In re Estate of Dr. Quintus Ekessa (Deceased) (Succession Cause E011 of 2020) [2025] KEHC 274 (KLR) (24 January 2025) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE E011 OF 2020

WM MUSYOKA, J

JANUARY 24, 2025

IN THE MATTER OF THE ESTATE OF DR. QUINTUS EKESSA (DECEASED)

RULING

1. The deceased herein died on 9th November 2019, according to death certificate number 0917256, of 6th January 2020. A letter from the Chief of Amukura Location, dated 7th January 2020, indicates that he had 3 wives, being Joan Khainja Mola Ekesa, Evelyne Mandela Angolo Ekesa and Francisca Ongaji, and 7 children, being Patricia Amoit Ekessa, Jude Wendy Ekessa, Diana Akisa Ekesa, Eileen Nyagoha Ekesa, Quintus Imamai Ekesa, Venecius Masiva Ekessa, Annetriza Ekessa and Valencia Amoit Ekessa .

2. The petition, for letters of administration intestate, was filed herein on 24th November 2020, by Annetriza Ekessa, Julie Wendy Ekessa, Ronald Ikamar Ekessa and Diana Akisa Ekessa, in their capacities as children of the deceased. They listed the deceased as survived by 2 widows, Joan Khainja Mola Ekessa and Francisca Ongaji; 6 daughters, being Patricia Amoit Ekessa, Julie Wendy Ekessa, Diana Akisa Ekessa, Eileen Nyagoha Ekessa, Annetriza Ekessa and Valencia Amoit Ekessa; and 3 sons, Ronald Ikamar Ekessa, Quintus Imamai Ekessa and Venecius Masiva Ekessa. He was expressed to have died possessed of 10 landed assets and 3 motor vehicles. The landed assets were South Teso/Amukura/1140, 2940 and 4326; South Teso/Apokor/1833 and 4346; North Teso/Kamuriai/1190; North Teso/Kocholia/5125; Kajiado/Olchoro-Onyore/4490; and Kabete/Kibichiku/2169 (units 16 and 17). The motor vehicles were registration marks and numbers KCG 951U, KCK 279A and KCM 556N. He had no liabilities.

3. The petition was objected to by Monica Wambui Njung'e, through a chamber summons, dated 19th March 2021 and objection proceedings filed on 8th February 2022. Both processes were dismissed, on technicalities, through rulings delivered on 1st December 2021 and 19th June 2023.

4. In the ruling of 19th June 2023, the court appointed administrators, being the petitioners who had moved the court on 24th November 2020, by the petition filed on that date. It was directed that a grant of letters of administration intestate be issued to them, and that the said administrators file for confirmation of their grant, within 45 days, which they were to serve on Monica Wambui Njung'e, who had liberty to file a protest to it, if she was so minded.

5. A grant of letters of administration intestate was duly issued to the said petitioners, being Annetriza Ekessa, Julie Wendy Ekessa, Ronald Ikamar Ekessa and Diana Akisa Ekessa, dated 29th June 2023. I shall, hereafter, refer to Annetriza Ekessa, Julie Wendy Ekessa, Ronald Ikamar Ekessa and Diana Akisa Ekessa as the administrators.

6. The 4 administrators then lodged a summons for confirmation of grant herein, on 22nd November 2023, of even date, seeking confirmation of their grant of 19th June 2023. They name the survivors of the deceased as the 11 individuals listed in their petition, and the assets available for distribution as the assets listed in their petition, plus an additional motor vehicle, being registration mark and number KCJ 458N. They proposed that Kabete/Kibichiku/2169 (units 16 and 17), Kajiado/Olchoro-Onyore/4490, North Teso/Kocholia/5125 and the 4 motor vehicles be shared equally amongst the 9 children identified as surviving the deceased, together with the money held in the bank account, with Equity Bank, which had not been disclosed in the affidavit in support. It is also proposed that Ronald Ikamar Ekessa and Quintus Imamai Ekessa share South Teso/Amukura/2940 and 4326 equally, while Julie Wendy Ekessa and Valencia Ekessa take South Teso/Apokor/1833 and 4346, respectively, absolutely. It is notable that no assets have been proposed for devolution to the 2 named surviving widows, Joan Khainja Mola Ekessa and Francisca Ongaji. A consent was filed simultaneously with the petition, of even date, duly executed by Joan Mola Khainja Ekessa, Ongaji Francisca, Patricia Amoit Ekessa, Eileen Nyagoha Ekessa, Quintus Imamai Ekessa and Venecius Masiva Ekessa.

