



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Raphael Omondi Ppuodho (Deceased) (Succession Cause
300 of 2005) [2025] KEHC 323 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 300 OF 2005**

RE ABURILI, J

JANUARY 24, 2025

IN THE MATTER OF THE ESTATE OF RAPHAEL OMONDI OPUODHO (DECEASED)

AND

**IN THE MATTER OF AN APPLICATION FOR
SUMMONS FOR CONFIRMATION OF GRANT**

BETWEEN

BERNADETTE AKINYI OMONDI 1ST APPLICANT

ELIZABETH ANYANGO OMONDI 2ND APPLICANT

AND

MARY AKINYI OMONDI RESPONDENT

JUDGMENT

“To form a family is a free decision. This means that, ideally, when a person dies there should be no fight whether the person had this or that family as one’s family or families should be a fact and not a contest. However, the litany of cases in our courts show that that is not the position. Courts are often called upon to determine whether a deceased person had one or more families. This is the question that will form the crux of this appeal.” Per HA Omondi, KI Laibuta & PM Gachoka, JJA *Ndunda v Mutunge* (Civil Appeal 47 of 2018) [2022] KECA 1308 (KLR) (2 December 2022) (Judgment)

1. The above citation relates to a case whose facts are similar to this case. This matter relates to the estate of the deceased Raphael Omondi Opuodho who died intestate on 28th March, 1992 aged 55 years old. He was survived by a widow Deborah Akoth Omondi who also died on 5th May 1996 aged 41 years and three children namely, Elizabeth Anyango Omondi, Bernadette Akinyi Omondi and John Paul Okoth Omondi who were at that material time still young.



2. In 2005, John Paul Okoth Omondi petitioned for a grant of letters of administration of the estate of the deceased and on 19/9/2005, he was issued with a grant. I observe that in an undated letter written by the Chief, North Ugenya Location, which letter was used to identify the beneficiaries to the estate of the deceased, it was stated that the deceased was survived by only one child, John Paul Okoth Omondi, the then petitioner. The petitioner also listed his now late mother, Deborah Akoth Omondi as the sole widow who had also since died.
3. The aforesaid grant was confirmed on 19th September, 2008 in favour of John Paul Omondi, Bernadette A. Omondi and Elizabeth A. Omondi, all the three surviving children of the deceased. This was after the Provincial Commissioner, Nairobi Area vide his letter dated 27th January, 2007 addressed to the Registrar, High Court at Kisumu, clarified that it had been discovered that the deceased was survived by three children who are the applicants herein and John Paul Okoth.
4. The property which was listed as forming part of the state of the deceased and which was to be distributed equally between the applicants herein and their brother John Paul Omondi are:
 - i. Kwale/Wasini/419
 - ii. Naivasha Block No. 1144/126
 - iii. Fortenan LRNO. 263
 - iv. Onyonka Estate LR No. 72/439
 - v. Migori/ Knyamkago/ Kawere II-1130
 - vi. Migori/ Kanyamkago/ Kawere II-1145
5. Unknown to the applicants and their brother, the children of the deceased, the respondent herein Mary Akinyi Omondi had almost immediately, following the death of the deceased Raphael Omondi in March, 1992, vide Kisumu High Court Succession Cause No. 134 of 1992 petitioned for a grant of letters of administration intestate to administer the estate of the deceased Raphael Omondi Opuodho and was issued with a grant which was confirmed on 9th August, 1993.
6. In the certificate of confirmed grant, the respondent herein listed herself as the sole beneficiary of the estate and the assets of the estate as listed for transmission to herself are:
 - i. Kosprin/79-Trans Nzoia
 - ii. Central Alego/ Nyalgunga/ 2371
 - iii. Kisumu Fort Tenan/263
7. There was no disclosure that the deceased was survived by children or other beneficiaries who were and had also petitioned for a grant of letters of administration vide this file, much later in 2007 and a grant confirmed in 2008.
8. In each of the independent succession processes, the petitioners/ administrators did not list all the assets of the estate of the deceased.
9. Therefore, upon the applicants herein learning of the separate succession cause filed by the respondent herein vide Kisumu HC Succession Cause No. 134 of 1992, they filed summons for revocation of the grant.
10. In the Summons dated 2nd December, 2019, the applicants sought for orders inhibiting any dealings in the estate of the deceased and consolidation of the two succession causes into one. They also sought



for revocation of the grant issued in favour of the respondent as confirmed in Kisumu HC Succession Cause No. 134 of 1992. They further prayed for orders reverting the property listed in the two grants into the deceased's name.

