children. Thereafter it may be followed by step father, step mother, brother, sisters, grandfather etc.

On reflection of the facts ordained to the instant succession dispute, it is once founded on the inheritance of immediate offsprings of the deceased and the lineal descendants originally maintained by the deceased during her lifetime. The right of property which is gained by occupancy and maintenance was explained by **SIMON SHIELS**, the husband to the deceased. To prevent mischief that might ensue from the succession he told the Court of an intention to originally write a will to establish conveyances prescribing with certainty the disposal of the Estate. But as fate would have it that was never to be as the deceased passed on suddenly. That became the basis of introducing the "nephew" and "nieces" whereby the original intention on the nature of the succession is such that it would incorporate those in the ascending line. They might not have derived their relationship under the first degree of consanguinity with the deceased but is founded as well on consideration that they were sons and daughters of her sisters taken in and maintained by resources from the marital estate. The "nephews" and "nieces" therefore are entitled to inherit intestate estate as collateral descendants.

The very interesting discussion that arose from **MARY AKOTH** and **ANTONY AKOTH**, was to the effect of their cousins not having *locus standi* to inherit notwithstanding that they were substantially or wholly taken in by the deceased as part of her family. The reality is they are capable of inheriting intestate Estate left behind by the deceased. I cannot say that a legal and proper inheritance always descends within the next of kin and kindred. The statute has construed so to that extent to provide the order of succession to intestate reality and personality under section 29 of the Act.

There is compelling evidence stemming from the owners of the intestate property that in the event of death or by probate individuals related by consanguinity or affinity would be considered as beneficiaries of the estate. At a broader level, the evidence by the Petitioner – **SIMON SHIELS** on how they had intended to regulate the process of transmission of property on death of either of them was at equilibrium with the freedom of testation. In many respects this was frustrated by the act of death of the deceased. It follows therefore that although the right to bequest by will or gift after death was never formalized in the form of a valid will. Therefore, the disposition intestate should pass first to their children and second to the "nephews" and "nieces" as dependants maintained by the deceased. In my considered view that process for the second degree of consanguinity should be in the sense of the provisions under section 26 of the Law of the Succession Act.

The soundness of the proposal as explained by the Petitioner as a spouse to the deceased makes an affirmative statement on this disposition of the Estate in question. The exclusion of this class of dependants as urged by **MARY AKOTH** and **ANTONY AKOTH** fails the standard of proof as prescribed under section 107, 108, 109 and 110 of the Evidence Act. That was in contrast with the threshold of proof by the

evidence from the “nephews” and “nieces” as corroborated with the statement on Oath by the Petitioner and their witnesses.

On scrutiny of both perspectives the latter class of witnesses discharged the burden of proof on a balance of probabilities to establish existence of a fact of inheritance for the children who were maintained by the deceased but not directly sired by her. That evidence was never controverted by **MARY AKOTH** and **ANTONY AKOTH** with certainty to disinherit the “nephews” and “nieces” as so particularized in these proceedings. The Court may presume that the so dying declaration made to the Petitioner by the deceased is relevant to prove existence or non-existence of a fact in issue on distribution of the Estate. In support of this legal proposition, I echo the words in ***Re Watson [1999] 1 FLR 878,883, by Lord Neuberger of Abbotsbury*** in which he said that; -

> ***“Whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together as husband and wife: but, when considering that question, one should not ignore the multifarious nature of marital relationships.”***

It is a fact that the Petitioner and the deceased lived together until her demise which means with elements of permanency there was frequency of intimacy contact to share both personal and confidential information consistent with the marriage union. As noted above, it is irrebuttable presumption that the question as to the distribution and beneficiaries to their Estate arose in one of those family conversations.

Notwithstanding it was never reduced into a written or oral will capable of being enforced by the Court. I give credit to the testimony given on oath by the Petitioner as is distinguishable from probable opinion by the objectors. But here we are in the realm of a statement about what happened between the deceased and the Petitioner signifying the moral truth on this issue of inheritance. In ***Blackstone Vol 2 PP 497, 34HVIII C.5*** in regard to the effects of marriage thus; -

> ***“By marriage, the husband and wife are one person in law, that is the very being or legal existence of the woman is, suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything upon this principle, of a union of person in the husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage. This doctrine of unity based on the canon law, in regard to marriage, vested absolutely any discussion on personal property acquired in her household.”***

To this extent the scheme assumed and facilitated by the Petitioner on ascertaining the free property under section 3 of the Law of Succession on intestate Estate ought to be given effectuated. In consequence of that power the Petitioner fulfilled the duty to administer the Estate as the voice and the eyes of the deceased should not be faulted. The trend of the law is to untie the fetters on alienation of the true heirs and beneficiaries to the intestate Estate. ***Blackstone(supra)*** commented as follows; -

> ***“Heirs, and children, are favored of our Courts of justice and cannot be disinherited by any dubious or ambiguous words, there being required, the utmost certainty of the testator’s intentions to take away the right of an heir.”***

This is the framework upon which I rest the contestation largely structured as an objection to the Confirmation of Grant to the Petitioner by **MARY** and **ANTHONY AKOTH**. It is evident that the writings on the wall in this litigation is that the children of the deceased continue to hatch a scheme to object to any *locus standi* or spousal relationship by the Petitioner and for him to exercise any power over the Estate of the Deceased. Admittedly if we take the legal formulation of this Estate it came into being by virtue of the marriage union between the Petitioner and the Deceased. Truth, is a thing of this world, its product only by virtue of multiple forms within the societal web to guide human relations. Of course, this trial was to determine the truth about the marriage between the Petitioner and the Deceased by examining the validity of various strands and claims resulting in establishing the existence of the union. The characterization of the spousal contributions by the Petitioner to the development of marital estate is something that can be verified or at least corroborated by evidence. The particular objections in my view point to some significant belief, delusions or undue influence or pressure about events that occurred which may favor their personal narrative. Despite this apparent hurdle to the Laws on inheritance in this Country the right for the “nephews” and “nieces” to be appropriated a share of the Estate can be inferred from the evidence of the Petitioner, their witness statements and independently founded on the next of kin who interacted with the deceased.

Such statements echoed by the objectors are critical of the contest itself in view of the perfect legal status enjoyed in their capacities as a daughter and son to the deceased. The instincts, affection and love apparently upheld by the deceased and given to the Petitioner as a spouse, however much is dissented and disapproved by the children is of no moral or legal consequence. This being another startling feature of this litigation intimated of excluding the other dependants from participating in the inheritance after the death of the deceased is hereby rejected.

In this case the question to the answer on this subject matter is to be found clearly in sections 35, (2), (3), (5) and 38 of the Law of Succession Act. The deceased here was survived by more than her two biological children. There is striking evidence of the children of her spouse **SIMON SHIELS** and the proven dependants commonly referred in this ruling as “nephews” and “nieces”. During the making of the grant of representation the letter of the Chief annexed in support of the Petition remains uncontroverted settling the issue on survivorship of the deceased.

The result of these is that status of heirs to the Estate are rendered secure unless the contrary is shown by the objectors. What then were the changed circumstances towards non-recognition of their claims as “children” of the deceased and family members, with rights to an enjoyment of the property of the deceased upon her death is a matter of conjecture. The underlying of that social-legal-structure of dependence created by the deceased during her life time has far reaching ramifications in the context of the deceased right of assumption of responsibility to legally provide and maintain the aforesaid children. It is clear from the evidence she took them over as her own children. In the opinion of the objectors the heirship relating to the devolution of property of the deceased should be altered so that they remain the sole heirs is certainly not within the provisions of the Law of the Succession.

For the above reasons, the thrust of the mode of distribution as encapsulated in the matrix set out to Petitioner’s annexture dated 17.8.2020 is hereby approved in form but varied in content to meet the requirements of Section 26 and 38 of the Law of Succession Act. With that the

following declarations shall abide; -

1. The surviving children share the estate equally in consonant with section 38 of the Act and shall not be limited to the biological children of the deceased and her spouse SIMON SHIELS.

2. The germ and attributes of this particular approach is for the administrator to dispose of by sale of the immovable and movable estate to equally appropriate money receivable to the heirs and beneficiaries. In the alternative the Petitioner fully aware of the different tenure system associated with regard to land parcels acquired moves to regularize any pending titling processes and procedure to distribute equal shares of the interest in land to the beneficiaries.

3. In the interest of justice the apportionment of the Estate gives effect to the Equal Share principle to all heirs named in the Chief's letter and the Petition to the making of the grant of representation. For the consolidation of peace and reconciliation an amended consent on distribution be filed within 7 days from today's date to facilitate the Court to perfect and issue Certificate of Confirmation of Grant. The final drafted proposal be refiled afresh for the Court's adoption consisting of several segments of the legislative scheme on the children sharing the Estate equally.

4. Derived from the principle in the Matrimonial Property Act, the husband/Administrator herein is granted full ownership of matrimonial property absolutely as a life interest.

5. Given that position I would dismiss the objection for want of merit and the Petitioner/Administrator is at liberty to proceed in earnest to Confirm the Grant of Representation. Costs be borne by the Objectors in this Litigation for the Petitioner.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF JULY, 2021.

.....

R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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