7. Monica Wambui Njung'e was treated as a protestor, for the purposes of the summons for confirmation of grant herein, although I never came across an affidavit sworn by her, despite some of the filings herein referring to an affidavit of protest sworn by her on 29th November 2023. For the purposes of this ruling, I shall recite the substance of her case as set out in her witness statement, sworn on 5th February 2024. She asserts that she too is a widow of the deceased, and that she and her son, Collins Nduati Ekessa, had been left out of the schedule of the survivors of the deceased and beneficiaries of his estate. She states that her union with the deceased had produced offspring, being Valencia Amoit Ekessa. She further avers that Collins Nduati Ekessa was a child born of another relationship prior, but the deceased had assumed parental responsibility over him. She mentions that Julie Wendy Ekessa is not a biological child of the deceased, but she had been recognized as a survivor of the deceased and a beneficiary of the estate. She states that she does not support the mode of distribution proposed, as the same was not aligned to the Law of Succession Act, Cap 160, Laws of Kenya. She points out that she, her co-wives and Collins Nduati Ekessa had not been provided for under the distribution proposed. She further points out that Joan Khainja Mola Ekessa, was the first wife, but she had separated from the deceased by the time of his death. She further states that her daughter, Valencia Amoit Ekessa, was the only daughter of the deceased, who was not entitled to equal share with the adult children of the deceased.

8. Whereas she agrees that the assets listed belonged to the deceased, she asserts that some assets have been left out, being Nairobi Kitisuru Estate No. 311 LR No. Nairobi/Block 101/193; 4 acres at Kidera area of Busia; 3 acres at Kamunoit area of Busia; 4 plots at Amukura, bought from Joseph Opili; 1 acre bought from Ongeek Omondi; 1 acre bought from Fred Arbano, located at Kochek, Amukura; 1 acre bought from Abel Emodo Ikwasa, located at Kidera, 3 parcels of land bought from Maria Oramisi and Paschal Amoni, located at Amukura; 1 plot bought from Patrick Okwara, at Amukura; 1 plot bought from Quinto Ongiro, of Kateleyang, Amukura; 1 plot bought from Pamela Ochieng Omukanga, at Amukura; 1 plot at Amukura, bought from George Imamai; 1 plot at Amukura, bought from Imujaro; and 1 plot at Amukura, bought from Fred Okello. She further avers that some bank accounts held by the deceased, at Barclays Bank, Kenya Commercial Bank, and Standard Chartered Bank, had not been disclosed. She asserts that motor vehicle registration mark and number KCJ 458N, does not belong to the estate, as she was the one who paid its purchase price, and the same was eventually transferred and

registered under her name. She cites bad faith on the part of the administrators in not disclosing the said assets. She also contests the signature on the consent, alleged to be of Patricia Amoit Ekessa, given that that individual has been out of the country for over 15 years.

9. The affidavit of protest by the protestor, which does not appear to have been placed on the record, provoked the filing of several affidavits in response, all sworn on 15th December 2023. Julie Wendy Ekessa asserts that the deceased had only 3 wives, and the protestor was not one of them, as no matrimonial home had been constructed for her, as per tradition, at the family land at Amukura. She only emerged after the demise of the deceased to claim that she was a wife. She asserts that Collins Nduati, not being a biological child of the deceased, ought to look up to his own biological father for inheritance. She argues that no asset had been omitted, and that KCJ 458N was an asset of the estate. Clement Nandai claims to be a friend of the deceased, and to be familiar with his affairs. According to him, the deceased had only 3 wives, being Joan, Evelyne and Francisca. He asserts that he was the one who took the deceased to hospital, during his final illness, as he was not close to any of his brothers, and he never trusted them. While on his sickbed, the deceased allegedly informed him to show all his assets to his children. He avers that the deceased never introduced him to the protestor, and never disclosed to him an intention to marry her, although he was aware of his affair with her, which produced offspring. He asserts that only Francisca was at the hospital at Kisumu before the deceased died.

10. Francisca Ongaji avers that the deceased had only 3 wives, and that she lived with him at Kitisuru. She avers that the protestor was never close to the deceased, and that she only visited the deceased at hospital a few hours before his demise. She states that she was aware of their clandestine affair, which was never formalized. She asserts that the deceased only supported the protestor because of the child that they had together. She further asserts that the protestor was never introduced to them as a wife. Phyllis Arubia had been employed by the deceased, at the residence of the protestor, as a caregiver for her daughter with the deceased. She avers that the deceased was not a frequent visitor to the house of the protestor, during the period that she worked there. She states that the protestor was at the time cohabiting with Baba Collins Nduati. She avers that the protestor and the deceased did not cohabit as husband and wife, and she never heard of any marriage ceremony between them.

11. Directions on the disposal of the summons for confirmation application were taken on 18th December 2023, for viva voce evidence. The oral hearings commenced on 24th April 2024. 5 witnesses testified for the administrators, while 4 testified for the protestor.

