REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO 2114 OF 2013

IN THE MATTER OF THE ESTATE OF DAVID MWANGI MWARANGU (DECEASED)

JUDGMENT

1. Dorcas Wanjiru Mwangi, the administrator herein, to be referred to hereafter as such, initiated this cause, vide a petition for letters of administration dated 22nd August 2013, seeking to be granted letters of administration intestate to administer the estate of the deceased. Jecinta Hito Grishon, hereinafter the 1st objector, on her part objected to the administrator's petition vide an answer to petition and a cross-application for grant of letters of administration dated 24th March 2017. Joycefine Wambui, hereinafter referred to as the 2nd objector, similarly filed an objection to the administrator's application vide an application for reasonable provision dated 12th February 2016 and a cross-application for grant of letters of administration intestate dated 21st February 2017. Mary Wamaitha Mwangi, hereafter referred to as the 3rd objector, on her part, also objected to the petition and filed an answer to petition and a cross-application for grant of letters of administration, dated 18th January 2018.

2. The administrator's case, as set out in her petition, is that she was the widow of the deceased, and thus she was entitled to and reserved the right to administer the deceased's estate. She listed the following as the beneficiaries to the estate of the deceased, that is to say Dorcas Wanjiru Mwangi, Serah Martha Wanjiku Mwarangu, Gladys Wanjiru Mwarangu, Nancy Wanjiru Mwarangu, Loise Wangari Mwarangu and Mary Wamaitha Mwangi. She states that the 1st objector was not a wife of the deceased and therefore she was not a beneficiary to the estate of the deceased. She relies on the decision of this court in Nairobi High Court P & A Cause No 94 of 2014, being an appeal from Kikuyu SPMCC Civil Suit No 207 of 2013, where the court had established that the 1st objector was not a wife of the deceased. She further stated that the 2nd objector was a sister to the deceased, and that she was not dependent on the deceased during his lifetime thus she could not be a beneficiary of the estate. Regarding the 3rd objector, she conceded, that she was indeed a daughter of the deceased. She stated that the 3rd objector was a beneficiary of the estate of the deceased, however she stated that the 3rd objector did not have to be a co-administrator as she, the administrator, would still cater for her interests just like the other beneficiaries.

3. The 1st objector's case is that she was the wife of the deceased and thus entitled not only to benefit from the estate but to also administer the same. She states that she was cohabiting with the deceased before his death, a fact that was well known to the administrator. She states that she had had one child with the deceased, known as Mary Wamaitha Mwangi, the 3rd objector herein, and that the deceased had taken her in with her son from a previous marriage, one Gerishon Njoroge and was taking care of him as his own. The 1st objector takes the view that she, the 3rd objector and Gerishon Njoroge, are entitled to the estate as beneficiaries and that she and the 3rd objector are well suited to be administrators of the estate of the deceased. She disputes the 2nd objector's claim that she was a beneficiary stating the 2nd objector was a sister to the deceased, and that she was a financially independent woman who was not dependent on the deceased.

4. The case for the 2nd objector is that she was a child of the deceased and thus she ought to be recognized as a beneficiary. She states that though she is a sister to the deceased, and that the deceased and the administrator had taken her in as their child and were taking care of her as such. She states that the deceased had made her a manager over some of his properties and that he allowed her to take money out of the rent she collected for her own personal needs. She acted as the deceased's estate agent without any pay as she was simply following her father's wishes. She further states that she was best suited to administer the estate as she was the only one who was aware of all the properties that the deceased had. She further states that she had been granted the powers by court to manage the estate through a consent dated 3rd October 2013.

5. The 3rd objector reiterated the position stated by the 1st objector, that she was the daughter of the deceased, and that the 1st objector, her mother, was a wife of the deceased. She states that the deceased had taken care of her and her brother as though he was his biological son and thus he was entitled to benefit from the state.

6. On the 10th May 2017, parties herein agreed on the following issues for determination:

a. Who the beneficiaries of the estate of the deceased are?

b. Who should be appointed the administrator(s) of the estate of the deceased?

d. Who the dependants of the deceased are and what provisions should be made to them?

d. Who the beneficiaries of the estate of the deceased are?