11. Among the grounds in support of the summons, were that the respondent did not seek consent of the applicants to petition for grant, that she was not the widow or beneficiary to the estate of the deceased and that she had left out the beneficiaries of the estate in her petition for a grant.
12. In the supporting affidavit, it was deposed and there is no dispute that the applicant's mother had died in 1996 after the death of their father. They also deposed that the respondent was a companion of their father from 1988 to 1992 until his death upon which the respondent got married elsewhere.
13. The deponent, who was Bernadette Akinyi Omondi deposed that their brother, John Paul Okoth Omondi had also taken out letters of administration intestate in respect of their late father's estate without informing them. It was deposed that they found that the respondent had transferred 5 of the properties in her name and that they had since placed cautions on four of the properties and also realized that the respondent had sold some of the properties belonging to their father's estate.
14. In her replying affidavit sworn on 15th October 2020, the respondent deposed denying the allegation that she was the deceased's companion. She deposed that she was the sole widow to the deceased after her co wife, the mother to the applicants died on 5th May, 1996. That the applicants had all along been aware that she had taken out letters of administration and that that is why they had not objected to the same almost thirty years down the line. Further deposition was that the deceased had left behind many assets, some of which had not been ascertained and or discovered. That the applicant had not disclosed to court some assets which her siblings had clung on an continued to enjoy to the respondent's exclusion.
15. The respondent singled out Plot No. B/151/439 in Nairobi Onyonka Estate, Naivasha LR No. No.16318. She also stated that she had no objection to the inclusion of the objector/ applicant as beneficiaries of the estate but that there was need to make a full inventory and accounts of the estate with a view to redistributing the estate. She was of the view that the case was not one for revocation of grant. Rather, one of inclusion of beneficiaries and redistribution of the estate after including any asset that was left out of the succession. She also stated that the photographs annexed to the objector applicant's affidavit show buildings erected before objection was filed.
16. She filed an affidavit jointly sworn by herself and the deceased on 21st December, 1989 wherein she was to change her name to include the deceased's name on account that the two had been married under Luo Customary law on 4th April, 1986 at Siranga.
17. That application was compromised by way of a consent recorded on 30/11/2020 consolidating this Cause with Cause No. 134 of 1992 and revoking both grants as issued to both the respondent in Succession cause No. 134 of 1992 and in this matter to John Paul Okoth Omondi. The parties also entered a consent agreeing that the respondent and the applicants be joint administratrices of the estate of the deceased. A fresh grant was then issued to both the objector and the respondent herein. The court also ordered both parties to file statements of account of the estate in relation to the two grants within 30 days.
18. On 19th February, 2021, the record shows that the respondent filed an affidavit of disclosure and accounts. She listed ten assets of the estate and disclosed that some of the assets were being controlled by the children of the deceased. She further disclosed that she had sold some of the assets including the Trans Nzoia property after she allegedly litigated in court over the same and settling the purchase price. She also disclosed selling away a portion of Kanyamkago/Kawere II/11302 measuring 7 acres to Daniel



- Oloo Obudho two acres, Victor Onyango Owino 2 acres and Elizabeth Atieno 3 acres which then left 4 acres intact. She urged that the objectors therefore render accounts of the rents received from two properties and that she was willing to have what she has sold to be debited from her share of the estate.
19. On 25th May 2023, the co-petitioner filed a summons to stay intermeddling against the respondent and interested parties who are named and who appear to be the persons to whom the respondent had sold the estate landed property to and especially the Kanyamkago properties. It was further deposed that the respondent was likely to sell off the remainder of the properties in the estate and transfer to third parties.
 20. On 24th October, 2023, the applicants abandoned the application dated 25th May 2023 for reasons that the interested parties had vacated the parcels of land, estate properties which they had occupied and which had prompted the application being filed.
 21. On 20th November, 2023, the applicants herein filed summons for confirmation of the grant and proposed the mode of distribution of the estate. The Summons were heard by way of viva voce evidence following directions of the court given on 24/1/2024. The hearing took place on 28/10/2024 with Bernadette Omondi the 2nd petitioner testifying as PW1 on oath adopting her affidavit and witness statement dated 5/4/2024 in support of the Summons for confirmation of grant as her evidence in chief as well as the schedule of distribution of the assets in the estate of the deceased. She also produced documents filed in support thereof which included search certificates for the various properties as exhibits 1-17 and the documents on the supplementary list of documents dated 8/4/2024 as exhibits 18 to 21 respectively.
 22. The applicant testified that her, her siblings and her mother were not included in the succession cause No. 134 of 1992 and that she was only 10 years old then and that neither were her siblings included therein.
 23. The witness stated that the respondent had done succession in respect of land parcel No. Kosprin 79-Trans Nzoia, Central Alego/Nyalgunga/2371 and Kisumu/Fort Tenan/263. She accused the respondent and John Paul Omondi for secretly taking out letters of administration intestate in respect of the deceased's estate without consulting all the beneficiaries. That after selling off the property subject of the grant she obtained secretly, she started intermeddling with the other properties whose title documents were in possession of the applicant and her siblings. That some of the properties belonged to her dead mother and which upon the demise, was transferred to the Public Trustee.
 24. Further testimony as per the witness statement was that the titles to Kwale and Naivasha land had been with the Bank as security for loans taken by the deceased and were only released to them after they presented their late mother's death certificate. She also stated that some properties were matrimonial home registered jointly in her parent's names and were transferred to their mother upon the demise of their father hence it was not available for distribution and or sharing more particularly, Onyonka Estate House B/155/72/439. That the Naivasha land was in their grandfather's name. further testimony was that she had property initially not part of the list she had disclosed in the succession cause and changed it into her name in 2016. That she had even used pawns to claim that they were the applicant's siblings. On the Kwale property, it was her testimony that the respondent advertised that the title was lost yet it was not. A Gazette Notice dated 27th September, 2019 was produced in the supplementary list of documents as an exhibits
 25. The applicant further testified that the estate property had not been accounted for by the respondent who had sold the same including 7 acres of the Migori land and even gazetted the Kwale title as lost yet the title document was available. She stated that they had suffered without the support of the respondent.



26. In cross examination, the applicant stated that her father was polygamous but that she was not certain that the respondent was married to him. Further, that her mother died in 1996 and that she never filed for any succession of the estate of the deceased.
27. She acknowledged that when her brother filed this Cause which was later consolidated with the one that the respondent filed, he did not include the respondent as a beneficiary. She denied the suggestion that she had only listed for distribution the properties sold by the respondent adding that they listed those assets that they know exist and were aware of. She stated that she did not know where the respondent lives but that she was not living where her father was buried.
28. She further stated that although she was aware of the affidavit by the respondent owning up to selling estate property and asking that her share be debited from the remainder of the estate, the respondent petitioned for a grant without involving them and neither did she list them as beneficiaries of the estate.
29. On being reexamined, she reiterated her evidence in chief that their parents died when they were young and that the respondent never took care of them. Instead, that it was their grandmother who took care of them. She maintained that the house n Onyonka Este in Nairobi was not the estate of their late father and that it was registered in their late mother's name after his demise since it was jointly owned by the two deceased persons.
30. The respondent testified on oath as OW1 and adopted her five affidavits filed in court dated 7/12/2023, 15/2/2020, 30/10/2023, 5/4/2024 and 14/4/2020 as her evidence in chief. She stated that she was married to the deceased in 1986 as his second wife. That she was aware of his assets. That she had sold the Fort Tenan land at kshs 800,000 and shared out the proceeds with John Paul, giving him kshs 300,000, sold Kawere II/1145 7 acres of the whole land at Kshs 700,000 and left 4 acres, Sold Tans Nzoia land which was 50 acres at kshs 5 million and a small plot at Alego Nyalgunga at kshs 14,000. She stated that the court should therefore take out what she sold as her share of the estate and debit it from her share. She stated thta the Onyonka property was the deceased's estate not owned jointly with his wife and that the Naivasha land was given to the deceased by his father so it should be included in the share of the estate.
31. On being cross examined, she stated that she lived and worked as a teacher at Siranga where she was married and that her advocate had evidence of her marriage to the deceased. She stated that she had no copy of title to the Kilifi land. That the applicants were children of the deceased. She denied that she tried to have the Kwale Wasini Title declared lost saying it had a loan facility taken by her husband and that the title was with KCB not with the applicant herein. She stated that the Gazette Notice for the loss of the said title as filed in court was fake.
32. She stated that she did not deliberately exclude the beneficiaries of the estate in the succession proceedings that she filed and that she knew that the children were there so she could not sell the entire state.
33. She denied having a title deed for Naivasha land and reiterate that she sold the Fort Tenan land and shared the proceeds with John Paul Omondi the son to the deceased. She stated that the Kawere 11302 title was at lands Office Migori after the dispute went to court but that she had title to Kawere 1145. She admitted selling Trans Nzoia land but stated that she had no bank statements or sale agreement. Shse state that it was 47 acres. She statd that the lease for the Onyonka house was issued in 1982 before she got married to the deceased. She stated that the Naivasha land was given to the deceased by his father although she was not aware of any succession proceedings conducted on the same.
34. In reexamination, the respondent stated that there was an agreement to share property with Bernadette's mother.



35. On being asked by the court, she stated that she did succession without involving the children of the deceased out of ignorant of the process involved.
36. At the close of the parties' respective cases, persons who had instructed Mr. Onyango advocate to come on record claiming that they were purchasers were granted leave to file affidavits and submissions but they did not file any document as at the time this matter was reserved for judgment on 25th November, 2024.
37. Only the applicant filed submissions and supplementary submissions. The respondent and the interested parties who had appeared through Mr. S.M Onyango and were granted to file affidavits and written submissions did not comply.
38. In the submissions by the applicant's counsel, it was argued that the respondent did not prove that she was a widow to the deceased and secondly, that she was not entitled to a share in the estate hence the property that she sold should revert to the deceased and distributed among the children of the deceased equally. The applicant relied on several decisions to support her position on the two issues framed.

Determination

39. I have considered the history of this matter as consolidated with succession cause No. 134 of 1992, the affidavits and oral evidence on record as well as the exhibits produced and the submissions filed by the applicant.
40. The issues for determination in my view are as framed by the applicant being, whether the respondent was a wife and therefore widow to the deceased and secondly, whether she is entitled to a share of the estate of the deceased. The other issue is whether the properties sold by the respondent should be recalled and redistributed amongst the beneficiaries of the estate.
41. On the first issue, the applicant claimed that the respondent was a companion of her father from 1986 to 1992 and not a wife. In the submissions, the respondent was referred to as a widow. According to the applicant, upon the demise of her father and mother, leaving them young, they lived with their grandmother and that the respondent did not care for them hence she cannot be their stepmother.
42. The respondent maintained that she got married to the deceased at Siranga under Luo Customary law in 1986 and that she lived with him in Siranga where she was also working as a teacher but that she was now living in Sega. In support of her case, she filed a n affidavit jointly sworn by her and the deceased allowing her to change her maiden name to adopt the name Omondi. The affidavit has depositions to the effect that the two got married in Siranga under Luo Customary law and had been cohabiting as such since 1986 till death do they part. Indeed, the parted ways when the deceased died.
43. To determine whether the respondent was a wife to the deceased, I will rely on caselaw decided. In *Ndunda v Mutunge* (Civil Appeal 47 of 2018) [2022] KECA 1308 (KLR) (2 December 2022) (Judgment), the Court of appeal was faced with a similar situation and evidence as is in this case. Upholding the holding by the High Court- (L. N. Mutende J), the Court of Appeal had this to say, and I quote extensively:

There is ample evidence that the deceased and the respondent cohabited for a long time, and that they had five children. The children adopted the name of the deceased as their father. Accordingly, there is sufficient evidence to support the trial court's conclusion that the respondent and the deceased cohabited to the extent that a marriage would be presumed.



The court thus did not err in that regard, and we agree with the sentiments expressed by the learned judge that:

“Evidence adduced however reveals that the objector had children, five in number that she stated were sired by the deceased. Patrick Musyoka Kinuka the third born testified. His evidence that he was the deceased’s son was not challenged. Further, evidence proves the fact that the objector cohabited with the deceased. To date she occupies houses constructed by the deceased. Although PW2 Nthenge the elder brother of the deceased refused to acknowledge the objector as the wife of the deceased, he admitted the fact that the objector cohabited with the deceased but alleged that his brother never told him that the objector was his wife as required by the customary law. Evidence was adduced that he was the one who would negotiate on behalf of the objector’s family in case the need arose. Evidence of a photograph in which he appears with the objector, her son and other family members was adduced in evidence. Cohabitation with the deceased for thirty-four (34) years was a very long time. They have grandchildren therefore a presumption of marriage should be drawn. In evidence we have a letter dated April 3, 2009 where both the petitioner and the protester/objector signed as wives of the deceased. The petitioner admitted having signed it in that capacity but still denied the suggestion that indeed the protester/objector was the wife of the deceased. The letter was signed after the burial of the deceased. This was in the course of the two (2) families being reconciled. The long cohabitation coupled with such evidence was proof of the existence of the presumption of marriage. The fact that specific ceremonies or rituals may have not been done cannot invalidate the relationship that is presumed to be a marriage.’

30. We agree with the judgment of this court in *Beth Nyandwa Kimani v Joyce Nyakinywa Kimani & others* (2006) eKLR where the court held as follows:

“For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant’s favour. Such was the situation following the predecessor of this court in *Hortenesiah Wanjiku Yaweh v Public Trustee*, Civil Appeal No 13 of 1976 where Mustafa JA in his leading judgment stated: I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption.’



31. The doctrine of presumption of marriage has its genesis in section 119 of the *Evidence Act* (Cap 80 of the Laws of Kenya), which states that:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case’.

32. Adding its voice on the doctrine, the former Court of Appeal for Eastern Africa in the case of *Hortensiah Wanjiku Yawe v The Public Trustee*, Civil Appeal No 13 of 1976 (unreported) stated as follows:

“The presumption does not depend on the law or a system of marriage. The presumption is simply an assumption based on very long cohabitation and repute that the parties are husband and wife.’

33. This court in *Joseph Gitau Githongo v Victoria Mwihaki* (2014) eKLR stated as follows:

“The rationale behind the presumption of marriage was succinctly explained by the court as follows:

“It (presumption of marriage) 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 that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the 'husband', or otherwise he dies, occurrence 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.’

34. Again in *Joseis Wanjiru v Kabui Ndegwa & Ano* (2014) eKLR this court expressed itself thus:

“The existence or absence of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except whereby reason of a written law it is excluded. For instance, a marriage can't be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances



where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.'

35. It is our finding that the learned judge did not err in relying on evidence of the long cohabitation, and the fact that there were five children out of that relationship, in holding that a presumption of marriage had been established.” [emphasis added]
44. Adopting the above holding, I observe that the applicant in the affidavits filed have referred the respondent as their father’s companion and they never disputed the fact that indeed, she remained a companion from 1986 to 1992 which was six years before the deceased passed on. Additionally, the consent recorded in court allowing the respondent to be a co-administrator of the deceased’s estate is a clear acknowledgment of her status in the family as a widow. Had she been a total stranger, the applicants could not have allowed her to be a participant in the proceedings. They would have first sought to have her marital status to their late father established before she could be allowed to be a co administrator.
45. From her testimony, the applicant and her siblings who did not testify appear to disown the respondent because she did not care for them. She left them to be cared for by their grandmother, following the demise of their own mother, in 1996, only four years after their father died while they were still very young. Indeed, it is not unusual for stepchildren to feel that way towards their stepmother who did not give them any love and warmth after losing their dear mother. It is understandable and excusable.
46. However, as children, the applicants did not have any say in what their father chose to live with as his second wife, even if it was a demon. The respondent did not have any children with the deceased. However, it is not children that make a marriage to be recognized. The affidavit jointly sworn by the respondent and the deceased was not contested. It shows that the deceased voluntarily allowed the respondent to change her name to used his name Omondi because the two had been married under Luo customary law at Siranga. There was no evidence to show that their father, the deceased or the respondent herein had no capacity to contract a customary marriage and although there is no evidence of dowry payment, I find that the long period of cohabitation between the two sufficiently established a presumption of marriage.
47. The other issue is whether the respondent, being a widow to the deceased, is entitled to a share in the estate of the deceased. To answer this question, Section 29 of the Law of Succession Act provides for different categories for dependants.
48. Section 29(a) of the Law of Succession Act provides that a dependant means wife (s), former wife(s) and children whether or not they were being maintained by the deceased prior to death. Section 29(b) further provides that dependants include, deceased’s parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately, prior to his death. Section (c) provides that where the deceased was a woman, the husband if he was being maintained by her prior to her death.
49. Section 29 illustrates that only the wife/wives and children of the deceased are out rightly entitled to the deceased’s estate. All other relations (Section 29b and C) need to prove that they were being maintained



- by the deceased and upon one proving that they are dependants, one is required to apply to court for provision out of the net estate. See In *Re-Estate of MMuthania Mwendwa (Deceased)* [2016] eKLR.
50. From the provisions of section 29 (a) of the *Law of Succession Act*, this court having found that the respondent was a wife and therefore a dependant of the deceased, I have no hesitation to find that the respondent is entitled to benefit from the estate of the deceased. I am however alive to the fact that the respondent came into the family of the deceased must later, six years prior to his demise. Nonetheless, this is not a suit for distribution of matrimonial property but an estate of a deceased person who died intestate.
 51. On the mode of distribution of the estate, the applicant filed a schedule of distribution of the estate listing her siblings as the sole beneficiaries and excluding the respondent. She also prayed that the properties sold by the respondent be distributed to them to share equally.
 52. On the part of the respondent, she admitted that she sold part of the estate including a 50 acre land in Transzoia, land in Fort Tenan, plot in Alego Nyalgunga and the Kawere land where she left 4 acres out of the 7 acres. She claimed that she was ignorant and that she was willing to have as her share, the part of the estate that she sold and appropriated to herself, exclusive of the applicant and her siblings. She claims that the applicants also appropriated the Onyonka House in Nairobi. Further, that the land in Naivasha was given to the deceased by his father.
 53. The applicant further claimed that the Naivasha Land lease had expired and that the Onyonka House belonged to their mother jointly with their father and that upon his demise, it was registered in their mother's name which they later succeeded. I have perused the lease for the Onyonka property and indeed, it was issued to the deceased Deborah and later registered jointly with her late husband. That asset is therefore not available for distribution as part of the deceased's estate.
 54. Regarding the Naivasha land, the document produced in evidence shows that the lease was issued to Alfred Odhiambo for 99 years from 1/1/1959 and later transferred to Alfonse...(the other name is not clear) as representative of the estate of the late Alfred Odhiambo on 14/7/1960. Later on 24th May 1974, the land was transferred to Raphael Omondi the deceased herein as tenant in common with Peter...(the other name not clear) and in equal shares. On the same day, the said title was transferred to the deceased Raphael Omondi at a consideration of kshs 2,300 therefore taking over the share of the other tenant in common before he charged it with Kenya Commercial Bank for Kshs 2,000. And he continued charging the title and discharging it with KCB Ltd until a provisional Certificate was issued on 24th June, 1988.
 55. There is therefore no evidence of the deceased holding the title to the Naivasha land in trust for his siblings. If that that were to be the case, nothing prevented the deceased's siblings from seeking to be enjoined in this Succession Cause as beneficiaries.
 56. I therefore find and hold that the Naivasha land belonged to the deceased and on the question of the lease expiring, it has not been shown that the estate is divested of the leasehold interest unless the beneficiaries give up applying for renewal of the lapsed lease. Furthermore, the 99 lease has not lapsed from the time of issue unless there was reduction of the lease period, which evidence was not availed to this court.
 57. It is however true that the respondent went on a selling spree of part of the estate property which was more prime especially land in Fort Tenan and Trans Nzoia. She petitioned for a grant the same year that the deceased passed on without involving her co wife the applicants' mother or children of the deceased which raises suspicions as to what her intentions were. She also claims that she sold the properties at certain values but there is no evidence as to how much she raised from the said sales. No



- sale agreements, cheque payments, bank statements or valuation reports were produced in evidence. The Kawere parcels of land which were subdivided are still registered in her name after objections were raised by the applicants herein. This is evidenced by the various search certificates filed in court.
58. It is clear by now that the deceased was polygamous, and also died intestate. The deceased having died intestate, his estate should be administered in accordance with section 40 of the *Law of Succession Act*.
59. Section 40 of the *Law of Succession Act* provides:
1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.
60. This will be the law applicable in the instant case. All children in the matter are now adults. The deceased's estate will be divided amongst them equally. Their step mother the respondent herein will be added as a unit of her household making a total of four beneficiaries. However, as the respondent has already unprocedurally allocated herself and sold off most of the estate property which was of high value, distribution of the sold property shall be done subject to the collection, valuation of the said property and distributed in accordance with section 40 of the *Law of Succession Act*.
61. Accordingly, I confirm the grant issued to the joint administrators herein and order that all the properties of the deceased shall be distributed to his children and the respondent widow in accordance with section 40 of the *Law of Succession Act*.
62. I further order that all the assets of the deceased which were sold by the respondent following revoked grant in Succession Cause No. 134 of 1992 and using a grant which was obtained fraudulently by the respondent without disclosing the other beneficiaries and without the consent of the other beneficiaries thereby amounting to intermeddling shall be recalled. How? The titles issued transferred to third parties and those now registered in the name of the respondent are hereby annulled and revoked. The titles to the said land shall revert to the names of the deceased, a valuation done and a proper distribution done in accordance with the law as stated herein.
63. Additionally, as earlier ordered by Ochieng J in this matter, all the beneficiaries who held grants which were subsequently revoked by consent must file in to court accurate accounts of the estate with documentary evidence within 60 days of today. In default, contempt proceedings to follow.
64. Certificate of confirmation of grant to issue upon which the beneficiaries shall embark on recovery of the sold out properties. For avoidance of doubt, the following identified properties are available for distribution:
- vii. Kwale/Wasini/419
 - viii. Naivasha Block No. 1144/126
 - ix. Fort Tenan LR No. 263 title if transferred to third parties is annulled and revoked, to revert to the name of the deceased
 - x. Migori/ Knyamkago/ Kawere II-1130 and any parts thereof as subdivided by the respondent which are hereby revoked and cancelled



- xi. Migori/ Kanyamkago/ Kawere II-1145 and any parts thereof as subdivided by the respondent which are hereby revoked cancelled
 - xii. Kosprin/79-Trans Nzoia title, whether subdivided or not, shall be cancelled and reverted to the name of the deceased
 - xiii. Central Alego/ Nyalgunga/ 2371 title if transferred is cancelled to revert to the name of the deceased
 - xiv. Kisumu Fort Tenan/263 title if transferred is cancelled to revert to the name of the deceased
65. The Land Registrars of each of the Land Registry areas where the respective parcels of land are situated to be served with copies of this judgment to effect the cancellations of titles passed to third parties back to the name of the deceased Raphael Omondi Opuodho.
66. Each party to bear their own costs of the application.
67. Judgment to be uploaded and published in the e-portal

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NAIROBI THIS
24TH DAY OF JANUARY, 2025.**

R.E. ABURILI

JUDGE