12. Julie Wendy Ekessa, was the first at the stand, as PW1. She was a daughter of the deceased, with Joan Khainja. She testified that their parents lived together initially, but not at the latter years of her life. She stated that she did not personally know the protestor, although she knew that she had had a clandestine affair with the deceased, which had produced a child. She met the protestor at hospital, during the final hospitalisation of the deceased, and at his funeral, although she could not speculate at the capacity in which she was present at both occasions. She said that she did not recognize her as a beneficiary. She identified Joan, Evelyne and Francisca as the widows of the deceased, for they had been married under customary law. She asserted that Collins Nduati was not her sibling, as he was never raised together with them, but she acknowledged Valencia as a sibling. She acknowledged that the protestor had a relationship with the deceased, and that she did attend his burial, although she could not tell whether she was a wife. She was unaware of any visits to Amukura by the protestor, apart from attending the funeral. She said that she was aware of the Kitisuru property, but explained that she did not list it, as it was still under the name of the National Social Security Fund, NSSF, although she acknowledged that the family was in occupation of it. She said that the assets not listed were not in the name of the deceased. She asserted that Patricia had signed the consent. She asserted that the deceased raised her, and provided for her, after having sired her.

13. Clement Nadai testified next, as PW2. He was a maternal cousin and friend of the deceased. He stated that they never lived together, but they used to visit each other. He identified the wives of the deceased as Joan, Evelyne and Francisca. He identified the protestor as a friend of the deceased, for about 2 years prior to his death. They had a child together, Valencia. He stated that he did meet the protestor, at the house where she lived at Mwimuto, Wangige, Nairobi. He said that he visited with the deceased, and that he did not meet Pamela Imote Emose there. Instead he found a house help there, called Phyllis, who was taking care of the child. He asserted that the deceased did not visit the parents of the protestor at Murang'a, for if that had happened, he would have known, and would have been present. He said that he saw people from Murang'a, the parents of the protestor, after the deceased died, for they attended the funeral. They did not speak at the funeral, and he could not tell the capacity in which they were in attendance. He said that when the widows spoke, at the burial, he was not present. He described events around the time the deceased died. He had come home to Amukura, for there was a land case whose ruling was due. He called him to inform him that he was unwell and needed to be taken to hospital. He found him with Francisca and a driver. They took him to hospital, initially at Busia, and later at Kisumu. He said that he was the one responsible for calling to inform relatives, and to raise funds, as the deceased was not close to his siblings. He said that he did not see the protestor at the hospital at Kisumu. He also said that he did not know Collins Nduati, for the deceased never told him about that child, neither did he tell him about getting married to the protestor. He said that the protestor came to hospital at Kisumu after the deceased had died. He said that the eulogy was prepared by Vincent Imamai, and the widows of the deceased were not involved. He said the family did the eulogy, and he was not part of the family. He said that he saw it at the funeral, and it was brought by Vincent and Fidelis.

14. During cross-examination, he mentioned that the deceased and the first wife, Joan, contracted marriage at a church ceremony, but he was small when it happened, and he was not in attendance. The 2 had 3 children, 2 daughters and 1 son. Evelyne was the second wife, who had 2 children. Francisca was the third wife and had 2 children. The deceased also had 1 child with the protestor. He said that he did not attend the marriage ceremony between the deceased and Evelyne, although he attended her funeral. He said that the deceased had only built 1 house at Amukura, meant for Joan, although she never lived there as she stayed in Nairobi. He said that Evelyne and Francisca did occupy that Amukura house. He said that he was involved in the marriage ceremony for Francisca and had visited her home in Nairobi. He said that he visited the house of the protestor, at Mwimuto, Wangige, in the company of the deceased, and she was introduced as a girlfriend, and the mother of his child. He and his wife had attended a function at Wangige, then passed by the house of the protestor, before proceeding to spend the night at the house of Francisca. He described Valencia as a child of the deceased, who was brought, to Amukura, by the deceased and the protestor, for the purpose of her hair being shaved, as per tradition. He stated that he was present at the shaving ceremony, in his capacity as a friend of the deceased. He conceded that he had met the protestor severally. He explained that the deceased had also made the protestor a member of a group, in which he, the witness, was also a member, adding that Joan and Francisca were not members of that group. He was shown the eulogy for the deceased, and he conceded that the same listed 4 wives, including the protestor. He said that the family recognised the protestor in that eulogy. He, however, said that the eulogy was prepared by the brothers of the deceased. He asserted that he was closer to the deceased than his own brothers. He said that he had no proof that the protestor was a wife of the deceased. He said that he saw the protestor at the hospital at Kisumu. He said he was unaware that the deceased visited the parents of the protestor at Murang'a.

15. He also testified on the assets of the estate. He said that the ones bought through his name, had been listed, and that he had shown them to the children. He mentioned that plots numbers South Teso/Apokor/1833, South Teso/Amukura/2940, South Teso/Amukura/4326 and South Teso/

Apokor/4363. He stated that Joseph Opili had sold land to the deceased, whose number he could not recall. He also stated that the deceased had bought land from Omondi, which was transferred to his name, that is to the name of the witness, PW5. He mentioned Albano as another person who had sold land to the deceased, but he said that he did not have the title deed for that property. He said that the 4 acres at Kidera had a pending land case, between the administrators and the persons who sold it to the deceased. He said that he, the deceased, the protestor and PW1 had visited the property.

16. