REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 850 OF 2007

IN THE MATTER OF THE ESTATE OF JACOB WAMBIA WALEKHWA (DECEASED)

RULING

1. The certificate of death serial number 97474, dated 17th January 2007, indicates that the deceased person, to whose estate this cause relates, known as Jacob Wambia Walekhwa, died on 3rd April 2005. There is a letter on record from the office of the Chief of Luandeti, dated 8th October 2007, is not very useful. It does not give an indication of the persons who survived the deceased, but merely asks the Registrar of the court to assist the widow, Priscila Jacob Wambia, file a petition for representation.

2. Representation to the estate was sought by the widow, Priscila Jacob Wambia, vide a petition she filed herein on 19th October 2007, in her purported capacity as widow of the deceased. She expressed herself as the sole survivor of the deceased, whom she described as having died possessed of one asset, being North Kabras/Luandeti/31. Letters of administration intestate were made to her on 5th February 2005. A grant was duly issued, dated 11th March 2008. I shall refer to Priscila Jacob Wambia hereafter as the administratrix. The grant was confirmed on 11th December 2009, on an application dated 25th March 2009. North Kabras/Luandeti/31 devolved wholly upon her. A certificate of confirmation of grant issued in those terms, dated 21st January 2009.

3. Parallel proceedings were commenced with respect to the same estate in Kakamega HCSC No. 239 of 2008. A letter from the Chief of Lwandeti Location, dated 5rd June 2008, was filed,which indicated that the deceased had been survived by Wycliffe Jacob Wambia, Muganda Jacob, Kevin Wafula Jacob, Levi Mukhwana Jacob and Lucas Jacob. The relationship between these individuals and the deceased was not disclosed in the letter. He was said to have had died possessed of North Kabras/Luandeti/31.

4. The petition for representation in Kakamega HCSC No. 239 of 2008 was filed by Wycliffe Jacob Wambia, in his purported capacity as son of the deceased. He listed himself and the other four individuals named in the Chief's letter that I have referred to above, plus a Joe Jacob. Although he expressed himself to be a son of the deceased, the relationship between the deceased and the other five individuals is not indicated. The deceased was expressed to have had died possessed of North Kabras/Luandeti/31. Letters of administration intestate were made to him on 24th February 2009, and a grant was issued, dated 3rd March 2009. The said grant was confirmed on 13th October 2010, on an application dated 25th September 2009. The estate was devolved upon the six individuals named in the petition. A certificate of confirmation of grant in those terms was issued on 5th November 2010.

5. What I am called upon to determine is a summons for revocation of the grant made herein, that is Kakamega HCSC No, 850 of 2007. It was filed herein on 27th February 2012, and it is dated 24th February 2012. The application was brought at the instance of the administrator in Kakamega HCSC No. 239 of 2008, Wycliffe Jacob Wambia, and two other individuals, Kevin Wafula Jacob and Lucas Jacob, who I shall refer hereafter as the applicants. The grounds upon which they seek the revocation are set out on the face of the application, while the factual background is given in the supporting affidavit, which Wycliffe Jacob Wambia swore on 24th February 2012. He avers that the grant was obtained in a defective process as the consents of the other survivors and beneficiaries of the deceased were not obtained, and that administratrix did not include the applicants and others as a beneficiaries. It is also argued that there was concealment of matter from the court.

6. In the affidavit in support, he avers that the administratrix was their stepmother, who had obtained the grant secretly without informing them, and that they got to know of the grant from the lands registry. He states that their consent was not obtained before she petitioned for administration. He complains that the Chief' letter filed herein was fraudulent to the extent that it did not list the other survivors of the deceased. The administratrix is accused of bad faith, for she has had the property transferred to her name, and distributed without any regard to them.

7. The administratrix responded to the application through her affidavit, which she swore on 31st August 2013. She asserts that Wycliffe Jacob Wambia and Kevin Wafula Jacob were not children of the deceased. She makes reference to litigation, in Kakamega Juvenile Case No. 44 of 1989 and Kakamega HCCA No 715 of 1989, where the deceased disputed their paternity. She asserts that the deceased, during his lifetime, never acknowledged paternity of them, nor were the two ever his dependants. She acknowledges Lucas Jacob as a child of the deceased, but says that he moved out of home and sold off some of the property of the deceased, such as North Kabras/Lwandeti/1430. She further avers that there was no legal requirement for her to cite the applicants and they could not in the circumstances argue that she filed the petition without giving them notice. She asserts that North Kabras/Luandeti/31 was distributed amongst the children of the deceased.

8. The matter was placed before Chitembwe J. on 27th February 2012. Restraining orders were made with respect to North Kabras/Luandeti/31. A further order was made for consolidation of this cause with Kakamega HCSC No. 239 of 2008. The orders were reiterated on 23rd April 2012, when directions were given, for disposal of the matter by way of *viva voce* evidence.

9. The oral hearing commenced on 26th April 2012, with Wycliffe Jacob Wambia, the 1st applicant, on the witness stand. He stated that the deceased had three wives: Priscila Jacob, Rael Jacob and Dorcas Jacob. Priscila had three sons and five daughters, Rael had two sons and one daughter. He stated that that he was from the house of Rael. He stated that the first house began to cause trouble as soon as the deceased died. They demolished the house of the witness, and chased away the other two widows. The clan was forced to intervene to restore order and affix boundaries. It was after that that he then lodged the succession cause in Kakamega HCSC No. 239 of 2008, while the administratrix initiated the instant cause. He pleaded with the court to deal with the estate through Kakamega HCSC No. 239 of 2008. He asserted that he was a son of the deceased for he lived with the deceased, saying that the latter had not discarded him.

10. Kevin Wafula Jacob followed. He reiterated that the deceased had three wives. He stated that after the deceased died, they attempted to have the estate distributed but the administratrix insisted that the land was hers. The dispute the escalated to the elders, the tribunal and the courts. He stated that when Kakamega HCSC No. 239 of 2008 was being initiated, they called the administratrix but she declined. He stated that three sons in the first house were included in Kakamega HCSC No. 239 of 2008.

11. Lucas Mafunga Kakai testified next, he was a brother of the deceased. He stated that after the deceased died, they decided to distribute the estate amongst the six sons of the deceased. They called a clan meeting and brought in a surveyor. The land was divided. The widow in the first house then destroyed the boundaries. He reiterated that the deceased had not disowned the applicants.

12. Francis Lumbasi Munialo was the Chief for Lwandeti Location. He confirmed that the deceased had three wives: Priscilla, Rael and Dorcas. Priscilla had three sons and five daughters, Rael had two sons and a daughter, while Dorcas had one son and three daughters. In total, the deceased had three wives, six sons and nine daughters. The chief denied issuing the letter that the administratrix used to initiate this cause. He also stated that he attended the burial the deceased, where all the three widows and their fifteen children were in attendance. He confirmed that the clan intervened and allocated the land. He said that he was not aware that the deceased had contested the paternity of some of his children. He also stated that he was aware that the deceased had separated from his second wife towards the end.

13. Jafeth Namunyu Welekhasia was an uncle of the deceased. He confirmed the evidence of the other witnesses as to the composition of the family of the deceased. He stated that after the deceased died, the clan shared out his land amongst his sons and wives, but not the daughters. He urged the court to confirm the distribution by the clan.

14. The case for the administratrix commenced on 13th November 2018, with her on the stand. She stated that the applicant was not related to the decease, for he was not a child of the deceased. She testified that he had sued the deceased before the Children's Court at Kakamega, and the deceased said that he was not his father. She asserted that the deceased had only two wives, herself and another. She stated that she had eight children, while her co-wife, Dorka, a localized form of Dorcas, had four. She stated that Dorka was separated from the deceased, and only came back after he died. She stated that she did not allocate her any land because she had left the deceased, but said that she allocated land to her son, Lucas. She stated that she did not give any property to the daughters because they had gotten married. She said that she did not know Rael, adding that she only got to know of her after her children sued the deceased in the children's case. She said that she never saw her at the deceased's homestead. She said that she was one of the two children who had sued the deceased, adding that she was unaware that she had four children. He stated that the two children of Rael claimed to be children of deceased and wanted to come home, but the court held that they were not his children. When the judgment of the court was read to her, she reacted by saying that what was read to her was a lie, as the court did not acknoledge the children. She stated she had only listed her children in her petition, and did not list Lucas, although she did allocate to him some property. She stated that she did not know Luka Kakai, saying that he was not a brother of the deceased. She said that Dorka had four children, and that she gave each of them a shop. She stated that Plot No. 17 did not belong to the estate, but to her daughter, Elizabeth Jacob, who had bought it from a James Mulati. Elizabeth Namuvuyu Jacob testified next. She said that she was a daughter of the deceased. She asserted that Plot No. 21 Lwandeti was hers, having bought it from James Mulati Paul.

15. At the conclusion of the matter, the parties were directed to file written submissions, which they did. I have gone through the proceedings and noted the arguments made therein.

16. A revocation application is grounded on and its determination pegged on the three general grounds set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The first general ground is, captured in section 76(a) (b) (c) of the Law of Succession Act, and it focuses on the process of obtaining a grant. If the process is found to be tainted by defects or improprieties, fraud, misrepresentation and concealment of material facts from the court, then the grant would be liable to revocation. Representation ought to be obtained in a clean and open process that is defined by integrity and propriety. The office of administrator is one of trust. It is an office in equity. It should be underpinned by fairness and confidence. The process of appointing any person to an office of trust must itself not be undermined by lack of integrity and fairness. Where these qualities lack at these very initial steps of obtaining appointment to office then the trust and confidence, that the persons beneficially entitled to the assets, to be managed by the person seeking that office, would be lost.

17. The second general ground, captured in section 76(d) of the Law of Succession Act, concentrates on the administration of the estate itself. At this point the court would be dealing with a situation where the process of obtaining the grant was proper and above board, but the administrator faced challenges with the administration process itself. Such would be the case where an administrator fails to apply for confirmation of their grant within the period prescribed by the law, see sections 71(1), 73 and 76(d) (i). The law envisages that confirmation ought to be sought six months after the grant is made, and at any rate within the year of its making. Anything beyond that period should invite revocation. Distribution of the estate, which comes with confirmation of the grant, is a critical responsibility of the administrator. Indeed, it is the only duty after collection and preservation of the estate and payment of debts and liabilities. An administrator who fails to apply for confirmation of their grant would have totally failed in his duties as administrator.

18. The other case would be where the administrator fails to proceed diligently with the administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any

of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased including pursuing debts owing to the estate and moneys payable to the estate by reason of the deceased's death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the time-frames set out by the Law of Succession Act. The very being of an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required in law. The office of a personal representative is one trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason of having appointed the personal representatives through the grants of representation.

19. The third general ground is where the grant has become useless or inoperative on account of subsequent events, that is subsequent to the making of the grant. It would arise where a sole personal representative has died. There would be no person to carry on administration under his grant, rendering the document useless and inoperative. It would also be the case where the administrator suffers disability whether physically or mentally rendering him incapable of discharging his duties, such as where he becomes senile or of unsound mind or lapses into a coma from which he does not recover or suffers such debilitating physical injuries that make it practically impossible for him to do anything for himself. An administrator who is adjudged bankrupt would also fall under this net for he would lose capacity, by virtue of section 56 of the Law of Succession Act, and he cannot possibly act as administrator, and the grant he holds would become a useless piece of paper.

20. Section 76 of the Law of Succession Act provides as follows:

> *"76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> *(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
>
> *(ii) to proceed diligently with the administration of the estate; or*
>
> *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

21. In the instant case, the applicant pegs his application for revocation of grant on section 76(a) (b) (c) of the Law of Succession Act, on grounds that the process of obtaining the grant was attended by procedural flaws, fraud and concealment of matter from the court. His principal claim is that the administratrix did not disclose to the court the existence of a large number of survivors of the deceased. The administratrix has responded to the application, and taken the position that she proceeded without obtaining the consent of the applicants because they were not members of the family of the deceased and there was, therefore, no need for her to consult them. She has disputed their paternity. She concedes that Lucas Jacob was a child of the deceased, but then said she excluded him because he had sold estate property. At the hearing, she stated that she did not disclose her co-wife, Dorka, because she had separated from the deceased and only came back to the homestead after his death. Regarding daughters, she said she excluded them because they got married.

22. It is common ground that when the administratrix sought representation, she projected herself as the sole survivor of the deceased. The letter she got from the Chief was conveniently vague as to who the survivors of the deceased were. She swore an affidavit to support her petition where she presented herself as the sole survivor of the deceased. She repeated that in her affidavit in support of the application for the confirmation of her grant. She has conceded that there were other survivors of the deceased. I note that the administratrix concedes that the deceased had another surviving widow, who was said to be separated, but not divorced, from him. That widow had four children, that she did not disclose. The administratrix herself had children, three sons and five daughters, she did not disclose them.

23. The status of the applicants is contested. The administratrix argues that they were not biological children of the deceased. Firstly, she says that their mother was never married by the deceased and he had denied the paternity of the applicants. The applicants testified that they were resident within the compound of the deceased up to the time of his death, and that they were chased out, and their houses demolished after the deceased died. They called three witnesses from outside the immediate family. One was a brother of the deceased, Lucas Mafunga Kakai, who stated that the deceased had not disowned the applicants, and confirmed that the administratrix demolished the houses of the applicants after the deceased died. The Chief of Lwandeti Location, Francis Lumbasi Munialo, testified that the deceased had three wives. The three and their children were said to have had attended the funeral of the deceased. He conceded that the deceased had separated from

his second wife at some point before he died. The third witness was an uncle of the deceased, Jafeth Namunyu Welekhasia. He confirmed that there were three wives, all of whom had children.

24. The administratrix did not call any neutral witness to confirm that the deceased had married only twice and that the applicants were not his children. Instead, she pointed at proceedings that were conducted in Kakamega Principal Magistrate's Court Juvenile Cause No. 44 of 1987, which had been brought against the deceased by the state, following a complaint by the applicants' mother, Rael Mapesa. Rael Mapesa had testified in those proceedings that the deceased was her husband, having married her in 1968, and they had children. On his part, the deceased stated that he had never married the applicants' mother and that he did not know the applicants. He denied chasing them away from home. In the end the trial court, in a judgement delivered on 22nd February 1989, concluded that the two were married and that the applicants were her children. That determination was set aside and vacated by the High Court in Kakamega HCCRA No. 71 of 1989, in a judgement that was delivered on 15th May 1990. The court held that the criminal jurisdiction, exercised by the lower court in the juvenile proceedings, was the wrong forum for determining questions relating to the alleged marriage between the deceased and the mother of the applicants. The court noted that paternity was disputed, which called for more detailed evidence, and that what was presented before the trial court fell short.

25. The short of it is that that none of these two judgments categorically confirmed Rael Mapesa to be a wife of the deceased and her children children of the deceased. The High Court left it to a civil court, but no decree has been placed before me. The applicants tendered some evidence, but the same did not dwell on whether or not their mother was married to the deceased, nor whether they were biological or other children of the deceased. It would appear that the Chief and the extended family considered them to be so. I shall take it that that was the position given that the administratrix did not present any other evidence, apart from pointing to the juvenile proceedings at the High Court, which, in any event did not rule that Rael Mapesa was a wife of the deceased or that the applicants were children of the deceased. The history pleadings are proceedings that are civil in nature. The standard of proof required is on a balance of probability. I believe that the applicants have proved on a balance of probability that the deceased was their father. I am persuaded that the applicants were children of the deceased and should have been disclosed in the probate papers.

26. On the issue of the second wife, Dorka, having separated from the deceased. It is common ground that she was a wife of the deceased. None of the parties and their witnesses made any reference to her having been divorced from the deceased. The language used is that the two were merely separated. A wife ceases to be one upon divorce and not separation. She, therefore, remained the wife of the deceased until his demise, when she became one of the surviving widows. In that regard, she was at par with the administratrix.

27. The deceased died intestate in 2007, after the Law of Succession Act had come into force 1981. Representation to his estate was, therefore, subject to administration in accordance with the provisions of the Act. The persons who qualify to apply for administration in intestacy are set out in section 66, which gives an order of priority or preference, to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

> *"66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*
>
> *(a) surviving spouse or spouses, with or without association of other beneficiaries;*
>
> *(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
>
> *(c) the Public Trustee; and*
>
> *(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect."*

28. According to that provision, the court should to be guided by Part V of the Act, which sets out the order of priority in entitlement to a share in the estate of the deceased. Priority is given to the surviving spouse, followed by the children of the deceased, followed by parents of the deceased in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter. The same applies with regard to entitlement to administration, by dint of section 66. The surviving spouse has priority to administration, followed by the children, parents of the deceased, siblings, other relatives to the sixth degree, the Public Trustee and creditors in that order. When I apply that provision to the instant case, it would follow that the widow of the deceased, the administratrix herein, had priority to appointment as administratrix over the children of the deceased, including the applicants, but ranked equal with Dorka, her co-widow, who she has acknowledged had survived the deceased.

29. I note that when she lodged her petition herein on 18th October 2007, she did not attach any documents, by way of consents or renunciation of probate, by any of the surviving children, nor by her co-wife, Dorka.

30. Was the said consent necessary in the circumstances? Rule 7 of the Probate and Administration Rules sets out the procedure for applications for representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitioner to apply for representation. The provisions of section 66 of the Act, which I have set out above, should be read together with Rule 7(7) of the Probate and Administration Rules, which states as follows:

> *"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by*

virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

31. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

"26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

32. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to serve such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

33. The administratrix in the instant cause, being a surviving spouse, had a superior right to administration over the children and the other relatives of the deceased, going by section 66 of the Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the widow did not need to comply with requirements of Rules 7(7) and 26, since those provisions applies only to persons who seek representation while they had an equal or lesser right to administration. She did not, therefore, have to obtain the consents of her children to apply for representation to the estate of her late husband. However, the two provisions require execution of Form 38, or its equivalent, where there was another individual with equal right to representation with the administratrix. There was such a person. She should have obtained the consent of Dorka. She did not, and, therefore, there was no compliance with Rules 7(7) and 26 of the Probate and Administration Rules.

34. The other issue for consideration is the question of the omission of the applicants, and other immediate survivors of the deceased, from the list of beneficiaries. The record before me indicates that the administratrix approached this matter in a manner that suggested that she was the only person who survived the deceased. The letter she obtained from the Chief implied so. One would have expected that the Chief, would have known the individuals who had survived the deceased, or would have, at least, enquired before he wrote the letter, so that he could give the court more reasonable or credible information on the actual state of affairs. Instead, he appears to have had colluded with the administratrix to paint the unreal picture that the deceased had been survived by only one individual, herself. She perpetuated that lie in her petition. She swore an affidavit to support her petition, where she averred that she was the sole survivor of the deceased. She compounded that lie when she sought confirmation of her grant. She swore an affidavit to support that application where she listed herself as the sole survivor of the deceased and proposed that the estate devolves wholly upon her. She has conceded in her reply to the revocation application that the deceased had a second wife who had children. She also conceded that she had children of her own with the deceased. These individuals were concealed from the court.

35. Does the law require disclosure of these other relatives of the deceased? The framework for applications for grants of representation is section 51 of the Law of Succession Act. The most relevant provisions are in section 51(2)(g)(h), which state as follows:

"Application for Grant

51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h)..."

36. Under section 51(2) (g) the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administratrix herein only disclosed herself, but not her co-wife and the children of the deceased. She has conceded in her response to the revocation application, and at the oral hearing, that such close relatives of the deceased existed, yet she did not disclose them in her petition, and, therefore, there was no compliance with section 51(2) (g).

37. The administratrix was obliged to disclose the children of the deceased. This is required because, as a surviving widow, she was not entitled absolutely and exclusively to the intestate estate of her departed husband. If anything, she was entitled only to a life interest over the property for the ultimate destination of the property of the deceased is not to her but to the children of the deceased. Her entitlement to absolute access to the estate is limited to personal and household goods, but not to capital assets, which are destined to the children. Succession is about a parent passing on property to his or her descendants but not to his or her contemporaries or ascendants. The concept of succession, whether under statute or common law or customary law, is about generational transfer of family wealth from parents to children. That is why the property passes absolutely to the children but not to the surviving spouse, who would only be entitled to a life interest over that property. Succession is not meant to be within a certain generation, where property passes from one spouse to the other, but is inter-generational, where family wealth passes from one generation to the next. The position is, clearly, that the claim by a surviving spouse to the property of his or her departed spouse is not superior to that of the children. Parents who, therefore, seek to steal a march over their children, so far as succession to family wealth is concerned, should not expect to get far.

38. What I have stated above is pronounced section 35 of the Law of Succession Act, which provides:

"35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, 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 applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

39. The failure to disclose the children of the deceased would distort the scheme of succession envisaged in section 35, so that instead of the estate being distributed under section 35, where there is a surviving spouse and children, it would be handled through section 36, as was the case here, where the deceased was alleged to have had been survived only by a spouse but no children. It clearly suggests that a surviving spouse who conceals existence of her children from the court intends to remove the devolution of property from section 35 so as to bring it within section 36. Such a scheme can only be described, at best, to be fraudulent and dishonest. Even then section 36 does not guarantee such a surviving spouse absolute access to that property. Indeed, there is no provision anywhere in the Law of Succession Act that entitles a surviving spouse to have absolute and exclusive access to the property of their departed spouse. Even section 36, which governs a situation where the deceased is survived by a spouse but no children, is no different. It states:

> *"36. Where intestate has left one surviving spouse but no child or children*
>
> *(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and*
>
> *(c) a life interest in the whole of the remainder:*
>
> *Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.*
>
> *(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).*
>
> *(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39."*

40. A case for revocation of the grant herein has been made out successfully. The conduct of the administratrix, from the very inception of the matter to its conclusion, clearly points to the fact that she does not merit the position of administratrix, which is one of trust, as she has proved herself untrustworthy.

41. What I have discussed above relates to the grant made in Kakamega HCSC No, 850 of 2007. The applicants have endeavoured in the revocation application to paint the administratrix black, as an individual who has no regard for the law, and who is devious and dishonest. They themselves are no better, going by the record in Kakamega HCSC No. 239 of 2008. When the applicant sought representation in that cause, he obtained a letter from the Chief, which disclosed only the sons of the deceased, to the exclusion of the two surviving widows and the nine daughters. That clearly offended section 51(2) (g) of the Law of Succession Act. Secondly, priority with respect to entitlement to administration is given, by section 66 of the Law of Succession Act, to surviving spouses. That meant that the two surviving widows had priority over the applicants with respect to obtaining representation to the deceased's estate. By dint of Rules 7(7) and 26 of the Probate and Administration Rules, the consents of the two surviving widows were mandatory, since they had priority over the sons to administration. The consents contemplated, through Form 37, was not filed. Similarly, the daughters of the deceased had equal right or entitlement to administration with the sons of the deceased by dint of section 66 of the Law of Succession Act. The sons did not have any superior claim to administration over the daughters. That being the case, Rules 7(7) and 26 of the Probate and Administration Rules required the sons to obtain the consents of the daughters of the deceased, in the nature of Form 37, to be filed simultaneously with the petition in Kakamega HCSC No. 239 of 2008. That was never done, and, therefore, there was no compliance with the mandatory requirements of Rules 7(7) and 26 of the Probate and Administration Rules. The administrators in Kakamega HCSC No. 239 of 2008 obtained their grant in a process that was defective and that reeked of fraud and misrepresentation.

42. I have noted from the record that both grants were confirmed; That in Kakamega HCSC No, 850 of 2007 on 11th December 2009 and that in Kakamega HCSC No. 239 of 2008 on 13th October 2010. I have noted that in both cases, the mandatory requirements of Rule 40(8) of the Probate and Administration Rules were not complied with. similarly, the requirements of Rule 40(4) (5) and (6) were not complied with. The estate, in both cases, was distributed, without key constituencies getting to be heard on the matter. Rule 40(8) provides:

> *"Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons who may be beneficially entitled , allow the application without the attendance of any person ; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit."*

43. In the end, the final orders that I shall make in this matter are as follows:

> **(a) That I hereby revoke the grants of letters of administration intestate made in Kakamega HCSC No, 850 of 2007 and Kakamega HCSC No. 239 of 2008;**
>
> **(b) That as a consequence of (a) above, the orders made in both causes confirming the two grants, are hereby vacated, and the certificates of confirmation of grant, issued subsequent to the making of the confirmation orders, are hereby cancelled;**

(c) That if any transactions were carried out on the strength of the said certificates of confirmation of grants, now cancelled under (b) above, the said transactions are hereby declared to be null and void

(d) That as the causes in Kakamega HCSC No, 850 of 2007 and Kakamega HCSC No. 239 of 2008 were consolidated on 27th February 2012, I hereby declare that Kakamega HCSC No, 850 of 2007 shall be the lead file;

(e) That I find that the deceased had three wives and children, and, consequently, succession to his estate shall be by the three wives and their children, both male and female;

(f) That the three houses of the deceased shall be represented in the administration of the estate of the deceased;

(g) That for the purpose of (f) above, the matter shall be mentioned, on a date to be appointed at the delivery of this judgment, for the purpose of appointment of fresh administrators;

(h) That the new administrators shall thereafter file for confirmation of their grant in which they shall comply fully with Rule 40(4)(5)(6) and (8) of the Probate and Administration Rules;

(i) That each party shall bear their own costs; and

(j) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF February, 2020

W. MUSYOKA

JUDGE