REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

HCFPA NO. 4 OF 2022

IN THE MATTER OF THE ESTATE OF GILLIAN ANYANGO RICHARD (DECEASED)

MARY OLLYV ADHIAMBO ORACHA…………………1ST APPLICANT

ERIC ONYANGO TOM …………………………………..2ND APPLICANT

SILAS OCHIENG OKOMBO……………………………..3RD APPLICANT

VERSUS

JONATHAN OGUTU OMONDI………………………1ST RESPONDENT

ANDREW OCHIENG OMONDI………………………2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. R. Odenyo (SPM) delivered on 27th October 2022 in Eldoret CM Succession Cause No. E092 of 2021)

JUDGEMENT

1. What is pending before this court is an appeal against the ruling of the trial court in Eldoret Succession Cause No. E092 of 2021 which was delivered on 27th October 2022. The Appellant had sought the following orders;

   1) That the Letters of Administration of the late Gillian Anyango Richards granted to Jonathan Ogutu Omondi and Andrew Ochieng Omondi both of P. O Box 4338-30100-Eldoret arising from Kenya Gazette Issued on 26th October 2021 be revoked and or set aside.

2) **That subsequent to prayer one (1) above, fresh Letters of Administration in respect of the estate of the late Gillian Anyango Richards be granted to Mary Ollyv Adhiambo Oracha and Eric Onyango Tom and Silas Ochieng Okombo.**

3) **That the costs of this application be provided for.**

2. The application was premised on the grounds on the face of it and the averments in the annexed affidavit of Mary Ollyv Adhiambo Oracha, Eric Onyango Tom and Silas Ochieng Okombo.

3. They contended that the deceased was a blood sister to the 1st and 2nd Objectors and an aunt to the 3rd Objector. Further, that the deceased died on 27/7/2020 while under the care of the 1st Objector at Eldoret Hospital and that she was born in a family of Ten (10) children. Six of whom are now deceased. The surviving ones were; a) Wycliffe Makasembo-brother b) Mary Ollyv Adhiambo Oracha-sister. c) Susan Griffith-sister d) Eric Onyango Tom-brother and e) Silas Ochieng Okombo-nephew to the deceased who was adopted from childhood.

4. She listed the assets of the estate of the deceased and urged that the grant was issued on misrepresentation of material facts to the effect that the Respondents were children of the deceased, an act they knew to be wrong and contrary to the law. Further, that the deceased died intestate and had no children during her lifetime. That the Respondents were not children of the deceased and urged that the Grant should be revoked.

5. In response to the application, the respondents filed a replying affidavit sworn jointly on 20th April 2022. They deponed that their late biological mother died in the year 1992 when they were only 6 years old and that at the

time, they were living in Asembo, Bondo Sub County in Siaya County. That their father was by then an employee of Kenya Pipeline in Eldoret. Upon the death of their mother, their father took them to live with him in Eldoret and in the year 1993, the late Gillian Anyango who was then a resident of Eldoret, moved into their house at Bondeni estate within Eldoret town and that is when she began to live with their father, the late Daniel Omondi Ochieng as his wife.

6. They stated that their father secured a plot at Kapsoya estate and built a house thereon and that this is where they lived together, until their father passed on, in the year 2009. They continued living with their mother until she also passed on in the year 2020. They denied petitioning the court and distributing the estate of their late father to the exclusion of the deceased Gillian Anyango during her life time and further stated that she was one of the Administrators of the estate as appears on the court documents.

7. They stated that Gillian Anyango took part fully in the Succession of their late father's estate and benefited immensely. They urged that the Objectors/Applicants herein have no right whatsoever over the estate of the late Gillian Anyango because she left behind children whom she took up as hers and nurtured accordingly. They urged the court dismiss the application with costs.

8. The matter was set down for hearing on 14th February 2022 and it was agreed that it be canvassed by way of written submissions. The parties then filed submissions and vide the ruling dated 20th October 2022, the trial court dismissed the application. The court found that for purposes of the Act, a step child is deemed to be a child of an intestate and thus the Respondents ranked higher in priority than the Objectors. The court then dismissed the Summons for Revocation of Grant.

9. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide a memorandum of Appeal dated 7th November 2022 premised on the following grounds;

1) **The learned magistrate erred in law and fact in finding and holding that the Respondents are children of the deceased for purposes of the Law of Succession Act.**

2) **The learned magistrate erred in law and fact in finding and holding that the Respondents rank higher than the Appellants, for purposes of succession, merely because they are step sons of the deceased.**

3) **The learned magistrate erred in law and fact by failing to properly interpret and apply section 39 of the Law of Succession Act and further erred when he held that For the purposes of the act, a step child is deemed to be a child of an interstate, without disclosing or citing the relevant provision of the Law of Succession Act on which he grounded such finding or decision.**

4) **The learned magistrate erred in law and fact In dismissing the Appellants' objection in totality and the learned Magistrate further erred when he failed to find and hold that the impugned petition did not comply with the mandatory provisions of Section 51(g) of the Law of Succession Act for excluding the Appellants, who are the Sister and Nephews of the deceased, from either administration or as beneficiaries of the deceased's estate.**

Appellant's submissions

10. The appellant laid down a brief background of the suit in the trial court and proceeded to submit on the issues for determination. Counsel urged that the trial Magistrate erred in finding and holding that the Respondents are children of the deceased for purposes of the Law of Succession Act. This finding was contrary to the clear provisions of the law, especially Sections 3 and 29 of the Law of Succession Act. He cited the case of Isaiah Gichimu Waweru vs Elijah Nganga Waweru [2015] eKLR and urged that it conclusively addresses the question of whether the Respondents herein, who were step-children of the deceased, can be deemed to be children of the deceased for purposes of succession. The answer, as explicitly stated, in the decision, is a clear no.

11. Further, and as already stated in the decision cited above, Section 3(3) of the Law of Succession Act does not provide for the recognition of a step-child who is merely taken in or cared for by a deceased female as a child of such deceased female. Accordingly, the Respondents' claim that the deceased took them in and recognized them as her own children and that they are therefore sons or children of the deceased for purposes of succession is clearly untenable in law.

12. Counsel urged that the Respondents' claim to be dependants of the deceased is equally unsustainable in view of the fact that the deceased married the Respondents' father in the year 2005. By that time, the Respondents were already adults, making it inconceivable that the deceased could have assumed responsibility for their care or maintenance. The Respondents therefore do not qualify as dependents of the deceased under the law and

they lacked the legal right to apply for letters of administration of the deceased's estate.

13. Counsel urged that Section 29 (a) and (b) of the Law of Succession Act does not support the Respondents' claim because this section only applies to males who die intestate and not females. Only Section 29 (c) applies to females who die intestate and it only recognizes as a dependants husband who was being maintained by his spouse immediately prior to the date of her death. He reiterated that the trial court erred in finding that a step child is deemed to be a child of an intestate.

14. Counsel submitted that the learned magistrate erred in finding that the Respondents rank higher than the Appellants for purposes of succession merely because they are step-children of the deceased. He cited Section 39 of the Law of Succession Act and cited the case of In re Estate of Jedida Wambui Njoroge (Deceased) [2022] eKLR where the court addressed the question of whether a step-son or siblings of a deceased person hold a higher priority in the issuance of letters of administration.

15. Counsel urged that Rule 7(7) of the Probate and Administration rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater propriety or get that person to renounce their right to administration He urged that the effect of the provision is that a person applying for administration must get consent from persons of equal or higher priority than him. He placed reliance on the case of Anthony Karukenya Njeru vs Thomas M. Njeru (2014) eKLR. He stated that the respondents do not deny obtaining the grant without consent and no evidence has been produced to show that the appellants renounced their right to apply for the grant of letters of administration. He prayed the court allow

the appeal and substitute the order of the trial court with one issuing a grant to the appellants.

Respondents' submissions

16. Counsel laid down the background of the case and urged that under the Law, of Succession, child or children shall include a child conceived but not yet born (as long as that child is subsequently born alive), and in relation to a female person, any child born to her out of wedlock and in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or whom he has voluntarily assumed parental responsibility. A child born to a female person out of wedlock, and a child as defined by Sub Section (2) as the child of a male person, shall have relationship of other persons through her or him as though the child had been born to her or him in wedlock.

17. Counsel urged that part V of the Law of Succession and particularly Section 39 makes reference where an intestate has left no surviving spouse or children. In this case the net intestate estate shall devolve upon the kindred of the intestate in the orders of father or if dead, mother or if dead, brother and sister, and any child or children of the deceased brothers and sisters in equal shares etc. In the instant case the deceased was survived by children, the Respondents herein. In terms of the Law' of Succession, the Respondents are children of the deceased, the deceased having voluntarily assumed parental responsibility and expressly recognized them as her children.

18. Counsel submitted that even if the Respondents were not biological children of the deceased, the deceased in her life time took them in as her children, assumed the role of a parent to them and expressly recognized them as her children. If the deceased benefited from the estate of their father as his wife,

why would the Respondents not benefit from the estate of the deceased as their mother?

19. Counsel urged that the Respondents were children of the deceased by virtue of the Law of Succession, the deceased having assumed the role of a mother upon the demise of their biological mother and subsequently their father. They were recognized by the deceased as her children, lived with them and took parental responsibility. During their baptism, Gillian Anyango was indicated as their mother and indeed she played that role until she also passed on in the year 2020.

20. The deceased was married when they were barely 6 years old and they lived with her until their father died and continued living with her until she also died. They buried her next to their father's grave and took part in the funeral ceremony and they knew they were burying their mother. It is therefore unbelievable that the Appellants who are old enough and independent are now turning against them simply because their sister died and left behind a small undeveloped plot and around Kshs. 200,000/- in the bank. Counsel urged that the court to find that it is the Respondents who are legally entitled to apply for Letters of Administration.

<u>Analysis & Determination</u>

21. In **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR,** the court stated as follows-

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions**

reached by the learned trial Judge are to stand or not and give reasons either way."

22. Further, in **Williamson Diamonds Ltd and another v Brown [1970] EA 1,** the court held that:

> **"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."**

23. The above said, having considered and addressed my mind to the issues raised for and against the Application for Revocation of the Grant as well as the submissions filed by Counsel on behalf of the parties, it is my considered opinion that the issues that arise for determination are

1) **Whether as stepchildren of the deceased, the Respondents children qualify to be considered as children of the deceased**
2) **Whether the Grant was obtained by the Respondents by way of misrepresentation of material facts to the effect that the Respondents were children of the deceased**
3) **Whether as step children, the Respondents rank lower in priority to the Applicants who are the deceased sisters and nephew**

24. From the pleading filed, it is common ground that the deceased was indeed the step mother of the two respondents under the circumstances already herein above summarised and I need therefore not belabour the point. The question is whether as stepchildren, they qualify to be considered to be children of the deceased for purposes of succession. If the court finds in the affirmative on this issue, then this finding will automatically resolve the

issues as raised in 2) and 3) and as result, uphold and affirm the impugned judgement of the Hon Trial Magistrate.

25. In this regard, the court shall be guided by the following under listed provisions of the Law of Succession Act, CAP 60 Laws of Kenya. **Section 3(2) and (3) of the definition section of the Act** defines a child of a deceased to be as follows;

> **(2) References in this Act to "child “or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.**
>
> **(3) A child born to a female person out of wedlock,** ***<u>and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.</u>***

26. Without going into much ado, from my plain reading and simple interpretation of Section 3 defines the relationship of the children not biologically born of either parent in any union, to any one of the parents in the event death and for purposes of succession. In this case, the children were not born of the deceased but were the biological children of her spouse who had since died. The provision of Section 3(3) provides for what the relationship of these children to the deceased in her capacity as the spouse of their deceased father. As read with Section 3(2) it provides as that any child of a male person, whether born within or outside of wedlock and has been expressly recognized and/or accepted as a child of his own by the male

person, and for whom he subsequently assumes permanent parental responsibility shall have a relationship to the female person through the male person as though the child were born to her in wedlock.

27. The above being the case, then the simple interpretation of the provision of Section 3(2) and (3) of The Law of Succession Act is that the Respondents, being the biological children of their deceased father, who it is common ground was a spouse to their deceased stepmother, acquired a relationship with their deceased stepmother through their father, as though the they were born to her. In this regard then the Respondents qualify to be regarded as her children of the deceased herein for purposes of succession.

28. With the courts finding as above, the issue of who then ranks in priority as between a child to the deceased and sisters, nieces and nephews is provided for under Section 29 of the Act which is to the following effect;

> **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, grandparents, 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.**

29. From the above provision, it is clear from the excerpts that the court has underscored, that whichever interpretation one would want to give to the children of a deceased, whether they be referred to as children or as step children, they still rank higher in priority to the brothers and sisters of their deceased parent. Further to the above, Section 38 of the Act also is also of relevance and significance on the same issue of ranking of beneficiaries and/or dependants where a deceased is survived by children only and no spouse and again, the child is ranked next to the spouse in their degree on consanguinity to the deceased and it provides as hereunder;

> **Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.**

30. It should be noted that brothers and sisters of a deceased only rank higher in priority after the spouse and children where an intestate has left no surviving spouse or children, as provided under Section 39 of the Act which provides that the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

> **(a) father; or if dead**
>
> **(b) mother; or if dead**
>
> **(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

31. From my above findings and conclusions, I am satisfied that for purposes of succession the Respondents do qualify to be regarded as children of the deceased. In this regard, they rank higher in priority to inherit the estate of the deceased as opposed to the Appellants who are sisters and a nephew respectively to the said deceased. This being the case then, it is my further finding the Applicants did not at all misrepresent themselves to the court as children of the deceased in seeking for the Grant of Letters of Administration for the deceased estate as herein alleged by the Applicants because they do in in law for the purpose of succession qualify as such. In the circumstances, it is my finding that the Application for revocation has not met the threshold of provisions of Section 76 of the Act which provides for the circumstances under which a Grant can be revoked or annulled as hereunder;

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."

32. Consequently it is my finding that the appellants' Appeal, seeking that the Letters of Administration of the late Gillian Anyango Richards granted to Jonathan Ogutu Omondi and Andrew Ochieng Omondi both of P. O Box 4338-30100-Eldoret arising from Kenya Gazette Issued on 26th October 2021 be revoked and or set aside and further that fresh Letters of Administration in respect of the estate of the said late Gillian Anyango Richards be granted to Mary Ollyv Adhiambo Oracha and Eric Onyango Tom and Silas Ochieng Okombo is misconceived and lacks merit and the same is now hereby dismissed in its entirety.

33. The upshot then is that the court now hereby affirms and uphold the decision of the Hon Trial magistrate and directs that each party is to bear their own costs.

Read dated and Signed at ELDORET on 19th December 2025

E. OMINDE

JUDGE