



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J]

SUCCESSION CAUSE NO. 29 OF 2017

(Formerly Homa Bay High Court Succession Cause No. 17 of 2017 and Nairobi High Court Succession Cause No. 1297 of 2010)

IN THE MATTER OF THE ESTATE OF BONIFACE OKACH (DECEASED)

BETWEEN

1. FRED NYAGADO OKACH

2. BETTY MAGOLO OKACH

3. BRIAN OKEYO OKACH..... PROTESTORS/PLAINTIFFS

AND

1. FLORENCE OKACH..... DEFENDANT

2. GRACE ATIENO OKACH CO-ADMINISTRATRIX/DEFENDANT

3. JACK ODERA OKACH.....CO-ADMINISTRATOR/DEFENDANT

JUDGMENT

The Background:

1. This cause relates to the estate of **Boniface Okach** (hereinafter referred to as **'the deceased'**) who died intestate sometimes in 1968 or 1970. During his lifetime, the deceased married one wife and was blessed with two children. They were **Miriam Okach** and **John Nyagado Okach**. Miriam Okach was allegedly married in Tanzania and her whereabouts have since then remained unknown to the family. John Nyagado Okach (hereinafter referred to as **'John'**) married two wives. They were **Florence Okach** and **Winnie Wangoma Okach**. Florence Okach is the 1st Defendant herein. I will henceforth refer to her as **'Florence'**. Winnie Wangoma Okach passed on as well. I will refer to her as **'Winnie'** henceforth. John was blessed with children from both wives.

2. The administration of the estate of the deceased began sometimes in 1996 with the filing of the Petition for Letters of Administration Intestate in *Nairobi High Court Succession Cause No. 1569 of 1996*. The Petitioners were Winnie and Jack Odera Okach, the 3rd Defendant/Co-Administrator herein. A joint Grant of Letters of Administration Intestate was issued to the Petitioners and was subsequently confirmed.

3. Later, one **Emmanuel Okach** (hereinafter referred to as **'Emmanuel'**), a beneficiary, successfully applied for the revocation of the Grant and the Certificate of Confirmation.

4. The then Petitioners, Winnie and Jack Odera Okach instead of proceeding on with the *Nairobi High Court Succession Cause No. 1569 of 1996* filed a fresh Petition for Letters of Administration Intestate in *Nairobi High Court Succession Cause No. 1297 of 2010*. That was on 20/06/2010. A joint Grant of Letters of Administration Intestate was issued to the Petitioners on 03/03/2011.

5. The Grant in *Nairobi High Court Succession Cause No. 1297 of 2010* was confirmed. A Certificate of Confirmation of the Grant was issued on 06/11/2011.

6. On 01/10/2012 Florence filed a Summons seeking the revocation of the Confirmation of the Grant. The Summons was evenly dated. On

05/10/2012 **Grace Atieno Okach**, the 2nd Defendant/Co-Administratrix herein (hereinafter referred to as '**Grace**') filed a Summons for the revocation/annulment of the Grant and the Certificate of Confirmation of the Grant. The Summons was dated 04/10/2012. The twin Summonses were opposed.

7. The pendency of the twin Causes was brought to the attention of the Court in Nairobi. The Court then called upon the parties to address it on the twin Succession Causes in respect of the deceased. The parties obliged. A ruling was rendered on 28/05/2015. The Court consolidated the twin Causes with *Nairobi High Court Succession Cause No. 1297 of 2010* being the lead Cause.

8. On 02/05/2016 Florence and Grace applied to transfer the Cause to the High Court in Homa Bay. That was *vide* a Summons dated 11/05/2016. The Cause was eventually transferred to the High Court at Homa Bay. It was duly registered as *Succession Cause No. 17 of 2017*. On 09/10/2017 the Presiding Judge directed that the Cause be transferred to this Court as the property in issue was within Rongo which is within the jurisdiction of this Court. That is how this Cause found its way to this Court.

9. On 22/05/2018 this Court gave directions on the pending twin Summonses. The Summonses were to be heard by way of *viva voce* evidence.

10. On 20/11/2018 the parties recorded a forward-looking consent with an aim of dealing with the main issues in controversy *in toto*. The consent disposed of the twin Summonses. Parties agreed and the Court revoked the Grant issued on 06/12/2011 and issued a fresh Grant in the joint names of Grace and Jack Odera Okach. I will henceforth refer to Jack Odera Okach as '**Jack**'). Any of the joint Administrators were at liberty to file for confirmation of the Grant.

11. Jack filed a Summons for confirmation of the Grant dated 30/11/2018 on 04/12/2018. Grace had no objection thereto. The Protestors however opposed the Summons.

12. Directions were taken on 03/04/2019. The Summons was ordered to be heard by way of oral evidence. The Protestors were deemed as the Plaintiffs and the rest as Defendants.

The Summonses for Confirmation:

13. The Summons was supported by an Affidavit sworn by Jack on 30/11/2018. The Affidavit annexed a Schedule of Distribution. The proposed distribution was equal distribution of the parcel of land known as **Kamagambo/Kabuoro/416** (hereinafter referred to as '**the land**') to the following beneficiaries: -

- (a) Jane Okach
- (b) Grace Atieno Okach
- (c) Emmanuel Okach
- (d) Joe Ngoje Okach
- (e) Jack Odera Okach
- (f) Fred Nyagado Okach
- (g) Tom Cliff Okach
- (h) Brian Okeyo Okach
- (i) Betty Magolo Okach
- (j) Annette Asigo Okach
- (k) Angela Odeka Okach

14. Jack filed a Supplementary Affidavit in Support of the Summons and Statement. He therein reviewed his earlier position on the beneficiaries. He contended that upon receipt of the judgment in *Nairobi District Magistrates Court Divorce Cause No. 2 of 1976 John Nyagado Okach vs. Florence Jadenya Okach* he realized that **Jane Okach** (hereinafter referred to as '**Jane**') was not a daughter of John as she was born of another man before Florence was married to John. Jack therefore sought to rectify the position by deleting the name of Jane from the list of beneficiaries.

15. Florence and Grace supported the Summons.

16. **Fred Nyagado Okach** (hereinafter referred to as '**Fred**'), **Betty Magolo Okach** (hereinafter referred to as '**Betty**') and **Brian Okeyo Okach** (hereinafter referred to as '**Brian**') opposed the Summons. They are the Protestors. They relied on the twin Replying Affidavits sworn by Fred on their behalf. The Affidavits were both sworn on 27/03/2019 and filed on 28/03/2019.

17. The Protestors were opposed to some of the proposed beneficiaries. The Protestors contended that **Grace, Jane, Fred Akama, Innocent Okach** and **Mary Saida** were not biological children of John hence not beneficiaries. They further contended that Florence was divorced by John *vide* a decision rendered in *Nairobi District Magistrates Court Divorce Cause No. 2 of 1976 John Nyagado Okach vs. Florence Jadenya Okach* on 28/02/1977. It was the Protestors' position that at the time the parties were formally divorced they were only blessed with 3 children namely **Ruth Akumu Okach** (hereinafter referred to as '**Ruth**'), **Grace Akinyi Okach** and **Emmanuel**.

18. The Protestors also stated that Florence was later re-married to one Caleb Ongugo and were blessed with Fred Akama, Innocent Okach and Mary Saida.

19. The Summons was heard by way of oral evidence. Fred testified on behalf of the Protestors. He reiterated their case prayed that the land be equally distributed to the following lawful beneficiaries: -

(a) **Emmanuel Okach**

(b) **Joe Ngoje Okach**

(c) **Jack Odero Okach**

(d) **Fred Nyagando Okach**

(e) ...

(f) **Annette Okach**

(g) **Angela Okach**

(h) **Tom Okach**

(i) **Brian Okach**

20. Grace testified on her own and on behalf of her mother Florence. Grace took the position that all the children given birth to by Florence were legitimate children of John. Grace stated that although Fred Akama, Innocent Okach and Mary Okach were born after the marriage between Florence and John was dissolved they were still the children of John. She narrated that John used to visit Florence who was then living at the home of a brother to the deceased in Ndhiwa since John had not built a house on the land. Accordingly, the post-divorce relationship between John and Florence bore the said three children.

21. Grace further testified that John used to take care of Florence and all her children including Jane. She alluded that all her siblings knew no any other father than John. Grace described the way John, Florence and all her siblings happily lived in Nairobi until the marriage of Winnie which resulted to Florence being relocated to the countryside.

22. Grace also clarified that she had two sets of names. They were Grace Akinyi Okach and Grace Atieno Okach. According to Grace the name Grace Akinyi Okach was her maiden name. She explained that she later married one Nicholas Atieno and adopted the name 'Atieno' in place of 'Akinyi' hence the two sets of names.

23. As a result, Grace was of the view that Florence and all her children together with the children of Winnie be regarded as the lawful beneficiaries of John.

24. Jack did not testify. He instead called a witness one **Eliud Ngonje Owinje** (hereinafter referred to as '**DW1**'). DW1 was aged 87 years old and mostly testified on various aspects of the Luo customs.

25. At the close of the respective cases all the parties agreed on the need to call a neutral witness to clarify on some aspects of the Luo customs. This Court ordered the Migori County Commissioner to avail such a witness. One **John Ben Omollo**, the Chairman of the Luo Council of Elders in Migori County testified. I will refer to him as '**Omollo**'.

26. The parties thereafter filed their respective submissions. The Protestors submitted on 6 issues. First, they submitted that pursuant to **Section 76(2)** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the LSA**'), the grant made to Jack and Grace ought to be revoked since Jack did not consult the rest of the beneficiaries. They cited the decision in **In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (Deceased) Nairobi HCSC No. 935 of 2003** in such support.

27. The second issue was that the divorce was absolute and Florence cannot lay any claim on the entitlement of John. They referred to the decision in **Cephas Kihanya Nathan alias Peter Kefa Kihanya (Deceased) Succession Cause No. 122 of 2015**. The third issue was that there was no evidence that Jane was a daughter of John. The Protestors relied on **Sections 10 and 11** of the **Registration of Births and Deaths Act, Section 107** of the **Evidence Act, Cap. 80** of the Laws of Kenya and the decision in **In the Matter of the Estate of Samuel Maina Mbora alias Samuel Mbora (Deceased) Nyeri HCSC No. 301 of 2015**. The other issue was that since Grace did not object to the process towards the issuance of the Grant then he cannot now raise a red flag. **National Union Fire Insurance Co. v. Ehrlich, 122 Misc. 682 (N.Y. App. Div. 1924)** was cited in support. The other issue was on the illegality visited on the land. They submitted that the subdivision and subsequent sale of part of the land to the willing buyers contravened the law since Florence and Grace were neither spouses of the deceased nor did they act on the strength of a Court order. They prayed that the illegal transactions be revoked and those occupying the land

be evicted. The last issue was the validity of the oral will by Winnie. They submitted that despite Winnie making such a will before 2 witnesses the same was not taken into account by the Defendants.

28. On their part, Florence and Grace submitted that the applicable law is the Luo customary laws since the deceased died before **the LSA** became operational. They relied on the evidence of Omollo in contending that the Luo customs regarded Florence as the wife of John since no dowry was refunded despite the divorce decree. They further submitted that the customs settled Fred Akama, Innocent Okach and Mary Saida as children of John. They only differed with the customs on the position that a daughter cannot inherit from her parents. The decision in **Migori High Court Succession Cause No. 451 of 2014 In the Matter of the Estate of Nyacho Ojwando (deceased)** was referred to.

29. Florence and Grace also reminded this Court to take cognizance of the fact that Winnie did not share the benefits she collected from the University of Nairobi on behalf of John.

30. Jack submitted on the effect of **Section 2(2)** of the **LSA**. He argued that **Section 3(1)** of the **LSA** defined the term 'estate' to mean '*the free property of a deceased person*'. Relying on the definition of the term '*administration*' from **Black's Law Dictionary** Jack argued that customary law was only admissible to the extent that it relates to the estate of the deceased which is land but it did not relate to the administration of the estate. He further argued that the customary law was not applicable to the marital status of Florence and the status of the children in relation to their grandfather.

31. According to Jack the administration of the estate of the deceased was to be based on the **LSA**, the **Land Registered Act, Cap. 300** of the Laws of Kenya (repealed) and the **Interpretation and General Provisions Act, Cap. 2** of the Laws of Kenya. He variously referred to several provisions thereof. He also referred to the persuasive decision in **Re Estate of Odinga Adak (Deceased) (2019) eKLR.**

32. He proposed equal distribution of the land to the following beneficiaries: -

- (a) **Grace Atieno Okach**
- (b) **Emmanuel Okach**
- (c) **Joe Ngoje Okach**
- (d) **Fred Nyagado Okach**
- (e) **Tom Cliff Okach**
- (f) **Brian Okeyo Okach**
- (g) **Betty Magolo Okach**
- (h) **Annette Asigo Okach**
- (i) **Angela Odeka Okach**
- (j) **Jack Odera Okach**

33. He also pointed out that Florence had greatly interfered with the land. That, she had defaced it and sold part thereof and that she ought to be held answerable to the lawful beneficiaries.

Analysis and Determination:

34. Having carefully read and understood the parties' pleadings, evidence, submissions and the decisions relied on, the following issues arise for determination: -

- (a) The applicable law.
- (b) The beneficiaries to the estate of the deceased.
- (b) The distribution of the estate.
- (c) Costs.

35. I will deal with each of the issues separately.

(a) The applicable law:

36. This Cause relates to the estate of Boniface Okach. There is no obvious consensus on when the deceased died. On one hand, it is alleged that the deceased died on 15/06/1968 and on the other hand it is alleged that he died on 10/12/1970. Either way, the deceased died before **the**

LSA came into operation on 01/07/1981.

37. According to its preamble, **the LSA** is an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

38. Resulting from the enactment of **the LSA** 8 legislations were repealed. The legislations were the *Indian Succession Act of India* (Act X of 1865), *The Hindu Wills Act of India* (Act XXI of 1870), *The Probate and Administration Act of India* (Act V of 1881), *The Hindu Succession Act* (Cap. 158), *the Administration of Estates by Corporations Act* (Cap. 163), *the Commonwealth Probates Act*, (Cap. 166), *the Africans' Wills Act* (Cap. 169) and *the Colonial Probates Act 1892 of England* (as applied to Kenya). Several other legislations were also amended.

39. **Section 2** of **the LSA** provides for the application of **the LSA**. Relevant to this Cause are **sub-sections (1) and (2)** thereof. They provide as follows: -

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

40. On the basis of the foregone provisions Florence and Grace hold that the applicable law in this Cause is the Luo customary laws. Jack has a contrary view. He instead holds that **the LSA** is the applicable law and that the customs only relate to determining the free property of deceased persons and not the administration of those estates.

41. I have previously dealt with the interpretation of **Section 2** of **the LSA**. I still hold that position. In **Migori High Court Succession Appeal No. 24 of 2018 Benard Ouma Akama & 2 others vs. Jeremiah Odero & 2 others (2019) eKLR** I stated as follows: -

9. The date of commencement of the Act is 01/07/1981. The estate of the deceased herein is therefore not subject to the Act but to the customs and laws applicable to the deceased at the date of death. The distribution of the estate was to be done in accordance with such customs and laws. However, the administration of the estate could be undertaken in accordance with the Act.

42. Alike position was taken by *Mativo, J* in **Nyeri High Court Succession Cause No. 620 of 2012 In the matter of the Estate of Mwangi s/o Ngamba alias Mwangi Ngamba (Deceased) (2015) eKLR**. The learned Judge elaborately stated as follows: -

The scope of the Law of Succession Act (2) is stated in Section 2 thereof. For avoidance of doubt, the said section states as follows:-

“2(1) Except as otherwise expressly provided in thi Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The effect of Section 2(1) of the Law of Succession Act is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subjket of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.

Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V, and VI of the Law of Succession Act. The substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.

The second part of Section 2(2) of the Law of Succession Act states that the administration of the estate of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the Law of Succession Act. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedure set out in the Law of Succession Act. The said provisions in the Law of Succession Act governing procedures and process in administration of estates are to be found in Part VII. Part VII of the Law of Succession Act applies universally to the estates of persons dying either before or after the commencement of the Act.

It is not in dispute that the deceased person the subject of these proceedings died before the Law of Succession Act came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the Law of Succession Act - that is the written laws and customs in force as at the time of his death.

43. I therefore hold that the applicable law in this Cause in respect to the distribution of the estate of the deceased are the customs and the law at the time of the death of the deceased. However, the administration of the estate of the deceased must be carried out in accordance with **the LSA**.

44. Having held as such, I must also say that the applicability of the customs in this Cause is subject to **Article 2(4) of the Constitution**. The said provision states as follows: -

Any law, including customary law, which is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(b) The beneficiaries to the estate of the deceased:

45. There is no controversy to the fact that the deceased married and was blessed with 2 children. The children are John and Miriam Okach. The wife of the deceased also died.

46. Miriam Okach (hereinafter referred to as '**Miriam**') was allegedly married in Tanzania and since then her whereabouts are not known. Miriam therefore did not participate in these proceedings. Given the uncertainty on Miriam's whereabouts it can be safely deduced that the deceased was survived by John. According to the Luo customs as described by Omollo and DW1 John would be the sole beneficiary to the estate of the deceased even if Miriam was available.

47. It is on record that John died on 09/07/1988. According to the customs the beneficiaries of the estate would then be the male children of John.

48. This Court has also dealt with the aspect of the Luo customs which hold that daughters are not eligible to inherit from their parents. I discussed reiterated the following in **Migori High Court Succession Cause No. 451 of 2014 In the matter of the Estate of Nyacho Ojwando (2016) eKLR:**

11. In this cause the Petitioner holds that the Protestor, as a daughter to the deceased, is not entitled to inherit the property which comprises of the estate of the deceased on the ground that she is married. But upholding such a position will be tantamount to discrimination of the Protestor which in itself will be contrary to Article 27 of the Constitution which prohibits any form of discrimination based on race, sex, marital status or culture. Indeed, Article 27(3) of the Constitution specifically provides that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres'.

12. Section 29(a) of the Act in recognizing 'children' of the deceased as dependants does not classify those children as sons, daughters, married or unmarried. However, that distinction happens to be in the Luo Customary Law on inheritance. To that extent therefore the Luo Customary Law on inheritance discriminates between the male and female children of a deceased person and as such it is a retrogressive custom which cannot supersede the Constitution and the law. This Court hence concurs with the holding of Makhandia, J. (as he then was) in In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR at page 8 where he stated that:

'The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

13. I am in further agreement with Kimaru, J. when His Lordship addressed the alleged justification under the customary laws as to why married daughters ought not to inherit from their parents in the case of Peter Karumbi Keingati & 4 others vs. Dr. Ann Nyokabi Nguthi & 3 others (2014) eKLR in stating as follows:

'As regards to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.'

I say no more.

49. I am still of that position.

50. Apart from the foregone there were two other hotly contested issues. They are whether Florence was a wife of John and whether Grace, Jane, Fred Akama, Innocent Okach and Mary Saida were children of John.

51. I will first deal with the issue of Florence. It is not in doubt that Florence was married to John under Luo customs in 1960. They were blessed with children.

52. Sometimes in 1976 John filed *Nairobi District Magistrates Court Divorce Cause No. 2 of 1976 John Nyagado Okach vs. Florence Jadenya Okach*. I will refer to the matter a 'the Divorce Cause'. The Divorce Cause was determined *vide* a judgment rendered on 28/02/1977. The marriage was dissolved. There was no indication that there was any appeal against that decision. The decision therefore stands to date.

53. Regardless of the above legal position, a question arose on the interlink between the customs and the Court decree. The issue was the status of a wife married under the Luo customs but divorced in Court without a refund of the dowry. There were two opposing positions. According to DW1 the customs regard a Court decree as absolute and a Court decree would override the customs. To Omollo, a Court decree on divorce is ineffective under the customs until there was a refund of the dowry.

54. It is clear there was no consensus on the position of the customs on the issue. As such this Court finds it difficult to embrace either side. The Court of Appeal has severally held that a party who intends to rely on a custom must establish the existence of such a custom. (See Njoki -vs- Muteru (1985) KLR 874, Kimani Gituanja vs. Jane Njoki Gituanja (1983) eKLR, Joyce Atemo vs. Mary Ipali Imujaro (2003) eKLR among many others).

55. There were only two witnesses who testified on the customs. They were DW1 and Omollo. Given the divergent positions I find that the existence of a Luo custom on the status of a wife married under the customs but divorced in Court without a refund of the dowry was not proved. There is hence no basis for this Court to proceed further to consider the constitutionality of a non-established custom.

56. **Section 2(2) of the LSA** urges the Court to rely on the written laws and customs then in existence as at the death of a deceased person if the death was before the enactment of **the LSA**. I have already considered the limb of the customs above. I will now look at the written laws then in existence in 1968 or 1970 when the deceased allegedly died.

57. **The Judicature Act, Cap 8** of the Laws of Kenya comes to play. **Section 3** provides as follows: -

(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -

a) the Constitution;

b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part 1 of the Schedule to this Act, modified in accordance with Part II of that Schedule;

c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

58. On the basis of the above provisions once customary law is inapplicable then the recourse is for a Court to exercise jurisdiction under **Section 3(1)**. The resultant decision must bind the parties.

59. The Divorce Cause was a scenario where a party who married under customs sought divorce in Court. In such a case the Court issued a *decree-nisi* which became absolute. The effect of the decree was that it nullified every element of the customary marriage. There was nothing left to the customs.

60. It is of importance to clarify that even if the parties proved the existence of a custom which alleged supremacy over a Court decree still the Court decree would stand as against the custom. There are two reasons for such a finding. First, the parties had the opportunity of presenting their cases based on the customs before Court. Second, the parties are estopped from running away from the decree under **Section 120** of the **Evidence Act**. Having taken part in the Court proceedings, or failing to take part upon appropriate invitation, the parties cannot renege from the resultant decision. (See JMK vs. DMK (2013) eKLR).

61. The above analysis therefore settles the issue of Florence. On the sanctity of the decree in the Divorce Cause I find and hold that Florence was not a wife of John as from the date of the decree that is 28/02/1977. Therefore, the issue of Florence being a spouse thereafter does not arise.

62. I will now deal with the other limb as to whether Grace, Jane, Fred Akama, Innocent Okach and Mary Saida were children of John.

63. The judgment in the Divorce Cause found that Florence had a daughter whose father was not John at marriage. The judgment stands. I therefore have no difficulty in finding that Jane Okach is not a daughter of John. The judgement still found that the union between Florence and John brought forth three children. They were Ruth Akumu Okach, Grace Akinyi Okach and Emmanuel Okach. That settles the status of Ruth Akumu Okach and Emmanuel Okach as children of John. Ruth Akumu Okach however passed on.

64. There was a controversy on whether Grace Akinyi Okach was the same person as Grace Atieno Okach. Grace explained in her evidence how her name changed from Grace Akinyi Okach to Grace Atieno Okach on marriage. Jack readily accepted the position. Even though the Protectors opposed the explanation tendered by Grace I find the explanation both reasonable and truthful. This Court takes judicial notice under **Section 60(1)(o)** of the **Evidence Act** that a lady may opt to and change her maiden name to reflect that of the husband. I now find that Grace Akinyi Okach also known as Grace Atieno Okach a child of John.

65. The fact that Fred Akama, Innocent Okach and Mary Saida were born after Florence and John divorced is not disputed. Grace however contended that John used to visit Florence and her family in Ndhiwa and as a result John fathered Fred Akama, Innocent Okach and Mary Saida. Grace was a daughter of John. Florence chose not to testify.

66. The position taken by Grace is mind-boggling. The mother of those children who is Florence did not testify as such. There was no any evidence produced to link the three children to John. Florence did not see the need to at least tell the Court that she had relations with John even after the divorce and their post-divorce encounter yielded forth the three children. She further did not see the need to rebut the allegation that she was remarried to one Caleb Ongugo and that their union resulted into the three children.

67. In view of the judgment in the Divorce Cause and the absence of any evidence on the parentage of the three children, I am not persuaded that Fred Akama, Innocent Okach and Mary Saida were biological children of John.

68. In conclusion, the following children of John who are the grandchildren of the deceased are the beneficiaries to the estate of the deceased:

(a) **Grace Akinyi Okach also known as Grace Atieno Okach**

(b) **Emmanuel Nyagado Okach**

(c) **Joe Ngoje Okach**

(d) **Fred Nyagado Okach**

(e) **Tom Cliff Okach**

(f) **Brian Okeyo Okach**

(g) **Betty Magolo Okach**

(h) **Annette Asigo Okach**

(i) **Angela Odeka Okach**

(j) **Jack Odera Okach**

(c) The distribution of the estate: -

69. The estate of the deceased herein comprises of the land. None of the parties led evidence on how land was to be distributed under the Luo customs upon the demise of the owner. A lot of emphasis was led on the customs in respect to who would inherit upon the demise of the owner of a parcel of land.

70. That being the case I cannot interrogate the customs on how the land was to be distributed as none was proved to exist. The distribution will therefore be done under the guidance of the **Constitution**.

71. **Article 10** of the **Constitution** provides for national values and principles of governance. They include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination among others. The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

72. On the strength of **Article 10** of the **Constitution** I am of the view that equal distribution of the estate among the beneficiaries would be a

fair order. I am reminded that such a mode of distribution is also provided for in **Section 38 of the LSA**.

73. It was also brought to the Court's attention that part of the land was curved out and sold to willing buyers by Florence. It is also on record that Florence lives on the land and has since established a homestead.

74. Having found that Florence was not a wife of John at the time when John died and that she was remarried to Caleb Ongugo with whom they had three children then her stay on the land cannot be on the basis of her marriage to John. It may be possible that Florence is on the land courtesy of her children Grace and Emmanuel.

75. This Court has been called upon to declare the alleged purchasers as trespassers and to accordingly issue an eviction order. I have considered the issue and I am satisfied that the request transcends the jurisdiction of this Court by dint of **Article 165(5) of the Constitution, Section 13 of the Environment and Land Court Act**, No. 19 of 2011.

76. The Court has also been called upon to take into account the fact that Winnie solely received John's benefits from the University of Nairobi and the oral will by Winnie. My response thereto is that this Cause relates to the estate of the deceased and not the estate of John or Winnie.

77. I now find and hold that the parcel of land known as **Kamagambo/Kabuoro/416** shall be equally distributed to the 10 grandchildren of the deceased. As the land measures 8.6 Ha, each of the beneficiaries shall get a 0.86 Ha share. Jack further pointed out that the land had earlier been sub-divided and 10 titles issued. Grace was however not one of those who benefitted. Since Winnie was a beneficiary and she is now dead then her title can be transferred to Grace to avoid unnecessary costs.

(d) Costs:

78. In view of the nature and the background of this matter coupled with the fact that further costs shall be incurred in the implementation of this decision I find, and do hereby hold, that parties shall bear their own respective costs.

Conclusion:

79. As I come to an end of this judgment I thank the Counsels and the parties for their diligence in conducting this matter. This Cause had been in Court since 1996 and when it was eventually transferred to this station in 2017 it took around two years to be fully heard and a judgment rendered.

80. Finally, the following orders do hereby issue: -

(a) The joint grant issued on 20/11/2018 is hereby confirmed.

(b) The parcel of land known as Kamagambo/Kabuoro/416 shall equally devolve to the 10 grandchildren of the deceased named in paragraph 68 of this judgment.

(c) Since the land was already sub-divided and titles issued then the sub-divisions and titles shall remain valid except the portion known as Kamagambo/Kabuoro/6919 which was registered in the name of Winnie Wangoma which shall be transferred to Grace Atieno Okach.

(d) Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of February, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Protestors in persons.

Mr. Okoth Counsel instructed by the firm of Messrs. G.S. Okoth & Company Advocates for the Third Defendant.

Mr. Awino Counsel instructed by the firm of Messrs. Odondi Awino & Company Advocates for the First and Second Defendants.

Evelyne Nyauke - Court Assistant