7. In her petition, the administrator lists Dorcas Wanjiru Mwangi, Serah Martha Wanjiku Mwarangu, Gladys Wanjiru Mwarangu, Nancy Wanjiru Mwarangu, Loise Wangari Mwarangu and Mary Wamaitha Mwangi as the survivors of the deceased. The list was not disputed by the other parties. The issue instead was that the other parties were also members of the deceased's immediate family and ought to be recognized as his survivors in intestacy.

8. The 1st objector claims that she was a wife to the deceased and as such she was a beneficiary. That claim is disputed by the administrator. In her oral evidence the administrator stated that she knew the 1st objector had had a child with the deceased, she however denied that he had married her and was cohabiting with her before his death. She made reference to previous proceedings and court determinations that had held that the 1st objector had not proved that she was a wife to the deceased. The objector had stated, on her part, that she was a second wife to the deceased, and called witnesses who stated the same. In her evidence, she alluded that there was a presumption of marriage between her and the deceased as her mother-in-law had recognized their marriage in previous proceedings. She also produced as evidence rent deposit slips that indicated that the deceased paid her house rent. She made no reference to either a civil or a customary marriage between her and the deceased, rather she testified that her cohabitation with the deceased was such that a court could presume marriage from the circumstances.

9. The circumstances under which a court could presume a marriage from cohabitation were addressed by the former Court of Appeal for Eastern Africa in *Hortensiah Wanjiku Yawe vs. The Public Trustee* Court of Appeal Civil Appeal 13 of 1976, where the court stated the applicable principles to be as follows -

a. The onus of proving customary law marriage is generally on the party who claims it;

b. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities';

c. Evidence as to the formalities required for a customary law marriage must be proved to that standard;

d. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

e. Only cogent evidence to the contrary can rebut the presumption; and

f. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.

10. The Court of Appeal in the case of *Phylis Njoki Karanja & 2 Others vs. Rosemary Mueni Karanja & another* [2009] eKLR stated that -

> 'Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.'

11. The same was emphasized in *Anastasia Mumbi Kibunja & 4 Others vs. Njihia Mucina* [2013] eKLR where court stated that "… having children and naming them after some man's relatives is not itself proof of marriage of any sort." Nyarangi JA in *Mary Njoki vs. John Kinyanjui Mutheru* [1985] eKLR stated that -

> '… in my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.'

12. In *Eva Naima Kaaka & Another vs. Tabitha Waithera Mararo* [2018] eKLR, the Court of appeal defined acts of general repute that would give rise to a presumption of marriage as follows –

> '… Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist… No evidence was led to demonstrate that Waithera and the deceased shared activities typical of married couples, and supportive of long cohabitation and that would give rise to acts of general repute. No family photographs, gifts or other memorabilia were produced as evidence, and there was no witness evidence from persons who might have regularly come into contact with the deceased and Waithera during the alleged period of cohabitation.'

13. The 1st objector stated that she was the wife of the deceased. Apart from stating that they were married, she did not offer any evidence that would allude to the fact that they were indeed staying together as a married couple. From the evidence given by the administrator she only knew her as a woman who had a child for the deceased. It was also the evidence of the 2nd objector that she only knew of the 1st and 3rd objectors. It is not clear how the 2nd objector who described her relationship with the deceased as being so close never knew of his second wife. The witnesses who testified on the 1st objector's behalf were her relatives; no independent witness was called to give evidence on the presumption of marriage. As stated in the foretasted authorities, the fact that the 1st objector had a child with the deceased does not allude marriage. In as much as the 1st objector alleged that she was in continuous cohabitation with the deceased until his death, she did not produce any evidence to support that assertion. The rent payment receipts produced in an effort to support that claim were dated four years before the death of the deceased, and thus they did not establish neither the presumption of marriage nor continuous cohabitation.

14. Be it as it may, it should be noted that the issue as to whether the 1st objector was a wife to the deceased was in issue in the burial dispute case between the parties herein in Nairobi HCCA No. 94 of 2014, being an appeal from Kikuyu SPMCCC No. of 2013**.** In Kikuyu SPMCCC No. 207 of 2013 the court held that -

> '**…** the 2nd Plaintiff (the 1st objector herein) has not proved on a balance of probabilities and for the proposes of the present proceedings that a marriage ought to be presumed between her and the deceased.'

15. The said holding was upheld on appeal in Nairobi HCCA No. 94 of 2014, where court stated that –

> '**…** *I have gone through the record, and I am satisfied that a marriage between the defendant* (the administrator herein) *and the deceased was rightfully presumed by the trial court on the basis of long cohabitation. The appellant* (the 1st Objector herein) on the other hand did not establish any custom, habit or repute that could accord her a position of legitimacy in relation to the family life of the deceased. Besides the fact that she met the deceased in 1980 and they had a child together, they do not appear to have cohabited continuously together nor was she introduced to the 1st family as part of the deceased's family.'

16. The administrator and the 2nd objector dispute the 1st and 3rd objectors' allegation that the 1st objector was a wife of the deceased. They rely on the findings in the burial dispute and state that the issue was already determined and the fact that there was no pending appeal on the same meant that the findings of the two courts in the burial dispute ought to be adopted by the court with respect to the instant proceedings. The 1st objector on her part contends that the findings in the burial dispute have no value to these proceedings. It is her submission that this court ought to make a determination of the same and ignore the findings in the burial dispute. She urges that the same are judicial opinions that were made *obiter dictum* and thus they are not binding. It was further her opinion that the said proceedings could not be adopted in this cause. She relied on the decision in *In the Estate of Gedion Kitivo Ndambuki* (2014) eKLR.

17. In *Re the Estate of Margaret Muringi Muhoro – (Deceased),* this court adopted a judgment delivered in a burial dispute on the basis that the decision was judgement of a court of law and that the decree had not been appealed. In Kikuyu SPMCCC No. 207 of 2013 the trial court made a determination that the 1st objector herein was not a wife of the deceased. The same was upheld in the appeal to the High Court. These are judicial decisions which cannot be regarded as mere judicial opinions as urged by the 1st objector. The issue as to whether the 1st objector was a wife of the deceased was determined in the burial dispute and it is thus water under the bridge.

18. In determining who should be appointed as an administrator of an estate of a deceased person, the courts are guided by the provisions of Section 66 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows –

> '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 in Part V;
>
> *(*c) the Public Trustee; and
>
> (d) creditors.'

19. In In Re the Estate of Margaret Muringi Muhoro – (Deceased) this court observed that **–**

> 'The provisions of Section 66 of Act make the right of the children to administer the estate of their departed parents secondary to that of the surviving spouse of the deceased. The rights of other relatives rank even lower. However, the provision in Section 66 of the Act is not mandatory. The court is not bound by the order of preference set out in that provision. There is discretion, the court can overlook those with prior right and pick on a person lower down in the order of preference.'

20. The same was reiterated In Re Estate George Ragui Karanja (Deceased) [2016] eKLR where this court was of the view that -

> 'The order of preference set out in section 66 of the Law of Succession Act is not binding to the court. It is discretionary. Section 66 refers to it as 'a general guide.' The court can appoint administrators without following the order of preference. Priority is given to

surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the Act, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.'

21. In In Re Estate of Gamaliel Otieno Onyiego (Deceased) [2018] eKLR the court observed that -

> 'Section 66 of the Law of Succession Act, provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section .'

22. In the case of *Wangari Kimari & Another vs. Samuel Gitere Kimari* [1988] eKLR the Court of Appeal in upholding the decision of the High Court stated that -

> 'The learned judge in our view correctly construed the phraseology of section 66 and its setting in the family of this deceased person. He noted correctly that section 66 gave him a final discretion to decide to whom letters of administration should ultimately be granted. But he also directed himself that the decision would have to be in the best interest of all concerned. He also noted that the section suggested certain preferences by way of guidance; and set out section 66(a) of the Act. There is no doubt that the purpose of that section was to place the widow in a stronger position than she had enjoyed in customary law. But the preference is not necessarily final. In this case it was found that the widow was a suitable person to undertake the duties of an administrator.'

23. In the case of Teresa Wangui Ngara vs. Kiama Gathuri Ngara & Another [2016] eKLR the court stated that -

> 'The order of preference is provided for under section 66 cited above. Under section 66, the court has a final discretion as to the person or persons to whom a grant in the best interests of all concerned shall be made, but the guiding principle is the order of preference provided in the said section and top on the list is the surviving spouse or spouses with or without association of the other beneficiaries.'

24. From the aforesaid authorities it is clear that when determining who should be administrator of an estate, the court in as much as it should adhere to the provisions of section 66 of the Law of Succession Act, should consider the facts of the case and determine the same in the interests of justice.

25. In the instant case, the administrator states that she is the rightful administrator by virtue of being the wife to the deceased. She relies on *Re the Estate of Efstratios Meimarids Phaedon (Deceased),* where the court was of the view that the widow has the priority to apply for the letters of administration. It should, however, be noted that the circumstances of that case were with regard to minors and thus cannot be compared to the cause herein. The 1st objector on her part argues that she should be made a co-administrator with the administrator so that the interests of her children can be catered for. The 2nd objector similarly wants to be an administrator so that she can secure her interests. From the fore stated authorities it is clear that court reserves the discretion to appoint an administrator despite the rank prescribed under section 66 of the Law of Succession Act.

26. The administrator herein states that by virtue of the fact that she was the wife of the deceased she had priority to be the administrator. In *Yunes Kerubo Oruta & Another vs. George Kombo Oruta & Another* [2015] eKLR the court observed that -

> '... Therefore in as much as the 1st administrator is right in stating that as the wife of deceased she has a priority in administering the deceased's estate as opposed to the objectors who are children of the deceased, such a right is not unfettered as the final decision on who should administer the estate of the deceased still lies in the sole discretion of this court as to whether or not the widow is capable of administering the estate of the deceased.'

27. The administrator herein has listed several other beneficiaries who have consented to her being the administrator of the estate of the deceased, the objectors herein have no objection too to having her appointed as an administrator. So far no issues have been raised as to her ability to administer the estate and therefore she is suited for appointment as one of the administrators of the estate herein. The 1st objector herein, as earlier established, was not a spouse to the deceased as she alleged. However, she wishes to be appointed an administrator so that she can protect the interests of the 3rd objector and her son. This position is objected to by the administrator and the 2nd objector who deem her to be a stranger to the estate. From the evidence given, it is clear that the 1st objector does not enjoy a good relationship with the administrator herein.

28. In Tabitha Wanjiku Mwangi vs. Anne Muthoni Njuguna & 4 Others [2016] eKLR the court observed that –

> '... the Court has final discretion to appoint administrator(s) but it should be in the best interests of all concerned. The Court must exercise judicial discretion based on law and pertinent facts…What this Court has discerned is that, the Objectors and Administrator's family are not on talking terms as deposed in the Objectors' further submissions of 25th May, 2015.To appoint the 1st Objector as a Co-administrator with the Administrator of the deceased's estate in the present circumstances is a recipe for disaster.'

29. The administrator herein denies the 1st objector's allegation that she was a wife to the deceased. As earlier stated that issue has been determined. owing to the past history between the two it would not be prudent for them to be appointed co-administrators. on the basis of the

authority cited above, that being a stranger to the estate and owing to her relationship with the administrator, the 1st objector should not be appointed an administrator as it will further delay the cause.

30. Regarding the 2nd objector, it should be noted that during his lifetime, the deceased worked with the 2nd objector in the acquisition and management of most of his estate. From the pleadings, it is clear that the 2nd objector knows a lot more about the estate of the deceased than the administrator. She has disclosed several properties that the administrator was not aware of and is in the meantime in charge of managing some of them. It is my opinion that the estate would be best administered with her on board as a co-administrator.

31. The 3rd objector also wishes to be an administrator so that she can safeguard her interests in the estate. In her testimony and submissions, the administrator acknowledges her as a daughter to the deceased. It is thus clear that like all the other children of the deceased her interests can be well taken care of without necessarily having her made an administrator of the estate. It should be noted that as a beneficiary, she has many options under the law to ensure that her interests are protected.

32. It is the 1st objector's case that when she met the deceased she already had a son from a previous relationship, and the deceased took up the said son as his own and took care of him. She stated that the deceased regarded the son as his own and catered for his education and other expenses just like he did for his daughter, the 3rd objector. It is thus the 1st objector's position that her son, Gerishon Njoroge, was the deceased's dependant and thus entitled to a provision. The 2nd objector also states that she was the deceased child and thus dependent on him. In her evidence, she stated that she was brought up by the deceased and the administrator herein since she was two years old. She states that the deceased and the administrator took her in as a daughter despite being the deceased's younger sister. She states that the deceased had entrusted her to manage some of his estates and he would cater for her needs and those of her children.

33. Both the 1st objector and the 2nd objector seek provision pursuant to the provisions of Section 26 of the Law of Succession Act provides as follows:

> 'Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.'

34. The term 'dependant' is defined in Section 29 of the Law of Succession Act in the following terms -

> 'For the purposes of this Part, "dependant" means—
>
> a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.'

35. Section 27 of the Law of Succession Act provides that:

> 'In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.'

36. In determining an application under section 26 of the Law of Succession Act the court is obliged to consider the factors set out in section 28 of the Act, which provision states as follows:

> 'In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—
>
> a. the nature and amount of the deceased's property;
>
> b. any past, present or future capital or income from any source of the dependant;
>
> c. the existing and future means and needs of the dependant;
>
> d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;
>
> e. the conduct of the dependant in relation to the deceased;

f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.'

37. In Sarah Kanini Thigunku vs. Elizaphan Njuki Thigunku [2016] eKLR the court observed that -

'For one to be a dependant, however, under Section 29 aforesaid, it is clear that one must prove dependency. The use of the words "…as being maintained by the deceased immediately prior to his death..." in that Section, connotes that one must prove that he was dependent on the deceased before his demise…A mere relationship does not automatically qualify one to be a dependant under Section 29 of the Act. Prove of dependency is imperative.'

38. In *RNM vs. RMN* [2017] eKLR the court stated that -

'Proof of dependency is thus a condition precedent to the exercise of the discretion in section 29(b) cited hereinabove. In addition, while considering the meaning of a dependant under section 29 of the Act, the court held as follows in the case of Beatrice Ciamutua Rugamba vs. Fredrick Nkari Mutegi & Others, Chuka Succ. Cause No. 12 of 2016: -

"From the foregoing, a dependant under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

I note in this regard that the Applicant did in her affidavits admit that the subject children were not the Deceased's biological children, and did not provide any additional evidence of how the Deceased maintained the children, and the responsibility he undertook with respect to the said children. This Court cannot in the circumstances make any conclusive findings as to the said children's dependency on the Deceased at this stage.'

39. The need to prove dependency was stated by the Court of Appeal in *EMM vs. IGM & Another* [2014] eKLR, and later reiterated in *Ngengi Muigai & Another vs. Peter Nyoike Muigai & 4 Others* [2018] eKLR where the court stated that -

'…So that, a child as defined under section 3 (2) of LSA, that is to say, a biological child as well as any child whom a man "has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility" shall be an automatic dependant under section 29 (a). Mugo, whom we have found to have been a biological son, although the deceased had not expressly recognized him as such, would be entitled to automatic provision of reasonable dependency provision. Nyoike, on the other hand, would also be entitled to reasonable dependency provision if he could prove that the deceased had taken him into the family as his own child and was maintaining him immediately prior to his death.'

40. The test for dependency was considered in the case of *In Re Joshua Orwa Ojodeh (Deceased)* (2014) eKLR where the court stated that "…Ideally before the court can exercise discretion under section 26 of the Act, it must be established that the applicant was dependent on the deceased immediately prior to the deceased's demise."

41. It is the 1st objector's case that the deceased had taken Gerishon Njoroge as one of his children. In her submissions she stated that he was under his care. She did not produce anything to show that the deceased was maintaining the said Gerishon before his death. It should also be noted that the said Gerishon did not testify or give an account of his dependency to the estate. It is my finding that Gerishon Njoroge has not been proven to have had been taken care of by the deceased immediately prior to his death and therefore he was not a dependant of the deceased.

42. In her application for provision under Section 26 of the Law of Succession Act, the 2nd objector sought provision as a dependant. It was the 2nd objector's evidence that the deceased catered for her upkeep before his death. She stated that the deceased took her in when she was young and took care of her as his own child. She stated that prior to his death the deceased used to pay her children's school fees and cater for her upkeep from the proceeds of his rental houses. She gave an account of how she would collect rent and maintain the deceased's rental houses and he would advance to her money for her upkeep and that of her children. She stated that although she was a trained hairdresser, she had no source of income and was wholly dependent on the deceased. it should be noted that the 2nd objector was 42 years old at the time of the deceased's death. It should also be noted that vide consent dated 19th December 2014 the 2nd objector was paid Kshs. 2, 000, 000.00 for maintenance. The 2nd objector seeks a monthly provision of Kshs 150,000.00 from the estate for her upkeep and maintenance. From her evidence, it is clear that the 2nd objector was raised up by the deceased a fact that the administrator did not dispute. The 2nd objector also established that she was managing and taking care of some of the deceased's assets and that he would cater for her needs in turn. It is my finding that the 2nd objector sufficiently proved that she was a dependant, maintained and taken care of by the deceased immediately prior to his death.

43. Having established that the 2nd objector is a dependant, what is she entitled to from the estate? The court in *Ulda Aloo Ojodeh vs. Mary Awuor Ojodeh* [2015] eKLR adopted the findings of *Re Estate of Ashford Njuguna Nduni (deceased)* HC Succession Cause No. 1589 of 1994, where the court had stated as follows: -

'A dependant coming under section 26 of Chapter 160 is not in the same standing as a beneficiary under a will or an heir under the Law. This court will not order reasonable provision that exceeds the present and future needs of the dependant, notwithstanding how rich the estate might be.'

44. In Beatrice Adhiambo Sijenyi vs. Josephine Kapukha Khisa & 2 Others [2018] eKLR the Court of Appeal stated that:

> 'We take the view that a dependant's position under section 26 of the Law of Succession Act is not exactly the same as that of a beneficiary. A dependant has no automatic entitlement to the deceased's property, but has merely a right to a provision from the estate so that he/she is not rendered destitute by the death of the deceased who has been the provider. A dependant cannot therefore claim equal rights with the beneficiary in the distribution of the estate but is only entitled to reasonable provision from the estate, determined in accordance with the court's discretion. That discretion must of course be exercised judicially taking into account factors such as the extent of the estate, the age and needs of the dependent, and balancing this against the interest of the beneficiaries.'

45. It is the 2nd objector's case that she was wholly dependent on the deceased. She established that she lived in a house given to her by the deceased and, despite having training in hairdressing, she had given up her career path to take care and manage the deceased's rental houses. In her testimony she stated that the money that was given to her by the deceased was used for her upkeep and that of her children. She also stated that the deceased used to pay school fees for her children now aged twenty-four and nineteen. She prays for a monthly provision of Kshs 150,000.00 from the estate. During cross-examination, she stated that she had a salon business that closed up in 2012. She also stated that apart from collecting rent for the deceased she also freelances on commission. she stated that the deceased used to cater for her needs as follows: -

a. Shopping Kshs 50,000.00;

b. Electricity, telephone bills and other expenses Kshs 20,000.00;

c. Clothing and other related expenses Kshs 50000.00;

d. Arnold Wanjohi Mwaura School Fees and relate uses Kshs 18,500.00;

e. Arnold Wanjohi Mwaura School Fees and relate uses Kshs 18,500.00; and

f. Kelvin Nyaga Mwaura School fees Kshs 15,000.00.

46. In her oral testimony she stated that she lived in one of the deceased's rental units at Umoja Innercore Plot A118 given to her during the deceased lifetime to reside in. She also stated that the deceased had allocated to her a shop at a residential building in Tassia Plot A/158 to try and revive her hairdressing business. It must be noted that as stated in *Re Estate of Ashford Njuguna Nduri (deceased)* (supra), the provision made to a dependant must be reasonable. From all indications, the 2nd objector is capable of taking care of herself owing to her age and that of her children. The sums advanced by her are not justified. She cannot be living on shopping and clothing worth Kshs. 100,000.00 at the expense of the estate.

47. The law requires the court to consider any gifts advanced to the dependant by the deceased during his lifetime. There is insufficient evidence that the deceased made any *inter vivos* gifts to the 2nd objector, but it would appear that he had allowed her to reside in one of his houses and to run a business from one of his shops, that is to say one of the units in Umoja Innercore Plot A118 and the shop at a residential building in Tassia Plot A/158 from the estate. With regard to a monthly provision. It should be noted that the 2nd objector had been managing the rental units of the deceased. During cross-examination, she was unable to account for the petty cash and expenses that were drawn from the rent collected. She has also advanced herself Kshs 5, 000.00 under the title of 'food' from each unit collected amounting to Kshs 25,000.00 monthly. In cross-examination, she stated that she had advanced the same to herself as payment or salary for her services. This reflects a lot on her conduct as she illegally advanced money to herself from the estate.

48. She also claims that the deceased used to pay school fees for her children and claims a monthly allocation of Kshs 52,000.00 for the same. It must be noted that during her testimony she did not produce any fee structures that proved the amounts. It should also be noted that the father of the said children was said to be alive and was supposed to cater for their upbringing, and to burden the estate with such an expense would be an injustice. Her witness stated that the deceased paid for her school fees and that of her other siblings. She stated that the deceased had taken the 2nd objector for a hairdressing course which she had completed and had the skills to operate a salon business. She further stated that it was the deceased's wish that the 2nd objector would be financially independent. She also stated that she had assisted the 2nd objector pay school fees for her children and that the 2nd objector was married to one James Mwaura. In my view, the amount of maintenance sought by the 2nd objector is unreasonable in the circumstances. In a prior court order herein, the 2nd objector was advanced Kshs 1,000,000.00 by consent for her upkeep and payment of school fees. In my view that amount was sufficient provision for the 2nd objector.

49. In view of everything that I have said above, I shall make the following final orders: -

a. That I hereby declare that the deceased was survived the following as beneficiaries: Dorcas Wanjiru Mwangi, Serah Martha Wanjiku Mwarangu, Gladys Wanjiru Mwarangu, Nancy Wanjiru Mwarangu, Loise Wangari Mwarangu and Mary Wamaitha Mwangi;

b. That I declare that the 1st objector was not a wife of the deceased and she is consequently not entitled to a share in his estate;

c. That I declared that the 2nd objector was a dependant of the deceased and is entitled to, and I hereby allocate to her, the following provision -

i. the one unit she occupies in Umoja Innercore Plot A118, and

ii. the shop at a residential building in Tassia Plot A/158;

d. That I declare Gerishon Njoroge was not a dependant of the deceased and is consequently not entitled to provision from the estate;

e. That I confirm Dorcas Wanjiru Mwangi as administrator of the estate of the deceased;

f. That the administrator shall move with due dispatch and apply for confirmation of her grant at which she shall provide for the 2nd objector in the manner stated in (c) above;

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders that I have made herein shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days of the date hereof.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 11th DAY OF APRIL, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 3rd DAY OF May, 2019

A. ONGERI

JUDGE