IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 47 OF 2016

(CONSOLIDATED WITH CIVIL APPEAL NOS. 50 AND 56 OF 2016)

IN THE MATTER OF THE ESTATE OF K

(DECEASED)

BETWEEN

M N M..APPELLANT

AND

D N M K..1ST RESPONDENT

E W M...2ND RESPONDENT

G K K...3RD RESPONDENT

P M K...4TH RESPONDENT

S K... 5TH RESPONDENT

S M K...6TH RESPONDENT

ETATE OF E W K.........................7TH RESPONDENT

B W K...8TH RESPONDENT

J N W/O I N M..............................9TH RESPONDENT

D W K...10TH RESPONDENT

SKK W/O

S K K...11TH RESPONDENT

L W K...12TH RESPONDENT

IMPULSE DEVELOPERS LTD.....13TH RESPONDENT

TANGULIZI VENTURES LTD.......14TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

(Musyoka, J.) dated 25th September 2015

in

Succession Cause No. 527 of 1981)

****

JUDGMENT OF THE COURT

The historian, ***Daniel Branch***, in his book, ***Kenya: Between Hope and Despair, 1963-2011***, ***Yale University Press, 2011,*** notes that the deceased, ***PMK (Deceased),*** to whose estate this appeal relates, was a very influential figure in the first post-independence regime in Kenya. He was educated in the United States of America and the United Kingdom from the 1930s for his undergraduate and postgraduate degrees; indeed his nephew, the journalist ***JK***, asserts in his autobiography, ***Through My African Eyes, Footprints Press, 2014***, that the deceased was the first Kenyan to obtain a postgraduate degree. The deceased played a major role in the anti-colonial politics in Kenya, as founder member of the ***Kenya African Union*** in 1944, and served as its representative in London between 1951 and 1959. Earlier, in 1939 he was the founder of ***[Particulars Withheld] College, Githunguri***, one of the first indigenous African educational institutions, where he served as principal until 1948. Between 1961 and 1962, he was the Secretary General of the ***[Particulars Withheld] African Freedom Movement for East, Central and South Africa***. After independence, he was not only a close confidant of the first [Particulars Withheld] of Kenya, ***J K***, but also his brother-in-law. For a long time he served as a Minister in [Particulars Withheld] Cabinet in the powerful docket of Minister of State in the Office of the [particulars withheld]. (See ***David W. Throup, Economic and Social Origins of Mau Mau, Heinemann Kenya / James Curry /Ohio University Press, 1988).***

What is not in dispute is that during his sojourn on this earth, the deceased acquired and accumulated massive wealth, particularly prime land in Kiambu, Nairobi, Nakuru and Mombasa counties, in all totalling to almost 6,000 acres worth billions of shillings. Unfortunately, that wealth has turned out to be the apple of discord in his family, as vividly demonstrated in this appeal and the proceedings in the High Court that gave rise to it. Since his death intestate on 3rd September 1981, his family has known no peace, fighting acrimoniously over whom his dependants are, and their respective shares of the property. The litigation over his estate has spawned countless petitions, objections and applications for one relief or another, ultimately leading to this appeal. Even the deceased's grandchildren and third parties have joined the fray, staking all manner of claims to portions of the estate.

There have been petitions for grants of representation; myriad applications for annulment of grants; for change and replacement of administrators; for cessation of intermeddling with the estate; for eviction of some of the children of the deceased from some of the properties; for disposal of properties of the estate; and for partial distribution of the estate, among others. Even criminal prosecutions, including for murder and attempted murder, have arisen from dealings in the estate. In those proceedings, widows and children of the deceased have, without any sense of irony, easily disowned persons who at one time or another they represented to the world to be their co-wives or siblings. Many of the beneficiaries and their dependants have passed on, not to mention that a substantial part of the estate has been dissipated in the litigation, which has been on-going for over 36 years. In a ruling dated 28th January 2005, one of the many judges to have dealt with the matter in the High Court, ***Koome, J.*** (as she then was) described the family litigation as "a classical theatre of the absurd." And as one of the learned counsel for the parties ruefully observed, the beneficiaries of the deceased seem to have been blessed in many ways, save in the realm of wisdom.

The deceased was polygamous. From the date of his death on 3rd September 1981, until the learned judge rendered his judgment on 25th September 2015, some 34 years later, it was represented, and the parties happily went along with the representation, that in his lifetime the deceased had four wives and therefore four houses. According to the initial position adopted by the family of the deceased, the first house was that of ***LNM***, who died, in 1966, long before the deceased. She was married to the deceased under Kikuyu customary law and her house is made up of ***D N K ("N")***; ***PM***K ***("M"); GKK ("K")***; ***MWK,*** who is deceased but survived by a daughter, ***SN; EW***, who is also deceased but survived by a daughter, ***SWK*** and a son, ***SMK,*** and lastly ***IWM,*** who is also deceased, but apparently with no issue.

The second house is that of ***RDWM (D)***, who is also deceased. The trial court also found that she was married to the deceased under Kikuyu customary law and her house is made up of ***INK ("I")***, who is deceased but survived by a widow, ***JNN ("J")*** and five children***; SKK***, deceased but survived by a widow, ***SK*** and a daughter, ***AWKM***, deceased, with no issue; ***FWK***, deceased, but survived by a daughter, ***BWK ("B")***; ***DWK ("W"); GKK,*** who is deceased with no issue; and ***LWK ("L")***.

There is no serious dispute regarding the beneficiaries from the above two houses of the deceased. The real dispute, however, is as regards what we shall for now describe as the "third" and "fourth" houses. The third house is that of ***MNM ("M"),*** who avers that she started cohabiting with the deceased in 1968 and solemnized their marriage under the ***Marriage Act,*** (repealed) on 20th March 1971. M did not have any children with the deceased but she adopted two, namely ***MNM*** and ***LWM,*** after the death of the deceased. She was separated from the deceased and living in Mombasa, but came back to one of the deceased's farms, ***[Particulars Withheld],*** after he died. Most of the respondents, however, contended later before the High Court that M was not a widow or beneficiary of the estate of the deceased and was not entitled to any share of the estate because the deceased divorced her, after which she married his brother, ***CKK***.

The fourth and last house is that of ***EWM (E).*** She contends that she married the deceased under Kikuyu customary law in November 1975 when she was 21 years old, and or that she is his widow by virtue of the presumption of marriage. At the time of the death of the deceased, she asserts that she was pregnant with her first born, ***SWM (S)***. After the death of the deceased she gave birth to three more children, namely ***FWM, BCNM,*** and ***MWM***, who she incredulously claims to be the biological children of the deceased. She is the one who took the deceased to hospital where he died. The respondents take umbrage at E's assertions and curtly respond that the deceased never married her, that she was merely his mistress, and that one ***HR***, a Goan, to whom E was married, fathered all her four children.

There is very clear and consistent evidence that for a long time after the death of the deceased, all the parties proceeded as if the deceased indeed had four houses and took important decisions regarding the estate on that basis. For example, save for a period of approximately three years between 1981 and 1984 when N served as the sole administrator, the estate of the deceased has since been administered by quartet of joint administrators, representing the four houses. The house of L N M has been represented in the administration of the estate by N; that of D by herself and subsequently with effect from 19th November 2009, by one of her sons, W, while M and E have represented their respective houses. All of these administrators have, since the death of the deceased, occupied and lived on his properties. And before the judgment that is impugned in this appeal, there were two partial confirmations of the grant by the High Court whereby the proceeds of sale of some of the properties of the estate were shared among the four houses.

That, in brief is the context of the three consolidated appeals before us. All of them arise from the judgment of ***Musyoka, J***. dated 25th September 2015, in ***Succession Cause No. 527 of 1981***, in which the learned judge attempted to finally lay the dispute to rest, by distributing the estate of the deceased. Although there were four administrators of the estate of the deceased, namely N, W, M and E, the summons for confirmation of grant that was heard and determined by the learned judge was taken out by only two of the administrators, N and W. In the summons for confirmation of grant, they took the position that after all, M and E were not widows of the deceased, and that they were entitled only to a gratuitous and token share of the estate for their service to it as administrators.

That proposition compelled the two other administrators to file protests and to make their own independent proposals for distribution of the estate, where they largely gave themselves the status and standing of the other two widows and houses of the deceased.

The first appeal, ***Civil Appeal No. 47 of 2016*** is by M who is aggrieved by the learned judge's conclusion that she was not a widow of the deceased because when the deceased purported to contract a statutory marriage with her, he had no capacity to marry, having been already married to D under Kikuyu customary law. All the other respondents from the family of the deceased, save E, who finds herself in the same position as M, opposed the appeal and supported the findings by the learned judge. K, M and W went further and filled a notice of cross-appeal in which they faulted the learned judge for finding that M was not a widow of the deceased and yet failed to find that she had intermeddled in the estate and declined to order her to refund to the estate all the moneys that she had received from the estate. They prayed for dismissal of the appeal, allowing of the cross-appeal, and an order compelling M to refund all the moneys she had received from the estate.

The second appeal is ***Civil Appeal No. 50 of 2016***, filed by E. Like M, she is aggrieved by the learned judge's finding that she is not a widow of the deceased, either under Kikuyu customary law or by presumption of marriage and therefore not a beneficiary of his estate. Again, as in Civil Appeal No. 47 of 2016, all the other respondents from the family of the deceased, save M, opposed the appeal, and supported exclusion of E from the estate of the deceased. K, M and W once more filed a cross-appeal similar to that they filed in the appeal by M, seeking an order compelling E to refund all the money she had received from the Estate. In this appeal there is a second cross-appeal by ***S***, a daughter of E, who was born on 25th November 1981 after the death of the deceased. She is aggrieved by the learned judge's finding that she is not a child of the deceased born in wedlock; that her status as a child of the deceased could be determined only by DNA testing; that she had been afforded the opportunity for DNA testing which she had rebuffed; and that accordingly she was not a child and beneficiary of the deceased.

There is a third party, ***Tangulizi Ventures Ltd (Tangulizi)*** which is directly affected by these appeals and which participated to secure a parcel of land which was awarded to it by the High Court. Tangulizi purchased 4.5 acres from ***Title No. [Particulars Withheld],***, which forms part of the estate of the deceased. It transpired subsequently that the seller, B, a granddaughter of the deceased, had absolutely no colour of right to sell the parcel of land to Tangulizi. Nevertheless, the parties entered a consent order and agreed that Tangulizi would get 4.5 acres from B's share of Title No Kiambaa/Thimbigua/819. It is that consent order that Tangulizi seeks to secure in these appeals.

The last appeal is ***Civil Appeal No. 56 of 2016***, which is filed by a Company known as ***Impulse Developers Company Ltd (Impulse)***. Impulse is aggrieved by the learned judge's finding that the purported sale and transfer to it of the asset of the estate of the deceased known as ***Land Reference No. [Particulars Withheld],*** was null and void because of its failure to complete the transaction and pay the balance of the purchase price, and for lack of consent of the Land Control Board under the ***Land Control Act***. The appeal is however opposed by the respondents from the deceased's family and M and E, the latter two supporting the judgment of the High Court only to the extent of its findings relating to [Particulars Withheld] Farm.

We shall now turn to consider the arguments advanced by each of the parties, for and against the judgment of the High Court. Starting with M, represented by ***Mr. Ahmednassir*** learned SC, ***Mr. Gikandi*** and ***Ms. Kariuki,*** learned counsel, her memorandum of appeal set forth 20 grounds of appeal, which her learned counsel compressed into six broad grounds.

In the first ground, she contended that the learned judge erred by holding that she was not a widow of the deceased, on grounds other than those relied upon by N and W in their summons for confirmation of grant. It was her case that N and W pleaded that she was not a widow of the deceased because he had divorced her and subsequently she had married CKK. Having found that the deceased did not divorce M and that she never married CKK, it was submitted, the learned judge should have concluded that she was a widow of the deceased. Instead, she contended, the learned judge introduced his own issues, which were not raised in the summons, and erred by holding that when she married the deceased under the Marriage

Act in 1971, the deceased had no capacity to marry because of an existing Kikuyu customary marriage between him and D. She urged that due to the approach taken by the learned judge, she was prejudiced and denied an opportunity to file a reply on the issue of capacity of the deceased to marry, and that in any event, no evidence was led on the issue, but instead the learned judge advanced and relied on his own theory regarding the nature and subsistence of the marriage between the deceased and D. Accordingly we were urged to find, on the authority of ***Galaxy Paints Co. Ltd v. Falcon Guards Ltd*** ***[2000] EA 38, Charles C. Sande v. Kenya Co-operative Creameries Ltd, CA No. 154 of 1992***, and ***Nairobi City Council v. Thabiti Enterprises Ltd*** ***[1997] eKLR***, that the learned judge erred by determining an issue that was not raised by pleadings. On the basis of ***Kenya Ports Authority v. Kashon (Kenya) Ltd*** ***[2009] 2 EA 212***, the trial court was faulted for introducing its own theory unsupported by evidence.

In the second broad ground of appeal, M submitted that the learned judge erred by misapprehending or ignoring consistent evidence on record that she was a widow of the deceased entitled to inherit from his estate and that his family treated her as such. She argued that although W and L testified that she was not a widow of the deceased, they had previously sworn affidavits acknowledging her as a widow of the deceased and that their evidence at trial was pure perjury. Other pieces of evidence that she relied upon to advance the argument that she was a widow of the deceased, which she contends was ignored by the learned judge, was that since 1967 she had lived on the deceased's ***[Particulars Withheld], Farm;*** that the court's registrar confirmed her presence on the farm during the trial; that since 1984 she had served as one of the four administrators of the estate of the deceased; that she has actively participated in meetings and affairs of the family; that she adopted and for a long time had been known by the M name; that with the knowledge and approval of the family of the deceased, she was a beneficiary of the partial confirmations of the estate; that pursuant to an order by ***Maraga, J***. (as he then was) the estate paid her Kshs. 50 million in her capacity as a widow and beneficiary; and that Koome and Nambuye JJ. (as they then were) had separately found that she was, or treated her as a widow.

It was M's further contention that the above evidence, particularly of her long cohabitation with the deceased, involvement in the affairs of his family, and recognition by his family and community as his wife, justified invocation by the learned judge of the presumption of marriage. For the proposition she relied upon the decision of this Court in ***MWG v. EWK***, ***CA No. 20 of 2009.***

Relying on ***Fernades v. People Newspapers Ltd*** ***[1972] EA 63*** and ***Triton Gas Stations Ltd & Another v. Kenya Commercial Bank Ltd & 2 Others*** ***[2015] eKLR***, she further submitted that due to the findings and orders of Koome and Nambuye, JJ., the trial judge was estopped and precluded from making any other contrary finding and in particular that she was not a widow of the deceased. It was in fact her view that the issue of whether she was a widow of the deceased was *res judicata* and that the learned judge could not validly re-open it. She invoked ***Theresa Costabir v. Alka Reshanlal Harbanslal Sharma & Another*** ***[2015] eKLR*** and ***Anthony Raymond Cordeiro & 2 Others v. Adrian Noel Cravalho & 5 Others*** ***[2014] eKLR*** in that regard. For good measure M added that by holding that she was not a window of the deceased, the learned judge had effectively set aside consent orders creating binding legal relationships without any basis or justification.

In the third ground of appeal, she faulted the judge for failing to determine one of the issues before him, namely whether she was entitled to an award of 20 acres from Ehothia firm as a token of good will as proposed by N and W in their summons. On the authority of ***Kiarie Wamutu v. Mungai Kiarie & Another*** ***[1982] eKLR,*** she submitted that failure to determine all the issues before the court rendered the decision irregular, unjust, and unreliable and liable to be set aside.

In the fourth ground of appeal, M faulted the High Court for the manner in which it distributed the estate. In the first instance she submitted that the learned judge erred by failing to distribute substantial parts of ***[Particulars Withheld] Farm***, ***[Particulars Withheld] Farm, [Particulars Withheld] Farm, [Particulars Withheld] Farm*** and ***[Particulars Withheld] Farm*** forcing W and L to apply to be awarded parts of the unallocated parcels. In her view, that amounted to a failure on the part of the court to determine all the issues that the parties had raised. Secondly, she contended that the court reserved huge parts of the estate for road reserves and a police station without the benefit of any evidence to justify the reservations and the sizes. Thirdly M urged that in distributing the estate, the court failed to take into account the fact that

some of the assets were more valuable than others and failed to give any reasons why it awarded some of the beneficiaries prime, and others, inferior properties. In particular, she contended that the distribution was skewed in favour of L. Relying on the High Court decision in ***In Re the Estate of John Musambayi Katumanga, (Deceased), HCSC No. 339 of 2007***, she submitted that distribution of the state between the children must be equal regardless of the ages, gender and financial status of the children. The decision of the English Court of Appeal in ***Flannery & Another v Halifax Estate Agents Ltd [2000] 1 WLR 377*** was invoked regarding the duty of a judge to give reasons for a decision.

In the next ground of appeal, M faulted the High Court for directing the costs of the summons by N and W to be paid by the estate of the deceased whilst the other parties were to bear their own costs. She contended that E and herself were administrators duly appointed by the court and ought to have been treated the same way as N and W.

Lastly this appellant submitted that the learned judge erred by ignoring evidence on record that W had intermeddled in the estate and rewarded him by confirming the grant at the instance of an intermeddler, despite his illegal conduct. She relied on ***Mistry Amar Singh v. Kulubya [1963] EA 407*** and submitted that the court cannot aid a person who has perpetrated an illegality such as intermeddling, which is a criminal offence under ***section 45*** of the Law of Succession Act.

Taking up her turn, E, represented by ***Mr. Muite,*** learned SC and ***Mr. Muriithi***, learned counsel, largely assailed the judgment of the High Court on similar grounds as those advanced by M. She compressed her 22 grounds of appeal into five.

In the first ground, she referred to dealings in the estate immediately after the death of the deceased and in particular depositions in court, and submitted that all the respondents had accepted and treated her as a widow of the deceased and the head of the fourth house. She argued that when M and herself were appointed co-administrators of the estate, D deposed that they were her co-wives. Other similar depositions cited were by I, on 22nd February 1982, 11th March 1982 and 22nd June 1992 and the deceased’s brother, CKK who deposed on 3rd October 1983 that the deceased had four widows, including E and M. In her view, it was no coincidence that there were four administrators of the estate of the deceased and that it was utterly inconceivable that M and herself would have been appointed administrators if they were indeed strangers to the estate as claimed by their co-administrators and affirmed by the High Court. She urged us to hold, from the conduct, representations and dealings of the parties, that the respondents were estopped from asserting that she was not a widow or beneficiary of the estate of the deceased.

Turning to the second ground of appeal, E submitted that the learned judge erred by dismissing the evidence on record that she had contracted a customary marriage with the deceased merely because some children of the deceased claimed they had not been consulted or invited to the ceremony. She also added that due to the earlier orders made by separate judges of the High Court, which had never been challenged, recognising her as a widow of the deceased and partially distributing his estate to her, the matter was *res judicata* and it was not open to the learned judge to find that she was not a widow of the deceased. In her view, by holding that she was not a widow of the deceased, the learned judge was purporting to sit on appeal from the previous decisions, which he could not do, being by judges of concurrent jurisdiction.

Advancing this ground, E submitted that the learned judge also erred by failing to presume a marriage between herself and the deceased, adding, on the authority of ***Anna Munini & Another v. M Nzambi, HCCC No. 751 of 1977***, ***Hortensiah Wanjiku Yawe v. Public Trustee (supra)*** and ***In Re the Estate of JAO (Deceased), HCSC No. 778 of 2007*** that for purposes of the presumption of marriage, what matters is long cohabitation and reputation, not ceremonies and rites. She contended that she had cohabited with the deceased for over five years before his death and was introduced and known as his wife. She maintained that she was pregnant with the deceased’s first child who was born posthumously. Other evidence which she relied upon to make a case for presumption of marriage, included her lengthy occupation, which continues to date, of [Particulars withheld] Farm as her matrimonial home; attendance, in 1979, of the wedding of K in the company of the deceased in her capacity as his wife and K mother;

the deceased's funeral programme in which she was duly listed and recognized as a widow; the fact that she was the first to lay a wreath on the grave of the deceased, even before the President; the photographs produced in evidence showing, among others, the deceased dancing with her at [Particulars Withheld] House New Year ball, and herself with the body of the deceased at the mortuary; the fact that the dividends accruing to the estate of the deceased from ***[Particulars Withheld] Limited*** in which he was a shareholder, were shared and continue to be shared between his four houses, and the fact that N, W and the other beneficiaries of the deceased were prepared to give her and M 20 acres each. Relying on ***Wilfred Macharia Nahashon v. John Mbugua Githae & Another, HCCA No. 60 of 1996***, she submitted that the offer of 20 acres made to her and M was sufficient evidence that they were beneficiaries of the estate of the deceased, since administrators have no powers to gift the estate of a deceased person to strangers.

On the third ground of appeal, E submitted the orders pursuant to which the administrators of the estate of the deceased were appointed and his estate partially distributed, were consent orders, which were binding on all the parties. Relying on ***Kamunge & Others v. Pioneer General Assurance Society Ltd [1977] EA 263***, ***Brooke Bond Liebig (T) Ltd v. Mallya [1975] EA 266*** and ***Flora N. Wasike v. Destimo Wamboko [1982-88] 1 KAR 625***, among others, she submitted that the consent orders were binding on all the parties as if evidence had been adduced and that like a contract, the consent orders could only be set aside on grounds of mistake or fraud, which was not proved.

E's fourth ground of appeal closely mirrored that of M relating to distribution of the estate, and similarly faulted the learned judge for failure to distribute the entire estate including some ***Kshs. 284 million*** held by advocates of the parties, as he was duty bound to do; for not addressing the issue of the 20 acres that the other beneficiaries had proposed to be awarded to her in the summons; for awarding L a disproportionately bigger part of the estate than all the other beneficiaries; and for reserving parts of the estate for road reserves and a police station without any evidence to justify the reservations. In addition, she complained that the learned judge erred by distributing ***Kiambaa [Particulars Withheld]*** as part of the estate of the deceased yet it was registered in her name after the deceased's clan gave it to her. By so doing, she submitted, the learned judge had purported to overturn a decision of the High Court inK ***& 13 Others v.K [1986] KLR 23***. A similar submission was made regarding distribution of the share in ***Ocean View Beach Hotel Ltd,*** which she maintained were transferred to her with the consent of the company and her co-administrators, by virtue of having been named by the deceased as his next of kin, in the event of his death.

E's last ground of appeal, which with respect, we think was rather opportunistic, was that proceedings in the High Court were vitiated by the fact that the summons for confirmation of grant sought confirmation of a non-existent grant issued on 1st April 1993 and a copy of the said grant was not annexed to the summons as required. It was contended further that although N and W sought confirmation of a grant purportedly issued on 1st April 1993, the learned judge ultimately purported to confirm the grant issued on 19th November 2009, which was irregular.

We do not intend to be blind sided by this issue, which in our view, is a red herring. E did not raise the issue before the High Court whilst she had the opportunity. She chose to go through the entire process of confirmation of the grant without questioning the grant that was intended to be confirmed. In any event, we do not see what prejudice any of the parties suffered, particularly the four administrators who knew or were expected to know, of the grant under which they were appointed administrators of the estate. Accordingly, this is the kind of technicality that Article 159 of the Constitution demands should never be afforded undue regard, and ought not to stand in the way of determination of these consolidated appeals on merit. It is a technical and procedural lapse of such a character that does not prejudice any party or impinge on the power of the Court to determine this dispute. (See ***Lamanken Aramat v. Harun Maitamei Lempaka, SC Petition No 5 of 2014).***

Next we heard ***Ms. Waitere,*** learned counsel who prosecuted S's cross-appeal. It was submitted that having been born on 25th November 1981, barely two and half months after the death of the deceased, the learned judge erred by directing her to undergo DNA testing against samples provided by K, to establish that she was a biological child of the deceased, instead of simply applying the presumption of legitimacy.

She contended that S lives out of the country and was not able to testify before the trial court or to comply with its order on DNA testing, and further that the learned judge erred by drawing an adverse inference against her and concluding that the deceased was not her father.

In trying to establish her legitimacy, S assailed the finding by the learned judge that her mother, E was not married to the deceased, which she submitted was contrary to previous pronouncements by the court that E was from the fourth house of the deceased. She also urged that the other children of the deceased had recognised her in their depositions in court as a member of the fourth house and therefore a child of the deceased. She relied on the partial distributions preceding the judgment of the trial court and insisted that her mother was recognised as a widow of the deceased. She however conceded that when the proceeds of the partial confirmation allowed by Nambuye, J. were distributed directly to the children of the deceased, she did not receive any share because her status as a child of the deceased was disputed. Nevertheless she contented that the only home she knew was Waehothia farm where her mother lived.

Further, the appellant contended that to the extent that K was not her father, the court's DNA order was prejudicial to her. In her view, it was only DNA samples from the deceased himself that would have conclusively determined or disproved her paternity. Contending that her birth certificate bears the name of the deceased as her father, she cited the decision of the High Court in ***In the Matter of the Estate of James Ngengi Muigai, P&A No. 523 of 1996*** and submitted that she is deemed to be a child of the deceased, having been named after the deceased's mother and having been using his name.

S further submitted that she was conceived before the death of the deceased when the deceased was cohabiting with E as husband and wife. She denied that E was ever married to H R. Relying on ***Yool v. Ewing [1904] 1 L.R. 434***, she argued that the presumption of legitimacy of a child born during wedlock cannot be rebutted by mere evidence that another man other than the husband had improper relations with the wife and that in such cases the law will not allow an inquiry as to who is the father of the child. On the authority of the judgment of this Court in ***Njenga v. Njenga, CA No 86 of 1983***, she submitted that the evidence required to rebut the presumption of legitimacy must be strong, satisfactory and conclusive, which was not the case in this appeal. Finally she also relied on ***section 118*** of the Evidence Act and submitted that having been born during the continuance of the marriage between the deceased and the E, it was conclusive proof that she was his child.

Mr. Kamaara, learned counsel, represented Tangulizi, whose claim is for 4.5 acres to be excised from B's share in Title No. Kiambaa/Thimbugua/819. It is common ground that at all material times that property formed part of the assets of the estate of the deceased. B, who was not an administrator of the estate of the deceased, purported to sell to Tangulizi 4.5 acres from the said parcel for ***Kshs 40,500,000.00***, which was duly paid to her. The administrators of the estate subsequently challenged the transaction as null and void. Ultimately the parties recorded a consent order in court and agreed that Tangulizi would receive 4.5 acres from B's share upon distribution of the estate. In the judgment that is impugned in these appeals, the trial court gave effect to that consent order and awarded Tangulizi 4.5 acres of Title No. ***[Particulars Withheld]*** from B's share. Accordingly,

Tangulizi urged us to ensure that its right to 4.5 acres from B's share is not affected by the outcome of the appeals.

It was Tangulizi's submission that although none of the parties had appealed against the award made to it, it was alarmed when M, who was party to the consent order that resulted in award of 4.5 acres to it, proposed in her submissions that Title No. ***[Particulars Withheld]*** should be sold and the proceeds deployed to pay the costs of the parties both in the High Court and in this Court. It was further submitted that having been part of the consent order, M was bound by it and that she had not proffered any valid reasons in support of her proposal for the sale of the entire property to defray costs. We were therefore urged to affirm the decision of the learned judge as regards the 4.5 acres awarded to Tangulizi.

The last appeal was by ***Impulse,*** which was represented by ***Mr. Havi***, learned counsel. It impugned the judgment of the High Court as regards ***[Particulars Withheld]*** farm on 6 grounds, contending that the learned judge erred by entertaining and determining the validity of sale and transfer of the farm while the

issue was pending for determination in the Environment and Land Court in ***ELCC No. 224 of 2013***; by nullifying the sale and transfer on grounds other than those upon which it was challenged; by holding that the farm was part of the estate of the deceased and available for distribution; by holding that the sale and transfer was null and void for want of consent from the Land Control Board; by holding that it had breached the agreement for sale; and by ignoring its submissions.

Impulse submitted that the estate of the deceased offered to sell to it the farm to settle indebtedness of ***Kshs 6,400,000.00*** to the ***Settlement Fund Trustee (SFT)***, which it paid, and that the sale was sanctioned by an order of the court dated 26th October 2005. The agreed purchase price was ***Kshs 214,800,000.00*** and on the same date the estate and Impulse executed an agreement for sale and a deed of assignment pursuant to which the estate assigned its interest in the farm to Impulse, which had already paid the deposit of Kshs 21,480,000.00 to the estate.

Subsequently on 27th April 2006 Impulse's bank, ***Charterhouse Bank Ltd*** gave the estate an undertaking to pay the balance of the purchase price of Kshs 193,000,000.00 within 21 days of registration of transfer and charge over the property. The transfer was registered on 22nd May 2011. Thereafter the administrators of the estate and some of the beneficiaries waged relentless legal challenges seeking to nullify the sale, which made it impossible for the charge to be registered over the farm. On 12th April 2007 the High Court issued an order restraining Impulse from obtaining vacant possession of the farm. It was the Impulse's contention that the completion of the transaction and payment of the balance of the purchase price was frustrated by the court orders and the administrators and beneficiaries of the estate.

Impulse submitted further that by the time the learned judge determined the summons for confirmation of grant holding that the farm was part of the estate of the deceased, there was pending before the Environment and Land Court Case No. 224 of 2013 in which the administrators of the estate had in their defence and counterclaim sought an order cancelling the transfer of the property to it and forfeiture of the deposit. In its view, that is the suit that ought to have been heard in lieu of the summons because the validity of the sale and transfer of the farm was already in issue. It was further contended that to the extent that the sale of the farm to Impulse was by the administrators of the estate who had duly obtained authority from the court under ***section 47*** of the Law of Succession Act and ***rule 73*** of the ***Probate and Administration Rules***, the learned judge had no basis for finding that the farm was part of the estate of the deceased. Impulse also relied on ***sections 82*** and ***93(1)*** of the Law of Succession Act and urged that the administrators had power to sell the farm to it, and that the learned judge erred by nullifying a sale that was valid in law.

Next it was submitted that the grounds on which the sale was nullified were not substantial. Impulse contended that one of the grounds upon which the nullification of the sale of the farm was sought was its failure to pay the balance of the purchase price and fraudulent acquisition of title, yet payment of the balance of the purchase price was frustrated by the court order and was therefore beyond its control. It also contended, on the authority of ***Joel Oiche Oisebe v. Bilia Bosibori Oisebe [2014] eKLR*** that the learned judge erred by making an order for rectification of the register whilst that jurisdiction is reserved for the Environment and Land Court only.

As to whether the farm was part of the estate of the deceased and available for distribution, Impulse submitted that the same having been sold to it lawfully by the administrators with the sanction of the court, it did not constitute *free property* of the deceased within the meaning of ***section 3*** of the Law of Succession Act. As regards consent from the Land Control Board, it was submitted that the transaction did not require consent from the Board because the farm was charged to the SFT, thus making the SFT a party to the transaction. By dint of ***section 6(3)*** of the Land Control Act, it was contended that transactions involving the Government or the SFT were exempted from the requirement of consent.

Lastly on whether Impulse was in breach of the agreement for sale, it was submitted that if indeed there was breach, the estate's remedy lay, not in rescission or nullification of the sale, but in a claim for the balance of the purchase price. In support of that proposition Impulse relied on the decision of this Court in ***Mwangi v. Kiiru [1987] KLR 324.*** It further contended that it was the administrators and the beneficiaries, as well as the court order that stalled the process and delayed payment of the balance of the

purchase price, and in all it was not at fault.

All the respondents who were declared by the High Court the beneficiaries of the deceased opposed the three appeals and the cross-appeal by S. Those respondents and their respective learned counsel are as follows: N, represented by ***Kiarie Joshua & Company Advocates***; Kihara and Mbatia, who were represented by ***Mr. Nyaberi***, ***Mr. Nyaanga*** and ***Mr. Okoth***; ***Joyce,*** the widow and administratrix of the estate of Isaac, who was represented by ***Mr. Munge;*** W, represented by ***Mr. Odhiambo;*** SK, the widow of the son of the deceased known as SKK, who was represented by ***Mr. Mugwuku,*** and L, who was represented by ***Mr. Miller*** and ***Mr Wena***. Unlike the other respondents, Susan did not file any submissions and her advocate merely stated from the bar that she was opposing the appeals.

By the very nature of this appeal and the sheer number of the parties involved, reproducing the submissions made individually by each learned counsel on behalf of his or her client would result in unnecessary duplication and repetition, because the arguments in opposition to the appeals and cross-appeal are virtually similar and backed by the same authorities. Some of the written submissions by different respondents are in fact the same, word for word. In the event, we shall set out together, all the shades of arguments that were advanced by those respondents against the appeals and cross-appeal.

The respondents we have adverted to submitted that the deceased had only two houses, namely those of L and D and that his *bona fide* beneficiaries within the meaning of ***section 29*** of the Law of Succession Act were only ten in number, being the children from the two houses, their spouses, and offsprings, as the case maybe. M and E and their children, they submitted, were not beneficiaries of the estate of the deceased as rightly concluded by the learned judge.

As regards M, they supported the finding by the High Court that although she had solemnized a statutory marriage with the deceased, it was invalid because the deceased was still married to D under Kikuyu customary law at the time he purported to marry M under the repealed Marriage Act. They contended that the status of D as a wife of the deceased was never in doubt or dispute and that the learned judge was justified in concluding that the deceased was married to her under Kikuyu customary law at the time he purported to marry M. Unlike the other respondents who submitted that a party that wishes to rely on customary law must prove it, W's view was that ***sections 4*** and ***119*** of the Evidence Act entitled the learned judge to *presume* that the deceased was married to D under customary law, given the ethnicity of the parties and period when they were said to have married. However as regards dissolution of that customary marriage, it was submitted that it could not be presumed and M was obliged to prove that it was dissolved before the deceased purported to marry her, which she failed to do.

The respondents relied on ***Section 11 (a) (d)*** and ***section 37*** of the repealed Marriage Act as well as the decisions in ***In the Matter of the Estate of Isaac Gidraph Njuguna Mukuro (Deceased), HCSC No. 1385 of 2010, Re Ruenji's Estate [1977] KLR 22*** and ***Re Ogola's Estate [1978] KLR 18*** and submitted that a person who was still married to any other person under native law or custom had no capacity to contract a marriage with a different person under the Marriage Act. As the deceased was already married to D under customary law when he purported to marry M, it was submitted, he had no capacity to contract the marriage.

It was the respondent's further view that the issue whether M's marriage to the deceased was valid was squarely before the court because they had disputed that she was a wife and in any case the court had inherent jurisdiction to do justice and by dint of ***Article 159*** of the Constitution, was obliged to do justice without undue regard to technicalities.

The respondents further submitted that M neither proved that she was married to the deceased under Kikuyu customary law, nor adduced any evidence on the basis of which the court could make the presumption of marriage as contemplated in ***Hortensia Wanjiru Yawe v. The Public Trustee, CA No. 274 of 2004, Phyllis Njoki Karanja & 2 Others v. Rosemary Mueni Karanja & Another, CA No. 313 of 2001, Anastasia Mumbi Kibunja & Others v. Njihia Muchina & Others, CA No. 274 of 2004***. They insisted that M had no children with him, and that although the two may have cohabited together in unclear circumstances, the deceased separated from her in 1976 after which she went to live in Mombasa

until his death, and that her involvement in his affairs was only after his demise. They contended that for the presumption of marriage to arise, M should have been living with the deceased before he died, which was not the case. They also denied that M was in occupation of Ehothia farm, contending that she had only rented it out to flower growers after she was appointed an administrator. Some respondents took the peculiar position that before the court can presume a marriage, evidence of *performance of the necessary ceremonies and rites* preceding long cohabitation must be adduced, which M failed to do.

Some of the respondents, particularly N and Joyce, with respect, also went off the rails, submitting that M was married to CKK and therefore was not entitled to inherit from the deceased. In that respect they were challenging the holding by the learned judge that M was not married to CKK. We think it is apt to lay this issue to rest at this early stage, because none of the respondents cross-appealed against the finding by the learned judge that M was not married to CKK. ***Rule 93(1)*** of the Rules of this Court obliged any respondent who wished to challenge any aspect of the findings of the learned judge to file and serve a notice of cross-appeal. The purpose of such notice is to give the other parties due notice and an opportunity to prepare to answer the issue or issues raised in the cross-appeal. A respondent who has indicated that he is happy with the judgment cannot, out of the blue, start attacking aspects of it without any notice. In the absence of a cross-appeal therefore, we have no basis for entertaining a challenge to the learned judge's finding that M was not married to CKK. (See. ***Alfred Mutuku Muindi v. Rift Valley Railways Ltd, CA No. 22 of 2015*** and ***Peter M. Kariuki v. Attorney General, CA No. 79 of 2012).***

As for E, the respondents submitted, on the authority of ***In Re the Estate of Harun Kagechu Kahagi (Deceased) HCSC No. 367 of 2003*** and ***Eliud Miana Mwangi v. M Wanjiru Gachangi, CA No 281 (A) of 2003,*** that the onus of proving customary marriage to the deceased was on her, which she failed to discharge. They added that E had failed to adduce any evidence of performance of the essential ceremonies and rites, such as *ngurario* and payment of *ruracio* that are central to a valid Kikuyu customary marriage. Other than E's own evidence, it was urged; she did not call any witness to vouchsafe for her alleged customary marriage to the deceased and the performance of the necessary rites in such marriages. Citing ***Eugene Cotran's Restatement of African Law: Kenya, Vol. 1, The Law on Marriage and Divorce, Sweet & Maxwell, 1968***, it was submitted that no marriage is valid under Kikuyu customary law unless a part of the dowry (*ruracio)* is paid and the *ngurario* rum slaughtered. The respondents also relied on the judgments of this Court in ***Njoki v. Mathara, CA No. 71 of 1989*** and

Anastasia Mumbi Kibunja & Others v. Njihia Muana & Others (Supra) and those of the High Court in ***Nderitu Ndirangu v. Patrick Mwago Wanjau, CA No. 77 of 2010*** and ***In the Matter of the Estate of Harun Kagechu Kachangi, HCSC No. 367 of 2003*** to demonstrate the essentials of a valid Kikuyu customary marriage, which they submitted E failed to prove.

On the presumption of marriage as relates to E, the respondents contended that her case as pleaded was not based on presumption of marriage and that in any event, she did not adduce any evidence on the basis of which the court could presume a marriage between her and the deceased. Her four children, it was contended, were born in 1981, 1984, 1985 and 1993 after the death of the deceased and were not his biological children. At best, some of the respondents submitted, E was a copy-typist who was employed by the deceased to type a manuscript of his autobiography.

They added that if indeed the deceased was married to M under the Marriage Act, by dint of ***section 37*** he lacked capacity to contract another marriage with E before dissolution of the earlier statutory marriage. On the above basis the respondents submitted that E did not adduce any evidence upon which a presumption of marriage based on cohabitation between her and the deceased could be made. They relied on ***Phyllis Njoki Karanja & 2 Others v. Rosemary Mueni Karanja & Another (supra), Anastasia Mumbi Kibunja & Others v. Njihia Muana & Others (supra)*** and ***Mary Njoki v. Kinyanjui Muthoni & Others [2008] KLR 288*** on the prerequisites for presumption of marriage.

Regarding the property known as ***[Particulars Withheld]*** and the shares in ***[Particulars Withheld]*** Beach Hotel Ltd, which the trial court found to belong to the estate of the deceased rather than to E, it was submitted that the court had a duty to protect and preserve the estate and that since the protection of the right to property under ***Article 40*** of the ***Constitution*** does not extend to property that is unlawfully

acquired, the court had the power to revert to the estate any of its property that was unlawfully acquired. It was also contended that the clan of the deceased did not have capacity to gift Kiambaa/***[Particulars Withheld]*** to E in breach of the provisions of the Law of Succession Act. In the same vein, it was submitted that the mere nomination of E by the deceased as next of kin as regards his shares in ***[Particulars Withheld]*** Beach Hotel Ltd did not entitle her to the shares, which were assets of the estate.

The respondents further urged that both M and E were not beneficiaries of the estate of the deceased within the meaning of ***section 29*** of the Law of Succession Act and that their mere control, respectively, of ***[Particulars Withheld]*** farms, use of the M name and service as administrators of the estate, for which they were handsomely rewarded, did not *ipso facto* confer upon them the status of widows or beneficiaries. They also submitted that notwithstanding previous partial confirmations of grants, consent orders, appointment as administrators, payment of moneys to them from the estate, and their treatment as widows of the deceased, the High Court was not precluded at the final confirmation of the grant under ***section 71*** of the Law of Succession Act, from determining whether they were, after all, widows of the deceased.

Various reasons were advanced to explain how and why it was represented that the deceased had four houses, ending up with the appointment of M and E as administrators, whilst the respondents still contended that the two were neither widows nor beneficiaries of the estate. Some of the reasons were that it was through a mistake of fact, which was discovered subsequently; that the respondents were anxious to move expeditiously with the administration of the estate and not to be bogged down by unnecessary disputes pending the determination of the *bona fide* beneficiaries later on; that the two were admitted as administrators merely for convenience without the intention of recognising them as widows and beneficiaries; that the decision to appoint them was made irregularly and illegally by the court; that Nambuye, J. erred and acted arbitrarily and without any basis in conferring upon M the status of a widow; and amazingly by Kihara, Mbatia and W, that the two ***"capitalized on the corrupt system in court thus thereby influencing the court in one way or another"***. In any event, the respondents urged, the appointment of a person as an administrator does not constitute that person a beneficiary. They relied on ***<u>Sewe v. Sewe & Another</u>, CA No. 20 of 1990*** in support of that proposition.

On whether the finding by the learned judge that M and E were not widows or beneficiaries of the estate of the deceased was *res judicata*, it was submitted that although the two received payments from the estate and benefits from partial distributions, the question of who were the deceased's widows and beneficiaries had never before been directly, materially or substantially determined by any court and therefore it was open to Musyoka, J. to make that determination with finality. It was further contended that to constitute *res judicata* under ***section 7*** of the ***Civil Procedure Act***, the issue must have been heard and finally determined by a court of competent jurisdiction. In this case, it was urged, the issue whether M and E were widows was not directly or substantially an issue before Koome and Nambuye, JJ. Relying on ***sections 54*** and ***55*** of the Law of Succession Act, the respondents argued that capital assets of the estate of the deceased could not be distributed before confirmation of the grant under ***section 71*** of the Act. They therefore urged that the prior distributions were only to enable payment of debts of the estate and that the real distribution, where the beneficiaries and their shares were identified and determined, was that made by the learned judge under section 71 of the Act. To buttress the point that the matter was not *res judicata*, it was argued that M had herself identified among the issues for determination by the learned judge, her status as a widow of the deceased, long after Nambuye, J. had held that she was a widow of the deceased.

On the doctrine of estoppel, the respondents contended that it did not apply in this case because they had all along contested the status of M and E as widows and beneficiaries of the estate of the deceased and in any case estoppel can only be used as a shield, not as a sword. They relied on the decision of this Court in ***<u>Henry Muthee</u> <u>Kathurima v. Commissioner of Lands & Another</u> [2015] eKLR*** and submitted that estoppel cannot be raised to protect unlawfully acquiredproperty or to override provisions of a statute.

As regards distribution of the estate, they submitted that the learned judge cannot be faulted because under ***section 27*** of the Law of Succession Act, he had complete discretion in the distribution of the estate. It was further contended that the trial court, having come to the conclusion that M and E were

neither widows nor beneficiaries of the deceased, they had no *locus standi* to question how the estate was distributed. Nevertheless, the respondents added, distribution should not only be equitable but also practical, and that in this case the learned judge took into account factors such as the efforts by some of the beneficiaries like L to preserve the estate, as well as the roles of administrators of the estate over a long time. They contended further that the distribution was proper because it was based on the proposals by the administrators of the estate, which were preceded by wide consultations among the genuine beneficiaries of the deceased, who consented to the scheme of distribution. While some of the respondents conceded that the learned judge failed to distribute the entire estate, which they attributed to oversight or inadvertence, they submitted that the solution was to apply for review of the judgment so that the undistributed assets could be distributed to the beneficiaries that the court identified.

Finally it was submitted specifically by L, that even if it was taken that M and E had come into the life of the deceased, they did so towards the end of his life, when he had acquired all the assets of the estate without their contribution. As such that fact must be borne in mind before interfering with the distribution proposed by the High Court. We were also urged, in the event we found that M and E were entitled to a share of the estate of the deceased, to apply ***section 23*** of the ***Married Women's Property Act, 1882 (repealed)*** and the decision in ***Dorcas Wangari Macharia v. Kenya Commercial Bank*** & ***Others, HCCC No. 18 of 2003*** and first set aside 45 % of the estate for distribution between the 10 beneficiaries identified by the High Court and the remaining 55% to be distributed among the 10 beneficiaries, M, and E.

Turning to the cross-appeal by S, the respondents submitted that she was not a biological child of the deceased; that she was born about two and half months after his death; that she was of mixed race; and that her biological father was one Harry Reginald. They added, relying on the decision of the High Court in ***In Re the Estate of Patrick Mwangi Wathiga (Deceased), HCSC No. 324 of 2005*** that the burden of proving paternity and that she was a beneficiary of the estate of the deceased was on S, which she failed to discharge. They further argued that the court ordered her to undergo a DNA test to determine her paternity and to appear and testify in court, which she promised to comply with, but eventually failed to do so. Having failed to prove that she was a biological child of the deceased, it was submitted S could not be a dependant under ***section 29(a)*** of the Law of Succession Act.

The respondents also relied on the judgment of this Court in ***EMM v. IGM*** & ***Another, CA No. 114 of 2012*** and submitted that the mere use of the M name by S did not make her a daughter of the deceased. As regards the presumption of legitimacy, it was submitted that the trial court having found correctly that E was not married to the deceased, the presumption had no application because section 118 of the Evidence Act contemplates birth arising during the marriage.

Moving on to the two cross-appeals by Kihara, Mbatia and W, which the respondents under reference supported, it was submitted that the learned judge, having found correctly, that M and E were not widows or beneficiaries of the deceased, he erred by failing to make an order directing them to pay back to the estate all the moneys and proceeds that they had over time received from the estate of the deceased. As far as the cross-appellants were concerned, the findings of the High Court rendered both M and E intermeddlers in the estate who should be compelled to make good the losses that the estate had suffered by making payments to them which were not deserved or justified.

Naturally M and E were of a different opinion on the cross-appeal, which they opposed on the ground that the payments were made to them on the basis of valid orders by the court, which recognised them as widows and administrators of the estate. Accordingly they denied that they were intermeddlers in the estate and urged us to find that no basis had been laid for allowing the cross-appeal as prayed by K, M and W.

As regards the claim by Tangulizi, none of the parties asked us to interfere with the 4.5 acres that the trial court awarded to it from B's share of Title No ***[Particulars Withheld]***, save for M who proposed the sale of the entire Title No. ***[Particulars Withheld]*** without addressing the effect of such an order on the 4.5 acres awarded to Tangulizi.

The respondents, together with M and E, however opposed the appeal by Impulse. They contended that the purported sale of the farm to it was irregular and unlawful because it neither involved, nor was it sanctioned by D, then one of the joint administrators of the estate. They denied that Impulse ever paid Kshs 6,400,000.00 to SFT on behalf of the estate, contending that the agreement for sale did not advert to such payment and that the evidence produced before the trial court in the form of official SFT receipts showed that it was L who paid the amount to SFT. They also insisted that Impulse had failed to complete the transaction within the specified time (25th November 2005), being 30 days from the date of execution of the agreement for sale, yet time was made of the essence. They denied that there was any valid variation or extension of the completion time and declaimed Impulse's contention that the completion was frustrated by litigation initiated by the administrators and beneficiaries, noting that the litigation commenced six months ***after*** the completion date had passed. They added that the real reason for Impulse's failure to complete within the stipulated time was its inability to raise the balance of the purchase price. Relying on ***Wambugu v. Njuguna*** ***[1983] KLR 172,*** it was submitted that the estate was entitled to rescind the agreement for sale because time was made of the essence.

The respondents further faulted Impulse for purporting to register the transfer on 22nd May 2006, yet as of that date stamp duty had not been paid and was not paid until 7th June 2006. In their view this was fraud intended to defeat the order of the High Court of 24th May 2006, which directed the maintenance of the *status quo*. As further evidence of fraud on the part of Impulse, they referred to the documents that it produced for stamp duty purposes purporting to show that the purchase price for the farm was Kshs 10,487,000.00 instead of the Kshs 214,800,000.00 in the agreement for sale. It was submitted that the purpose of those documents was to avoid paying the due stamp duty, which amounted to fraud. They also submitted that to add insult to injury, Impulse failed to pay the balance of the purchase price. In their view, fraud was proved against Impulse to the required standard and the learned judge did not err by nullifying the purported sale of ***[Particulars Withheld]*** farm to it and determining that the farm was available for distribution to the beneficiaries. They relied on ***Lazarus Estates Ltd v. Beasley*** ***[1956] 1 All ER 341*** and submitted that fraud vitiates all contracts and transactions.

On consent of the land control board it was submitted that the evidence on record indicated that none was obtained and as a result the transaction, which involved agricultural land, was null and void. The respondents contended that the transaction as clearly indicated in the agreement for sale was between the estate and Impulse rather than between SFT and Impulse and therefore consent from the Land Control Board was required. In their view, once SFT was paid its outstanding dues by the estate, it had no interest in the farm, which it could transfer to the company.

As regards the suit before the Environment and Land Court, it was contended that Impulse withdrew the same on 22nd December 2009 leaving only the counterclaim by the estate, which did not preclude the trial court from determining whether the farm was part of the estate. In any event, according to the respondents, the High Court had much earlier disposed of an objection by Impulse and held that it had jurisdiction to determine whether ***[Particulars Withheld]*** farm was part of the estate of the deceased, a decision that the Impulse did not appeal. In addition, the respondents contended, the counterclaim was stayed pending the hearing and determination of the probate and administration cause.

Relying on the ruling of the High Court in ***Capital Fish Kenya Ltd v. Monnatz Ltd, HCCC No. 254 of 2013***, the respondents urged us to find that there are situations where the High Court and the Environment and Land Court had concurrent jurisdiction.

On whether the trial court had determined the summons on grounds other than those raised by the respondents, it was submitted that whilst some of the respondents impeached the sale of the farm to the company on the ground that some administrators and beneficiaries had not been consulted; others challenged it on grounds of fraud and misrepresentation. Accordingly, we were urged to find that the learned judge did not rely on any new or extraneous grounds that were not raised by the respondents.

Lastly, it was submitted that once the trial court came to the conclusion that the purported sale of the farm to impulse was null and void, it followed naturally that the farm was part of the assets of the estate and was available for distribution to the beneficiaries.

We have carefully and anxiously considered this appeal and the lengthy record of appeal, which runs into 18 volumes of over 7,000 pages. It is a first appeal and as is the settled practice in this Court, we must reconsider the evidence, evaluate it and draw our own conclusions, but making allowance for the fact that unlike the trial judge, we neither saw nor heard the witnesses. Accordingly, we shall not readily differ with

the learned judge unless it is demonstrated that the conclusions that he reached are not based on evidence or are based on a misapprehension of the evidence or that he acted on wrong principle in reaching his findings. (See ***Selle & Another v. Associated Motor Boat Company Ltd. &*** ***Others*** ***[1968] EA 123).***

In our estimation, the following nine are the real issues in controversy in this appeal, namely whether the learned judge erred by:

i) holding that M and E were not widows and beneficiaries of the deceased;

ii) failing to direct M and E to refund to the estate of the deceased all payments made to them therefrom;

iii) holding that S is not a biological child and beneficiary of the deceased;

iv) failing to determine all the issues raised by the parties;

v) distributing the estate in a skewed manner and failing to distribute all of it;

vi) finding that Kiambaa [Particulars Withheld] and the shares in [Particulars Withheld] Beach Hotel Ltd were part of the estate of the deceased and available for distribution;

vii) holding that [Particulars Withheld] farm was part of the estate of the deceased and available for distribution; and

viii) What orders should we make as regards:

(a) the award made by the High Court to Tangulizi; and

ix) (b)the costs of this appeal and of the proceedings in the High Court.

On the first issue as far as it relates to M, N and W did not contend in the summons for confirmation of grant that M's marriage to the deceased was invalid. Their ground for her exclusion from the estate was that she was validly married to the deceased, who subsequently divorced her, after which she married the deceased's brother, CKK. In paragraph 3 of their two separate affidavits sworn on 20th February 2012 in support of the summons for confirmation of grant, they deposed that the deceased was survived by among others:

*"**M N – Divorced late Hon. MK and remarried to (sic) the late CKK. She has no siblings (sic) with the late Hon. MK."***

In their witness statements dated 18th June 2013, as well as in their evidence, Kihara and L also maintained that M was married to the deceased, divorced and remarried CKK. In her protest and witness statement, M however maintained that she was married to the deceased; that he had divorced D before marrying her; and that she never divorced the deceased or remarried CKK. When she framed her issues for determination arising from the summons for confirmation of grant, the pertinent part was as follows:

*"**3. Whether M N M is a lawful beneficiary of the Estate;***6

4. Whether M N M divorced the late Honourable MK;

5. Whether M N M remarried after the demise of the late Honourable MK."

In our view, the determination of issue No. 3 on whether M was a lawful beneficiary of the deceased was clearly dependent on the conclusions that the trial court would reach on issue Nos. 4 and 5, regarding whether the deceased divorced her after which she remarried. In holding that M's marriage to the deceased was invalid, the learned judge expressed himself as follows:

> ***"The circumstances of the second marriage (between the deceased and D) were not clearly brought out, save that it produced seven (7) children. The last child from that marriage was said to have been born in 1966, suggesting that the same was contracted either in the 1940s or in the 1950s. Considering the circumstances prevailing at the time, I would hold that the same must have been contracted in accordance with Kikuyu customary law for the parties were all Kikuyu by ethnicity. No proof was presented to (the) effect that the said marriage had been dissolved when M N allegedly began to cohabit with the deceased, nor by 1971 when she purportedly married the deceased under statute."***

With respect, it was not open to the learned judge to conclude that the prior marriage between the deceased and D was a Kikuyu customary marriage merely on the basis that the parties were both Kikuyu and the marriage was conduct in the 1940s or 1950s. This was pure speculation. To reach the conclusion that the deceased was married to D under Kikuyu customary law, the learned judge had to have before him evidence. In ***Gituanja v. Gituanja*** ***[1983] KLR 575***, this

Court held that the existence of a customary marriage is a matter of fact, which is proved by evidence. (See also ***Kimani v. Gikanga [1965] EA 735.*** It cannot be presumed under sections 4 or 119 of the Evidence Act as the respondents invited us to do, because there is no basis for the assumption that in the 1940s and 1950s all Kikuyus were getting married exclusively under customary law. In any event no law provides, as contemplated by section 4 of the Evidence Act that the court may presume a customary marriage. It is also not lost to us that the repealed Marriage Act commenced on 29th November 1901 and the African Christian Marriage and Divorce Act (repealed), on 17th December 1931, undermining the assumption that Africans in the 1940s and 1950s were marrying only under customary law.

As far as we can discern, none of the parties pleaded that M's marriage to the deceased was vitiated by his prior customary marriage to D. None of them asked the court to declare the marriage between the deceased and M invalid; they could not possibly have done so because it was their position that the marriage was lawfully ended by divorce. They proceeded on the assumption that M was validly married to the deceased, but that marriage had ended in divorce and she had remarried CKK. That in our view was the issue that the learned judge was called upon to determine. However, he somehow ended up determining a totally different issue on the validity of the marriage, which was not properly placed before him.

Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in ***Chalicha FCS Ltd v. Odhiambo & 9 Others*** ***[1987] KLR 182,*** the Court held that:

> ***"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."***

Later in ***Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed,*** ***CA No. 179 of 2010*** the Court expressed itself thus:

> ***"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by***

the court are clear."

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See ***Odd Jobs v. Mubea [1970] EA 476)***. However that was clearly not the case in this appeal. A perusal of the record leaves no doubt that the validity of M's statutory marriage to the deceased on account of a subsisting customary marriage to D was not before the learned judge; that such issue would have been completely at variance with the respondents' case as pleaded and presented, namely that M was married but divorced; and in any event the issue of D' customary marriage was adverted to rather obliquely and fleetingly in cross-examination, to ever justify it constituting the lynchpin of the court's decision. We accordingly think there is considerable merit in the circumstances, in M's complaint that she was prejudiced and denied a proper opportunity to address the new and different issue of the alleged prior customary marriage and its effect on her statutory marriage.

There are still additional reasons why we think, from the evidence on record, that the conclusion that the statutory marriage between the deceased and M was vitiated by an earlier customary marriage is not tenable. The pertinent part of section 11(1) (d) of the repealed statute, which the learned judge relied upon to declare the marriage between the deceased and M invalid, provided as follows:

> ***"The registrar, at any time after the expiration of twenty-one days after the expiration of three months from the date of the notice referred to in section 8 of this Act, shall, upon being satisfied by affidavit that-***
>
> > ***(a)...***
> >
> > ***(b)...***
> >
> > ***(c)...***
> >
> > ***(d) neither of the parties to the intended marriage is married by native law or custom or in accordance with Mohammedan law to any person other than the person with whom such marriage is proposed to be contracted, issue his certificate in the prescribed form."***

In our view, that provision leaves no doubt that it is the registrar of marriages as defined in section 2 of the Act who is to be satisfied, before issuing a certificate, that neither of the person to the marriage is already married to another person by native, customary, or Mohammedan law. The evidence on record shows that a marriage was ultimately solemnized between the deceased and M on 20th March 1971 at the District Commissioner's Office, Kiambu and a ***certificate of marriage No. [particulars Withheld]*** was issued to the two. Under the repealed Act, a marriage could not be solemnized and a certificate of marriage issued without the registrar being satisfied that none of the two parties to the marriage suffered the impediment contemplated by section 11(1) (d). The "condition" of M is indicated in the marriage certificate as "spinster" and that of the deceased as "divorced". What the learned judge did was to find, forty-four years after the event, and without the issue being properly placed before him and without proper evidence, that the registrar should not have been satisfied as to the status of the deceased. To reach such a conclusion would have required a complaint before the learned judge that the registrar had not issued the certificate required by section 11(1) (d) or that he had issued it in violation of the statute, and also evidence from the registrar or another witness explaining whether the registrar had issued the certificate and the basis upon which he was satisfied as regards the marital status of the deceased before he issued the certificate. That a marriage certificate was issued to M and the deceased *prima facie* means that the requisite procedures before the solemnization of the marriage and the issuance of the marriage certificate were complied with. That would include the registrar satisfying himself that the deceased was not married under native or customary law. We are accordingly satisfied that validity of the certificate of marriage and by extension the validity of the marriage between M and the deceased, with respect, could not be impeached as fortuitously as happened in this case.

We would also add that ***section 34*** of the repealed Act as read with ***section 83*** of the Evidence Act did not

allow the learned judge to go behind the marriage certificate and conclude casually that the procedures prescribed before the issuance of the marriage certificate were not complied with. Section 34 declared every certificate of marriage admissible as evidence of the marriage to which it relates without any other proof whilst section 83(1) of the Evidence Act requires, in mandatory terms, the court to presume to be genuine every document purporting to be a certificate that is declared by law (such as section 34 of the repealed Marriage Act) to be admissible as evidence of any particular fact.

We do not think that the decisions in ***K (otherwise B) v. K*** ***[1972] EA 554*** and ***Pauline Ndete Kinyota Maingi v. Rael Kinyota Maingi, CA No. 56 of 1984*** are of any assistance to the respondents because in those cases it was properly proved, and not merely presumed, that at the time of contracting the monogamous marriages, there were existing customary marriages, which had not been dissolved. Again the question of the validity of the statutory marriages on account of prior customary marriages was properly pleaded and placed before the court in those two cases.

Ultimately, as regards M, we come to the conclusion that the learned judge erred by holding that her marriage to the deceased solemnised on 20th March 1971 was invalid. There was no evidence that M was ever divorced by the deceased as required by the repealed Act, save that they were separated and living apart when the deceased died. Separation alone did not deprive her of the status of a widow of the deceased because the Law of Succession Act defines wife to include a separated wife. As we stated earlier, none of the party has cross-appealed against the finding by the learned judge that M did not marry CKK. This ground of appeal must therefore succeed.

Arising from our finding as regards the validity of the statutory marriage between M and the deceased, it is in our view moot to enter into an inquiry whether the deceased and M were married under customary law or whether the presumption of marriage could have arisen as regards their relationship. In light of our concrete determination, the issue has ceased to exist as a live and tangible dispute, and courts must avoid wasting time determining issues that are or have become merely hypothetical or academic. (See ***Barowski v. Attorney General of Canada*** ***[1989] 1 SCR 342).***

Turning to E, she was named in the affidavit in support of the summons as one of the persons surviving the deceased, but in the following terms:

> ***"14. M/s (sic) E WW was employed as an assistant but ended up cohabiting with the late Hon. MK for a short while. She has no siblings (sic) with the late Hon. MK.***
>
> ***15. Before the late Hon MK passed on in or around 1980, E WW was married to a Mr HR who is the father of the first three children namely S (sic) W, P W and***
>
> ***B."***

In her witness statement and evidence L insisted that E was not a widow of the deceased while K maintained that between 1978 and 1990 she was assisting the deceased as a copy typist for an autobiography that he was writing. It was his case that the deceased never married E who was the daughter of a neighbour and younger than some of the children of the deceased. As far as he was concerned, she was married to HR who was the father of her children.

In her protest, E deposed as follows regarding her status:

> ***"With reference to paragraph 3 (14) and (15) of the affidavits of David N M.K and D WK, I wish to state that I was a wife of the deceased and deny the allegations that I was an assistant or even that I was as that time married to HR. We were living together as man and wife, in our matrimonial home and even when he fell ill on his last day, we were together when he started vomiting and our cook (now deceased) and I rushed him to hospital." (Emphasis added).***

Clearly from the above, E was claiming that she was a widow of the deceased arising from cohabitation as husband and wife. It is therefore not correct, as the respondents contend, that she had not pleaded or

raised the issue of presumption of marriage. When she testified in court, she claimed that she married the deceased traditionally in November 1975 but there was no ceremony apparently because her father was an Anglican Church of Kenya lay leader who did not believe in customary rites and ceremonies. It was her evidence that when she married the deceased, he was not living with any other wife, was a bachelor and they cohabited at [particulars withheld] farm as their matrimonial home. She denied having been married to HR or being merely the deceased's mistress or copy typist. As we earlier adverted, she took the preposterous view that all her children, including those born years after the death of the deceased, were his biological children, notwithstanding the fact that when the deceased died, she was at least 6 months pregnant and the deceased practically never had any access to her after she gave birth to S in November 1981.

Having carefully analysed the evidence, we do not see any basis for faulting the learned judge in his finding that E did not prove that she was married to the deceased under Kikuyu customary law. The onus was on her to prove such marriage. In ***Kimani v. Gikanga*** ***(supra), Duffus JA*** explained the position thus:

> ***"To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."***

To prove a valid Kikuyu customary marriage, E was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work ***Restatement of African Law: Kenya Volume1 The Law on Marriage and Divorce*** ***(supra)*** explains that no marriage is valid under Kikuyu law unless the *ngurario* ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the *ruracio* has been paid. (See also ***Zipporah Wairimu v. Paul Muchemi*****, *HCSCNO 1880 of 1970).*** These are the rites that E readily admitted were not performed on account of her father's Christian background, and yet she was insisting that she was married under Kikuyu customs.

Although she later on changed track and insisted that dowry was paid and *ngurario* performed, there is no credible evidence on record to prove that. It is inconceivable that the *ngurario* ceremony could be performed by a few people in a hurry, as she testified, on a day when the family was also involved in a funeral, and also in the absence of the deceased, who with E would have been the stars of the ceremony and responsible for cutting the lamb's shoulder. It is also far fetched to claim, as she did, that a different person represented the deceased in such an important ceremony. As this Court observed in ***Eliud Maina Mwangi v. M Wanjiru Gachangi:***

> ***"Even if we allow room for evolution and development of customary law, it does not appear to us that ngurario under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people."***

This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E based on cohabitation and the parties holding themselves out to society as husband and wife. In ***Mbogoh v. Muthoni & Another*** ***[2006] 1 KLR 199***, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the Court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also ***Kimani v. Kimani & 2 Others*** ***[2006] 2 KLR 272).***

The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example

Hortensia Wanjiku Yawe v. Public Trustee**, CA No. 13 of 1976). In ***MWG v. EWK** [2010] eKLR*, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact. As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the ***Hortensia Wanjiku Yawe v. Public Trustee** (supra), Wambuzi, P.* noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.

Madan, JA (as he then was) articulated the rationale of the presumption of marriage in the following famous words in ***Njoki v. Mutheru** [2008] 1 KLR (G&F) 288:*

> ***"It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the "husband", or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband"***

The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (***Mbogoh v. Muthoni & Another,** (supra)*. ***Mustapha, JA*** added in ***Hortensia Wanjiku Yawe v. Public Trustee** (supra)* that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also ***Kimani v. Kimani & 2 Others** (supra)*.

Turning to the evidence on record, the evidence of E was that she started cohabiting with the deceased as husband and wife at ***[Particulars Withheld]*** farm since 1975, where she has resided since. At the time of the death of the deceased, they had lived together for about six years. The deceased was not living with D or M at that time.

E and the deceased did not have any children, save for S who was born approximately two and half months after the death of the deceased, and whose status we shall revert to later in this judgment. When he was cross-examined by Mr. Muriithi for E, N stated that E was living with the deceased when he was taken ill. Cross-examined further by Ms. Waitere for S, he stated thus:

> ***"At (the) time my father died he was taken to hospital by E. E was cohabiting with my father. I do not know that she was married by someone else thereafter."***

In answer to a question by Mr Odhiambo, he stated that he did not know whether E was married to the deceased. For her part, M also testified that by the time the deceased died, he was living with E whilst she was living in Mombasa. According to M the deceased started living with E after M separated from him in 1976 and went to live in Mombasa. Although she maintained that E was not married to the deceased under any system of law, M however, had no objection to E being recognised as a wife of the deceased.

The other respondents denied that E was cohabiting with the deceased as husband and wife and tried to explain away her presence at [particulars withheld] farm with the deceased on the basis that she was a copy-typist assisting with his biography. Before the trial court, E had attempted to rely on a bundle of documents, among them photos showing her dancing with the deceased at State House during one of the new year's ball, photos of herself with the body of the deceased at the mortuary, and the funeral programme which showed her as the first person to lay a wreath on the deceased's grave. The court refused to consider those documents, correctly in our view, because of the shoddy and unorthodox manner in which they were produced.

Nevertheless, having carefully re-evaluated the evidence on record, we are satisfied that there was a lot of evidence indicating that the family of the deceased itself treated and held out E as a wife and later widow, of the deceased. We are equally satisfied that the learned judge fell into error by limiting himself to the consideration that E did not call any member of the community as a witness to confirm that she was held as a wife of the deceased, without paying due regard to the evidence on record of the status that the family of the deceased ascribed to her, long before they changed their minds as final distribution of the estate beckoned.

If E was only a mere copy typist, it is difficult to fathom why it was her rather than the children of the deceased who claim to have been older than her, who was responsible for rushing him to hospital when he fell ill just before his demise. There is equally no rational explanation why the estate of the deceased allowed a total stranger to occupy, and to continue up to now occupying [Particulars Withheld] farm where she was staying with the deceased just before he died. Or even why the deceased named her his next of kin with respect to his 11,000 shares in ***[Particulars Withheld]*** Beach Hotel Ltd, which the family readily and obligingly transferred to her name. There is also no convincing reason why the family of the deceased allowed her to serve as a director of ***[Particulars Withheld] Limited***, an investment company of the family, on equal basis with the three representatives of the other houses of the deceased, including in the sharing of dividends. Further, there is the ***[Particulars Withheld] Investment and Development Company,*** a family company where E is a director and a prime plot in the heart of Nairobi used as a parking lot, from which the family has allowed or let E to collect income.

But more importantly, it does not make sense to us that the clan of the deceased would agree to transfer to a total stranger, a mere copy typist of the deceased, the *ancestral land* known as Kiambaa/***[Particulars Withheld]*** which was to devolve to the deceased as his inheritance from his father, the late Senior Chief K. If there was ever any piece of evidence of the family of the deceased treating E as the youngest wife of the deceased, it is this *readiness or willingness* of his clan and family to transfer in her name *ancestral land* that was meant for the deceased, independent of the question whether they had power to do so. In our view, the evidence of how the deceased's clan and family regarded E and treated her, when properly considered and evaluated, would be a much stronger pointer of her acceptance as wife or widow of the deceased, than would have been the evidence of a general member of the public. By their actions and representations, the clan and family of the deceased had accepted her as a wife and widow of the deceased and treated her as such. As shall be clear shortly, we are persuaded, in the peculiar circumstances of this appeal, that the High Court misdirected itself in failing to consider and give due regard to glaring evidence on record of how E (and M for that matter), were treated and held up by the family of the deceased itself, for a period of over thirty years, in determining whether the two were widows of the deceased.

The record is replete with evidence, some of it on oath, where the respondents unequivocally stated or represented that the deceased had four houses including those of M and E and that the two were widows of the deceased. The following few examples will suffice to demonstrate this point. Way back on 22nd February 1982, Isaac, the eldest son of D and the husband of Joyce deposed in support of his application to be included as an administrator *ad collegenda bona* with N, that the deceased had four houses, that of L, D, M and E. It is inconceivable to us how Joyce, the widow and administratrix of his estate, can 30 years later purport to take a position totally different from that taken by her late husband, I, in his lifetime. We are persuaded that between herself and her late husband, he was better placed to know the marital status of E.

The deceased's brother, CKK, a former Provincial Commissioner, Eastern Province, in support of his own application to be appointed interim administrator of the estate of the deceased in lieu of N deposed as follows on 3rd October 1983:

> ***"8. As stated above my application is supported by affidavits sworn by all who are interested and these affidavits represent their consent that I should be appointed as the interim administrator. Those who have sworn these affidavits are:***
>
> ***1. From the house of my brother's first wife LN (deceased)***

(a) PMM

(b) GKM

(c) IWM

2. From the house of my brother's second wife DRW

(a) I N M

(b) D W M

(c) G K M

(d) S K M

(e) C W M

(f) the said second wife of the deceased, D W M

3. From the house of my brother's third wife, M N who has not been blessed with children there is an affidavit sworn by the said third wife of the deceased , M N M (Emphasis added).

4. From the house of E W the fourth wife of my late brother there is a letter from the Advocate acting for her to show that she has no objection to my being appointed the interim administrator in place of the said D N." (Emphasis added).

It is apposite to note that the depositions by Isaac and CKK were made soon after the death of the deceased, when there was no obvious reason for them to make untrue depositions. At the very least, it was an important indicator of the status of M and E in their eyes, soon after the death of the deceased.

On 13th April 1984 the High Court varied the limited grant of letters of administration *ad collegenda bona* and appointed N, Isaac, M and E the administrators of the estate of the deceased. The record of proceedings before ***Platt J***. on 12th January 1984 shows that the family of the deceased, with the exception of ***RWM, GM,*** and ***I W,*** who were said to be out of the country in the USA, consented to the variation. The rationale of appointing four administrators was clearly to have a representative of each of the four houses in the administration of the estate. It is the height of mischief therefore for K, M and W to blame Platt, J., as they do in their submissions, "for being ignorant of Kikuyu customary law" and admitting M and E as administrators of the estate, representing each of the four houses of the deceased. The information that the learned judge acted upon came from the family itself and it was the family that agreed to the four administrators. There is in our view therefore no basis for the claim that Platt, J. arbitrarily admitted strangers as administrators of the estate of the deceased.

When D herself applied to be appointed an administrator of the estate in May 1988, she caused citations to issue to N, Isaac, M and E worded thus, in the pertinent recital:

"Whereas it appears by the affidavit of D R sworn on the 11th day of May 1988 that the above named MK of Post Office Box Number 49799 Nairobi died on the 3rd day of September 1981 leaving you the said D N, IN, M N and (E) WK being sons and second and third widows respectively to the deceased and other persons to share in his estate..." (Emphasis added).

In the affidavit D deposed that she was the eldest surviving wife of the deceased and that M and E were the second and third widows of the deceased and entitled to share in his estate.

On 22nd March 1993, Githinji revoked the interim grant issued on 13th April 1984, but still maintained four administrators of the estate namely N, D, M and E, each representing one of the four houses of the

deceased. It is instructive that in making the order, the learned judge relied on a joint affidavit sworn by N, M and E, which supported the appointment of the four administrators. When she became ill, D was replaced as an administrator by one of her sons, W. We find it very odd that although the respondents whimsically claim that it was the High Court that arbitrarily and without their consent foisted strangers on the estate as administrators, they have never appealed against the appointment of M and E as administrators.

There is also on record a consent order recorded before Githinji, J. on 9th June 1995 for payment of medical bills for some members of the family of the deceased. Clause 8 of that order states thus:

> ***"8. That the administrators do pay Kshs 300,000/= maintenance to each of the 4 houses of deceased for maintenance subject to review of the maintenance to be paid." (Emphasis added).***

By consent therefore all the four administrators were reiterating that the deceased had four houses, two of which belonged to M and E.

In 2001, N, M and E filed in Nakuru ***High Court Civil Suit No. 152 of 2001*** against ***Barely Wheat Ltd*** and 4 others challenging the leasing of ***[Particulars Withheld]*** farm. This is how the plaintiffs were described in the plaint:

> ***"5. The plaintiffs aver that the first plaintiff (N) being the eldest son of the late MK and the second (M) and third (E) plaintiffs being two of the four widows of the late MK respectively, jointly with Rith D W M are the duly appointed administrators of the estate of the late Hon. MK by virtue of the grant of letters of administration issued in 1981." (Emphasis added).***

N was the first plaintiff and had no problem pleading or being party to a pleading expressly stating that M and E were widows of the deceased.

L, one of the respondents who has been most outspoken in asserting that M and E are not widows of the deceased, swore an affidavit on 19th April 2007 in support of her application to be appointed an administrator of the estate in lieu of her mother, D, who at the time was ailing. This is what she deposed in paragraphs 2, 3, and 4 of her affidavit:

> ***"2. That on 22nd day of March 1993 the Honourable Mr. Justice Githinji appointed Rith D W M, D N M, M N M and E W M as the administrators of the estate of the (sic) MK (hereinafter referred to as the estate) (Annexed and marked LCK1 is a true copy of the orders).***
>
> ***3. That each of the aforesaid administrators represented each of the four houses of the deceased.***
>
> ***4.That the 1st house is represented by D N M, the 2nd house is represented by Rith D W M, whereas the 3rd and 4th houses are represented by M N M and E W M respectively."*** (Emphasis added).

W opposed L's application and prayed to be appointed the administrator to represent the house of D instead of L. In an affidavit sworn on 26th October 2009, he deposed as follows in paragraph 3.

> ***"That the inability of the said R W M to administer the estate is prejudicing the interests of the beneficiaries in her house since as an administratrix she represents not only her own interests but also those of the beneficiaries in her house because the deceased had four wives."*** (Emphasis added).

In one of the applications that was determined by Nambuye, J. in a ruling dated 30th April 2010, L had in an affidavit sworn on 10th December 2009 deposed that the beneficiaries of the deceased were from four houses, with M being in the 3rd house and E in the 4th, adding however that none of the two had any children with the deceased. In her proposal for distribution of the estate then, she duly recognised the houses of M and E, a position that was adopted by M and K in a joint affidavit sworn on 17th December

2009. The unequivocal representations by L, W, M and K regarding the status of M and E in the estate of the deceased, are too clear to require any further elaboration.

Then there are the partial confirmations of grant, where the estate of the deceased was partly distributed and proceeds of sale of part of the estate shared among the four houses. The first was by Koome, J. on 30th November 2005 in which she distributed the proceeds of sale from 291 acres excised from one of the assets of the estate (Closeburn Estate) to all the four houses. The second was by Nambuye, J. on 28th May 2010. Clause 4 of the order reads as follows:

> ***"4. That the widows namely R (sic) D W M, M N M and E W M do each receive a partial disbursement of Kshs 30,000,000 (30M) from the deposited funds." (Emphasis added).***

From the rest of the order it is crystal clear that the only dispute as regards the beneficiaries was the children of the house of M and E. The court withheld any payment to them pending determination of whether they were beneficiaries of the deceased.

Contrary to the claim by the respondents that the partial distributions were under section 54 of the Law of Succession Act pending final distribution under section 71 of the Act, the ***Certificates of Partial Confirmation of Grant*** on record in respect of the two distributions expressly state that the confirmations were pursuant to section 71 of the Act. Arising from those partial confirmations both M and E received huge payments just like the other two houses. We must emphasise that from the record those payments were not arbitrarily determined by the court as the respondent now claim, but by the family of the deceased itself, the court only sanctioning their wish.

The respondents' explanation for the payments made to M and E upon partial confirmations of the grant is rather disingenuous, to say the least. In one breath, they claim that the two were paid in their capacities as administrators of the estate, not as beneficiaries. In another, they claim that the payments to the M and E were interim, pending final determination of the real beneficiaries of the deceased. In our view a grant cannot be confirmed, even partially, without first identifying the beneficiaries. Moreover, to effect any payment to M and E in their capacities as administrators, did not require partial confirmation the grant.

In ignoring the partial confirmations of grant that Koome and Nambuye, JJ. had separately ordered, Musyoka, J. reasoned that the issue of the status of M and E was alive since the 1980s and that the full grant was made in 1993 without the parties being given opportunity to ventilate on all the issues and that it was the hearing before him that gave the parties that opportunity for the first time, although by that time there had been partial confirmations of the grant. He than concluded:

> ***"The practice is that a grant should not be confirmed or an estate distributed before issues that touch on identity of persons who are entitled to a share in the estate are sorted out. The issue should have been disposed of first before the partial distributions were done...In my view the partial distribution before determining those issues did not deny the parties the chance to ventilate on them or rob the court the opportunity to address the matter. It did not tie the hands of the court. It cannot therefore be argued that the court is estopped from considering whether or not M N and E W were wives, or, put differently, are widows of the deceased. The court had not previously taken evidence on the matter, which would have assisted it decide on the matter of the status of these two women, and therefore it cannot be said that the matter is res judicata." (Emphasis added).***

With respect, we have fundamental problems with the approach taken by the learned judge in the above passage. Firstly, save for the question whether the children of the houses of M and E were beneficiaries of the deceased, which was deferred, the other beneficiaries of the deceased were identified in the partial confirmed grants, which we have noted, were under section 71 of the Law of Succession Act. Secondly, there is an implicit and misleading assumption on the part of the learned judge that "evidence" of who are beneficiaries must only be *viva voce* evidence and not affidavit evidence. We do not see the basis in law for that view, granted the many depositions that we have referred to in this judgment in which the respondents expressly stated under oath that the deceased had four houses and that M and E were two of

his widows. In any event, if the respondents deemed it necessary to adduce *viva voce* evidence, it was for them to apply for it to be taken either before Githinji, Koome or Nambuye, JJ., which they did not do. It cannot therefore fall on Musyoka J. many years later, to give gratuitous advise that *viva voce* evidence ought to have been taken. Third and more fundamental, Musyoka J.'s jurisdiction was concurrent to that of Koome and Nambuye, JJ. at the material time. It was not open to him to purport to find that the partial confirmations of grant were undertaken contrary to the law or without identification of the beneficiaries, which the record shows, in any event, was not the case.

The respondents who urged the learned judge to find that he had jurisdiction to revisit the issue of identification of the beneficiaries and overrule the two earlier decisions of judges of the same court, if at all they were aggrieved, did not appeal either against appointment of M and E as administrators or against the finding in the partially confirmed grants that the two were widows and beneficiaries of the estate. When Nambuye, J. partially confirmed the grant, the respondents had the presence of mind to object to payments to the children of the houses of M and E, but not to M and E themselves. But even if they had appealed, it could not have fallen upon Musyoka, J. in the circumstances of this case, to reverse or contradict the findings of Koome and Nambuye, JJ. In our view, the only way by which Musyoka, J. would have circumvented the findings by Koome and Nambuye, JJ. was if he was dealing with an application for review of their earlier orders and awards, which was not the case.

Ultimately and with respect, the learned judge erred by purporting to reverse, without jurisdiction or being properly moved, the earlier findings of the two judges of concurrent jurisdiction. As was stated by this Court in ***Stephen Mwaura Njuguna v. Douglas Kamau Ngotho & Another [2012] eKLR*** and ***Joseph Ndirangu Waweru t/a Mooreland Mercantile Co & Another v City Council of Nairobi [2015] eKLR,*** a judge cannot review an order of a concurrent judge merely because it is perceived that that it was made on a foundation of incorrect procedure, a misapprehension of the law, or wrong exercise of discretion. In such a case the proper way to correct a judge's alleged misapprehension of procedure, substantive law, or wrongful exercise of discretion is to appeal the decision. (See also the judgments of the High Court in ***Eastern & Southern Africa Development Bank v. Africa Green Fields Ltd & Others [2002] 2 EA 377*** and ***James Karuri Ndegwa & Another v Mbiti Ndegwa & Another [2008] eKLR***). Regrettably the learned judge in this case dealt with the application for confirmation of grant before him as if there had never been any partial confirmation of grant, or as if those partial confirmations were misconceived and of no legal consequences.

In our view serious legal consequences for the estate and for M and E in particular, flowed from the partial confirmations of grant made by Koome and Nambuye, JJ., which the learned judge was not entitled to overlook, ignore or reverse at a stroke of the pen. Identification of M and E as beneficiaries of the deceased, with the active participation and representation by the respondents, resulted in payment to them of hefty amounts of money from the estate of the deceased on equal terms with his other two houses. As a result of those judicial determinations, they acquired legal rights as pertains to their status and property, which could not be taken away arbitrarily save through an appeal to a higher court or on a proper application for review in the High Court.

In all the above depositions and statements that we have adverted to, the respondents made representations of fact that the deceased had four houses; that M and E belonged to two of those houses; and that the two were therefore widows of the deceased. As a result of those depositions and representations, M and E were made administrators of the estate of the deceased, were treated for more than 30 years as widows and beneficiaries of the deceased, and were intimately involved, like all other members of the family of the deceased, in making critical decisions concerning the estate. They were allowed to live comfortably and at peace in properties of the deceased and were maintained and paid huge sums of money, in equality with the other two houses of the deceased. Out of the representation and conduct of the respondents, the High Court also treated them as widows of the deceased in the two previous partial confirmations of the grant. In litigation where one of the central issues was whether M and E were treated by the community and the family of the deceased as his widows, the respondents could not, when it suited their convenience, change stance at will and claim that, after all, M and E were not widows. The law does not allow such cynicism in human relationships and the learned judge should not have allowed the respondents to assert before him positions inconsistent with their previous statements

and depositions over a long period of time. ***Section 120*** of the Evidence Act provides as follows:

> ***"120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."***

In this case the respondents were properly estopped from claiming that M and E were not widows of the deceased. (See ***Nurdin Bandali v. Lombank Tanganyika Ltd [1963] EA 304)***. There was no statute, in the circumstances of this case, which barred M and E from relying on the principle of estoppel and in addition they were not invoking it as a sword rather than a shield as claimed by the respondents.

Ultimately, we have come to the conclusion that there was consistent and cogent evidence on record to lead to the conclusion that the clan and family of the deceased accepted and treated E as his widow and that the learned judge fell into error by ignoring that evidence as well as prior judicial determinations by judges of concurrent jurisdiction. We are accordingly satisfied that E was by cohabitation, repute and the conduct of the family of the deceased towards her, a widow and beneficiary of the deceased.

The respondents contended, on the basis of section 37 of the repealed Marriage Act that because the trial court found that at the time the deceased started cohabiting with E, he was still married to M under the statute, E cannot be recognized as a widow and beneficiary of the deceased. Having found E a widow of the deceased by virtue of the presumption of marriage, we do not see why she cannot be a beneficiary under section 3(5) of the Law of Succession Act. That provision provides as follows:

> ***"3(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.***

The section was introduced in 1981 by the ***Statute Law (Repeals & Miscellaneous Amendments) Act, No. 10 of 1981***. The purpose of the amendment was to mitigate the rigours of decisions such as ***Re Ruenji's Estate (supra)*** and ***Re Ogola's Estate (supra)***, which did not recognise as beneficiaries widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognised as a beneficiary of the deceased. (See ***Irene Njeri Macharia v. M Wairimu Njomo & Another, CA No 139 of 1994, Miriam Njoki Muturi v. Bilha Wahito Muturi, CA No. 168 of 2009*** and ***Muigai v. Muigai & Another [1995-1998] 1 EA 206).***

For the avoidance of doubt, save for the case of S, which we shall consider shortly, the house of M and E consist each of only one widow, as there is no dispute that their other children are neither the biological children of the deceased nor children that he had taken into his family as his own and assumed maintenance responsibility prior to his death.

We now turn to the second issue in the appeal, which is raised in the cross-appeal of K, M and W, to wit, whether the learned judge erred by refusing to direct M and E to refund to the estate of the deceased all payments made to them after finding that they were not his widows or beneficiaries. The learned judge refused to order refund because he found that the payments to M and E were made pursuant to an order of a court of concurrent jurisdiction, which he could not interfere with. We think that was the correct approach, which unfortunately the learned judge did not follow when, contrary to the earlier concurrent decisions; he decided that M and E were not widows and beneficiaries of the deceased. In light of our conclusion that both M and E are widows and beneficiaries of the deceased, the issue whether they should refund to the estates moneys already paid to them along with the other two houses of the deceased is moot and does not deserve further inquiry.

The third question arises from S's cross-appeal and concerns the learned judge's finding that she is neither a biological child of the deceased nor a beneficiary of his estate. It is common ground that S was born on 25th November 1981, some 83 days after the death of the deceased on 3rd September 1981. To qualify as a beneficiary of the deceased under section 29 of the Law of Succession Act, S had to satisfy the court that she is a biological child of the deceased because it is not practical for her to rely on the other option presented in that section, namely that she was a child that the deceased had taken into his family as his own and maintained immediately prior to his death. That could not do for someone who was born *after* the death of the deceased. To prove that she was the biological child of the deceased, S resorted to the presumption of legitimacy under section 118 of the Evidence Act. That provision provides as follows:

> ***"118. The fact that any person was born during the continuance of <u>a valid</u> marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."***

We have no doubt in our minds that in proper case section 118 provides conclusive proof of legitimacy, unless the evidence in rebuttal contemplated therein is adduced. As the maxim goes, *pate rest quem nuptiae demonstrant* - a child born to a married woman is presumed to be that of her husband. (See ***<u>EMM v. IGM & Another</u>, (supra)).*** However in the circumstances of this case, the readily application of section 118 to the relationship between the deceased and E posed a lot of challenges. As this judgment shows the marriage of E to the deceased and its validity was the subject of major challenge in the court below. There was also the issue before that court whether E was married to HR before or after the death of the deceased. The paternity of S was therefore an issue of major dispute, with the respondents maintaining that she was of mixed race and sired by HR rather than the deceased. So contested was the issue, that when Nambuye J. ordered partial distribution of the estate and made payments to the children of the deceased from the houses of L and D, no payment was made to S pending determination of her paternity.

In the circumstances, the learned trial judge decided, quite reasonably in our view, that the best way to settle that dispute was to conduct a DNA test. This does not seem to us unusual. See for example ***<u>Elizabeth Wairimu Waiyaki v Elizabeth Wangari Mwathi & Another</u> [2015] eKLR***. On 10th March 2014 the learned judge directed that S undergo a DNA test to confirm her paternity after K agreed to provide the necessary tissue samples. S was happy with that order but although the court extended the period for the test to 3rd July 2014, she did not undergo the test. Instead she opted to establish her paternity through the presumption in section 118 of the Evidence Act, which we have noted faced many challenges in light of the issues that the respondents raised. We must note too that though she was given the opportunity to participate in the proceedings below, S did not testify before the court. When we asked S's counsel why she did not undergo the DNA test or testify before the trial court, her answer was that she lives out of the country and that she could not undergo DNA testing on the basis of samples provided by K, who is not her father. In her view, DNA testing could only have been on the basis of samples taken from the deceased.

With respect, to us those sound more like excuses rather than reasons. It was the duty of the S to ensure that she attended court and presented her case if she so wished. She has not claimed that she was not aware of the proceedings or that she was denied an opportunity to participate. The evidence on record is that she was aware of the proceedings and had indicated her willingness to participate by testifying and availing herself for DNA testing, which ultimately she did not honour. We are not persuaded that the deceased's own sample were the only ones that can determine S's paternity. In the case of ***<u>EMM v. IGM & Another</u>, (supra)***, the deceased's remains were disinterred but due to the period that had elapsed since death, it was not possible to generate or extract DNA profiles from the remains due to degradation of the samples over time. His children, whose paternity was not in dispute, provided the DNA samples instead of the deceased. The deceased in this case was dead and buried for more than 30 years and it is possible the same eventuality would have resulted.

From the evidence on record, we are persuaded that the learned judge did not err in any way by holding

that there was no credible evidence on the basis of which he could find that S was a child or a dependant of the deceased within the meaning of the Law of Succession Act. She was afforded an opportunity to testify before the trial court and to undergo a DNA test, which she rebuffed. Accordingly, we find that the cross-appeal by S has no merit and his hereby dismissed.

Next we shall address the contention by E that the learned judge erred in finding that the property known as Kiambaa /***[Particulars Withheld]*** and the shares in Ocean View Beach Hotel Ltd, both registered in her name, were part of the estate of the deceased and available for distribution to his beneficiaries. To begin with the parcel of land, the same was part of a larger ancestral land known as Kiambaa/***[Particulars Withheld]***, measuring 36.25 acres and registered in the name of the father of the deceased, the late Senior Chief K M, who had five houses, including that of MW, the mother of the deceased. The ancestral land was the subject of litigation inK ***& 13 Others v.K [1986] KLR 23***. By a judgment dated 23rd May 1986, ***Amin, J***. directed that the ancestral land be divided into five equal parts for each of the five houses of the late Senior Chief. The part that was intended for the house of MW, the mother of the deceased, was divided into two further parts, meant for her two sons, CKK and the deceased. The parcel that was meant for the deceased is what his clan transferred to E's name as Kiambaa/***[Particulars Withheld]***.

By virtue of that transfer, E argues that the parcel was her personal property and was not available for distribution as part of the estate of the deceased. First we do not agree with E that the judgment of the trial court contradicts the earlier judgment in K & ***13 Others v.K (supra)*** simply because the earlier judgment directed transfer of one of five equal shares to the house of MW, the mother of the deceased. The judgment did not direct transfer of the property to E. It was the clan elders, in their wisdom or otherwise who decided to transfer the parcel that was meant for the deceased to E.

Kiambaa/***[Particulars Withheld]*** was intended to be the deceased's inheritance from his father. It was transferred after the death of the deceased and therefore ought to have formed part of the estate. As we have already explained, the willingness of the clan to transfer the parcel to E is only an indication of the fact that they regarded her as the youngest widow of the deceased. But otherwise, to the extent that the clan was not the administrator of the estate of the deceased, it had no power under the Law of Succession Act to deal with the parcel as it did. Accordingly, we do not find any basis for faulting the learned judge's conclusion that Kiambaa /***[Particulars Withheld]*** is part of the estate. That is not necessarily to say that the E's registration as proprietor of Kiambaa/***[Particulars Withheld]*** must *ipso facto* be cancelled. If she elects to retain that property, having already found that she is a beneficiary of the deceased, her share in the estate must be reduced accordingly.

As regards the 11,000 shares held by the deceased in [Particulars withheld] Beach Hotel Ltd, the evidence on record shows that the basis of E's claim to those shares and the eventual transfer of the same to her was the fact that the deceased had nominated her his next of kin as regards the shares. Upon his death, the company and the administrators of his estate, on the strength of E's nomination as the next of kin, transferred the shares to her.

The learned judge held that although normally a nomination is a devise of transferring property from a deceased person to the nominee that takes effect upon the death of the nominator, as regards the Companies Act there is no mechanism for transfer of shares in a limited liability company to the next of kin by nomination and that in intestate succession the shares are transferrable to his estate. This is how he expressed himself:

> ***"74. The investment comprised in shares in a limited liability company is governed by the Companies Act. Cap 486, Laws of Kenya. The main legislation does not provide for disposal of shares in a limited liability company by way of nomination, neither is it provided for under the Companies Rules. Such shares are transferable upon death by will or intestacy to the beneficiaries named in the testamentary instrument, where the deceased dies testate, and survivors of the deceased intestate shareholder, where he dies intestate. That is the effect of sections 75 to 87 of the Companies Act.***
>
> ***75...[N]omination is a creature of statute. Transmission of shares in a liability company (sic)***

> ***cannot therefore be done through the device of nomination unless there is statutory provision for it in the Companies Act. The provisions of the Companies Act only provide for transmission of shares in the event of death through the succession process, it is silent on transmission through nomination."...***
>
> ***78. My finding with regard to the said shares is that the alleged nomination was a nullity as there was no statutory basis for it. The interest sought to be conferred by the document relied on to have the shares transferred to E W could not be transferred by the means of the alleged document or the alleged process. The 11,000 shares therefore, although allegedly transferred to E W, still form part of the estate of the deceased and are therefore available for distribution."***

M's and E's consistent complaint that the learned judge went out of his way to make his own findings and conclusions, even without the parties making out the necessary case, appears to be borne out strongly as regards the question of transfer of the shares. It is surprising that the learned judge made the above findings, even after observing that the respondents had not established a basis for nullification of the transfer. The nullification of the transfer of the shares by the learned judge was prefaced by the following poignant paragraph:

> ***"Although the beneficiaries appear to have reservations about the alleged nomination, none of them have attempted to present a proper case for its invalidation or to convince me to disregard it and proceed as if the same did not exist. It was not even submitted that nominations do not apply to transmission of shares in a limited liability company, and therefore the document relied on to transfer the shares had no validity and accordingly there was no foundation for it." [Emphasis added].***

By his own words, the learned judge confirms that the parties did not present these issues but, instead, it was the court that raised and determined the issues on its own motion. That, we have already stated, a court cannot do.

With respect, our reading of the former Companies Act, which was in force at the material time, does not also support the conclusion of the learned judge. ***Section 75, 78, and 79*** of that Act provided as follows:

> ***"75. The shares or other interest of any member in a company shall be movable property transferable in manner provided by the articles of the company."***
>
> ***...***
>
> ***78. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer.***
>
> ***79. On the application of the transferor of any share or interest of a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee. (Emphasis added)***

It is therefore not correct that the Companies Act does not provide for transfer of shares by nomination. To determine whether the shares of the deceased in the company could be transferred to E as his next of kin, one had to look at the articles of association of the company. Where the articles of association provide for transfer of the shares to the next of kin, that would constitute, by dint of section 75, a transfer of the shares by operation of the law, so long as the transfer is by the personal representative of the deceased. The personal representative of the deceased has power to transfer the shares of the deceased as if it were the deceased himself and upon transfer of the shares, the transferee is entitled to be registered in the register of members. What we are saying is that upon death of the shareholder, his shares vest in his personal representative, but contrary to what the learned judge stated, there is nothing in the Act to stop

the personal representatives, if the articles of the company so provide, from transferring the shares to the deceased's nominee. ***(See __Re Kahawa Sukari Ltd__ [2004] 2 EA 93).*** That is exactly what the administrators of the estate did in this case. In our view, the transfer of the shares to E was neither arbitrary nor illegal. It had the full backing of the law. The learned judge, with respect, totally ignored the above provisions in holding that the Companies Act does not provide a mechanism of transfer of shares by way of nomination. The onus was upon the respondents who "had reservations" about the transfer of the shares to E by the administrators of the Estate of the deceased, to prove that the articles of association of the company did not allow transfer of shares through nomination. In the absence of such evidence and in view of the glaring misreading of the provision of the Companies Act by the learned judge, there was no evidence upon which the learned judge could find that the transfer of shares to E as the deceased's nominee was irregular, null and void. On the contrary, the willingness, bordering on alacrity, of the company and the administrators of the estate to transfer the shares to E, strongly suggest the articles of association sanctioned such transfer.

Accordingly, we are not persuaded that the learned judge had any valid basis for interfering with the transfer to E, as the deceased's nominee, his 11,000 shares in ***[Particulars Withheld]*** Beach Hotel Ltd. Both the company and the administrators of the estate of the deceased duly sanctioned that transfer. This ground of appeal must therefore succeed.

The next issue that we shall dispose of is Tangulizi's claim against the estate of the deceased. The claim is for 4.5 acres to be excised from B's share in Title No. ***[Particulars Withheld]***. By a consent order recorded on 26th July 2011 before ***Maraga, J.*** (as he then was), the parties agreed on that excision. Before the trial court, all the parties agreed to uphold the consent order. This issue is raised before us because in her submissions, M suggested that the entire Title No. ***[Particulars Withheld]*** be sold and the proceeds deployed to pay the costs of the parties both in the High Court and in this Court, without making any reference or provision for Tangulizi's claim against B's share.

Having carefully reviewed the evidence on record, we find that M was party to the consent order and that when she testified before the trial court, she was explicit that she had no objection to Tangulizi getting its parcel from B's share of Title No. ***[Particulars Withheld]***. The consent order which guaranteed Tangulizi 4.5 acres from B's share of Title No. ***[Particulars Withheld]*** is still in force and valid. It has not been challenged, let alone set aside. None of the parties to it can avoid it save on the grounds that it was obtained by fraud, misrepresentation or mistake, which is not the case. (See ***__Brooke Bond Liebig (T) Ltd v. Mallya__ (supra), __Flora N. Wasike v. Destimo Wamboko (supra)__, __Greenfield Investments Ltd v. Baber Alibhai Mwaji__ [1998] e KLR,*** and ***__Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another__ [1998] eKLR).***

Accordingly as regards the claim by Tangulizi, we affirm the finding of the trial court that it is entitled to and shall have transferred to it 4.5 acres from Barbra's share of Title No. ***[Particulars Withheld]***.

The next issue for consideration is whether the learned judge erred by failing to determine all the issues placed before him by the parties. This ground of appeal arises from what M and E complain was the total silence of the learned judge as regards the 20 acres that were offered by their co-administrators and the children of the deceased to each of them from ***[Particulars Withheld]*** farm as "token of goodwill from the family". We shall address this issue together with that on distribution of the estate, because they are very closely related and intertwined.

In their evidence in support of the summons for confirmation of grant, the respondents, after claiming that M and E were not widows and beneficiaries of the deceased, nevertheless proposed in the scheme of distribution of the estate, to give each of them 20 acres from ***[Particulars Withheld]*** farm as token of appreciation for their service in the administration of the estate. We have perused the judgment and are satisfied that the learned judge did not address himself to that issue, although it was live before him. It is not possible to tell whether it was his view that the administrators had no power to give away the property to strangers, which is what he found M and E to be, or whether he felt that they had been adequately remunerated as administrators.

We would agree that it was an error on the part of the learned judge to fail to address that offer, which the respondents never withdrew and was therefore an issue before him. As this Court stated in ***Mohammed Eltaff & 3 Others v. Dream Camp Kenya Ltd**, CA No. 318 of 2000*, it is a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or if it has left certain issues unresolved.

(See also ***Sorofina Omurunga Ndunde v. Agnes Namusia Shati & 3 Others [2015] eKLR)***. Once more however, having determined that M and E are widows and beneficiaries of the deceased, dwelling on the failure of the learned judge to make a determination on the award of 20 acres to each of them will not add any value to this appeal.

As regards the distribution of the estate, M and E argue that the distribution was skewed and unduly in favour of L and that the learned judge failed to distribute the entire estate, leaving substantial parts of ***[Particulars Withheld]***, ***[Particulars Withheld]***, ***[Particulars Withheld]***, ***[Particulars Withheld]*** and ***[Particulars Withheld]*** farms undistributed, as well as some ***Kshs. 284 million*** that was held by advocates of the parties. They add that large parts of the farms were reserved for a police station and road reserves without the evidence of a surveyor to confirm or justify the reservations. They also contend that the learned judge failed to give reasons to justify the mode of distribution that he adopted.

The respondents on the other hand challenge the *locus standi* of M and E to question the distribution, contending that once the court found that they were not beneficiaries, they had no ground to complain. They submit that the learned judge took into account the distribution proposal by N and W, the two administrators who applied for confirmation of grant, which proposal was supported by most of the respondents. They also contend that some of the beneficiaries got slightly bigger shares, taking into account their role as administrators and the efforts that others had made to save the estate.

It is common ground that after the judgment, some of the respondents went back to the High Court seeking to be allocated parts of the estate that had not been distributed. Indeed, in their submissions, some of the respondents contended that the solution to non-distribution of the entire estate was not to appeal to this Court, but to apply for review of the judgment of the High Court, to the intent that the undistributed assets would be shared out to the beneficiaries identified by the High Court. For her part L was of the view that since M and E had come into the life of the deceased late when he had acquired all of his properties, principles borrowed from the law of matrimonial property should apply so that, in the event we were to find that they are beneficiaries of the deceased, only 55% of the estate should be available for distribution.

That some of the respondents had to return to the High Court for further distribution of the estate is the clearest indication that indeed as M and E contend, the entire estate was not distributed. As regards the Kshs 284,000,000.00, the learned judge noted that after the sale of one of the portions of ***[Particulars Withheld]*** Estate, Maraga, J. ordered on 26th July 2011 that the advocates for the administrators and some of the beneficiaries hold the sum of Kshs 284,000,000.00 which was not to be disbursed without the authority of the court. On 18th September 2014 ***Ecobank Kenya Ltd*** in which the money was deposited swore an affidavit showing that the account had a debit balance. How the money was withdrawn without the authority of the court as earlier directed or even the advocates concerned, is not disclosed in the record. Again, the learned judge left the issue hanging without determining who took the money and whether the estate of the deceased is entitled to it.

The effect of our finding that M and E were wrongfully excluded as beneficiaries of the deceased; that the shares in ***[Particulars Withheld]*** Beach Hotel Ltd are not available for distribution because they were validly transferred to E; and that there is still an outstanding issue as regards the Kshs 284,000,000, is to vitiate the entire distribution scheme adopted by the High Court, which did not take into account the shares that the houses of M and E were entitled to. We do not think it necessary therefore to say more as regards this ground of appeal which faults the court for failure to distribute the entire estate, save that we do not think there is any room, as urged by L, for application of the principles of matrimonial property in the distribution of property of the deceased in this case. Neither M nor E argued that they were entitled to any property of the deceased by virtue of their contribution, as wives of the deceased, to its acquisition.

The last issue for determination relates to the appeal by Impulse. In our view, this issue turns primarily on whether the transaction was null and void for lack of consent from the Land Control Board. It is common ground that ***[Particulars Withheld]*** farm is agricultural land within the meaning of section 2 of the Land Control Act. ***Section 6*** of the Act provides as follows:

> *"**6. (1) Each of the following transactions -***
>
> > ***(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land, which is situated within a land control area;***
> >
> > ***(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;***
> >
> > ***(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,<u>is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act</u>. (Emphasis added)***
>
> ***(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).***
>
> ***(3) This section does not apply to –***
>
> > ***(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or***
> >
> > ***(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party."***

Again it is common ground that the consent of the relevant land control was neither applied for, nor obtained. Impulse contends that the transaction in question was not a controlled transaction within the meaning of the Land Control Act and that no consent was required because it was a transaction to which the SFT was a party. We are persuaded by the respondent's submission that the transaction was purely between the administrators of the estate of the deceased and impulse and that the role of SFT was very peripheral, as the holder of the documents of title. The evidence on record shows that the deceased had purchased the farm from SFT but had an outstanding balance of the purchase price. SFT's interest in the farm was therefore only payment of the balance of the purchase owed by the deceased and that explains the reason why the agreement for sale was between the administrators of the estate of the deceased and Impulse, rather than between Impulse and SFT. Accordingly, in our view, it is stretching imagination a wee too much to claim that this was a transaction that by virtue of section 6 (3) (b) of the Land Control Act did not require consent because of involvement of SFT as a party.

Consistent decisions of this Court abound on the interpretation of section 6 of the Land Control Act which reinforce that a controlled transaction in respect of which no consent has been obtained is void for all purposes. For example in ***<u>Wamukota v. Donati</u> [1987] KLR 280 Apaloo, JA*** (as he then was) declared as follows:

> ***"I believe that sound reasons of public policy motivated the Parliament of Kenya to seek to prevent the alienation of agricultural land to non Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be void for all purposes. Strong words indeed!"***

See also ***Karuri v. Gitura*** ***[1981] KLR 247; Onyango & Another v. Luwayi [1986] KLR 513*** and ***David Sironga ole Tukai v. Francis arap Muge & 2 Others,*** ***CA No. 76 of 2014).***

Under ***section 22*** of the Land Control Act, it is a criminal offence to be a party to a transaction that is voided by section 6. The provision provides:

> ***"22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person –***
>
> > ***(a) pays or receives any money; or***
> >
> > ***(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment."***

It is trite that a transaction that is declared by law void for all purposes and the furtherance of which constitutes a criminal offence cannot be enforced by a court of law, irrespective of how the illegality is brought to the attention of the court. In ***Heptulla v. Noormohamed*** ***[1984] KLR 580*** this Court held that:

> ***"No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality."*** (See also ***Mistry Amar Singh v. Serwano Wofunira Kulubya*** ***[1963] EA 408*** and ***Mapis Investment [K] Ltd v. Kenya Railways Corporation*** ***[2006] eKLR).***

The remedy that is provided by ***section 7*** of the Land Control Act to a purchaser of land under a controlled transaction that is void is recovery, as a debt, of the money or consideration that has been paid, if any.

On this ground alone, we are satisfied that the learned judge did not err in holding that the transaction between the administrators of the estate of the deceased and Impulse involving ***[Particulars Withheld]*** farm was void for all purposes and that the farm remained part of the estate of the deceased. To countenance completion of the transaction in the absence of consent from the land control board would be compounding a criminal offence. Accordingly we do not deem it necessary to delve into the other grounds upon which the transaction was impeached, save to add that from the record, an application was made in ELC No. 224 of 2013 on 11th March 2013 to stay the hearing of the counterclaim by the estate of the deceased until the hearing and determination of the probate and administration cause. The record does not indicate the fate of that application, but be that as it may, it appears that the parties agreed that whether ***[Particulars Withheld]*** Farm was part of the estate of the deceased be determined in the probate and administration cause and they all addressed the court on that issue. In addition, we are satisfied the administrators of the estate of the deceased adduced evidence to the required standard to show that the transaction was in any event tainted by fraud. (See ***R. G. Patel v. Lalji Makanji*** ***[1957] EA 314*** and ***Gudka v. Dodhia*****, CA. No. 21 of 1980).** That evidence includes the purported payment of Kshs 6.4 million to SFT on behalf of the estate, the transfer of the property before payment of stamp duty, and the deliberate under-declaration of the purchase price for stamp duty purposes.

Under the Appellate Jurisdiction Act, this Court has power, upon hearing an appeal, to distribute the estate of the deceased should it differ with the manner in which the High Court distributed the estate. In view of what we stated at the beginning of this judgment regarding the inordinate delay that it has taken to resolve this dispute, that approach would have been our first and only option. However, we face a distinct handicap in that regard. We have found, and some of the respondents readily concede, that the entire estate was not distributed. The full detail and extent of the parts of the estate that were not distributed are not available to us. Some of the beneficiaries have urged that in some respects surveyors'

reports are required to determine the extent of the road reserves and reservations for police stations and other utilities. M and E were completely excluded in the distribution by the High Court and our conclusion that they are beneficiaries of the deceased will require fresh re-distribution, which may require evidence that is not before us. There is also the Kshs 284 million that the High Court found was withdrawn in violation of a court order, but did not determine who was responsible for the withdrawal. That matter will require determination of which beneficiary or beneficiaries, if any, took that money. Distribution of the estate will have to take into account that amount, and will certainly affect the share of whichever beneficiary is found to have been involved. We have also found that the 11,000 shares of the deceased in ***[Particulars Withheld]*** Beach Hotel Ltd that the High Court distributed are not available for distribution, which will affect the shares of the beneficiaries who were awarded those shares. As regards Kiambaa/***[Particulars Withheld]***, which was distributed as part of the estate, E may elect to retain the same with the consequence that her share in the estate must be reduced accordingly.

All in all, re-distribution of the estate, failing agreement by the beneficiaries as identified in this judgment, will entail, in some respects, taking evidence, which unfortunately is not before us. In the circumstances we are compelled, under ***rule 31*** of the Court of Appeal Rules, to remit the matter back to the High Court for re-distribution of the estate to the beneficiaries that we have identified.

Ultimately, we answer the issues presented in this appeal as follows:

> ***(i) M and E are widows and beneficiaries of the deceased and each of their houses comprise the widow only;***
>
> ***(ii) As a result of (i) above, there's no basis for an order directing them to refund payments already made to them from the estate of the deceased;***
>
> ***(iii) There is no evidence that S is a biological child and beneficiary of the deceased;***
>
> ***(iv) Kiambaa/[Particulars Withheld] is part of the estate of the deceased and available for distribution. If E elects to keep it, her share in the estate of the deceased shall be reduced accordingly;***
>
> ***(v) The deceased's shares in [Particulars Withheld] Beach Hotel were validly transferred to E and are not available for distribution;***
>
> ***(vi) [Particulars Withheld] farm is part of the estate of the deceased and is available for distribution;***
>
> ***(vii) Tangulizi is entitled to 4.5 acres from B's share in Title No. [Particulars Withheld]***
>
> ***(viii) This matter is remitted back to the High Court for re-distribution of the estate, by a judge other than Musyoka, J., to the beneficiaries of the deceased as identified in this judgment. For that purpose the matter shall be mentioned before the presiding judge, Family Division, within 15 days from the date of this judgment for the necessary directions on priority hearing and determination.***
>
> ***(ix) The estate shall bear the costs of the administrators and all the other parties shall bear their own costs.***

It is so ordered.

Dated and delivered at Nairobi this 24th day of November, 2017

P. N. WAKI

....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

K. M’INOTI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR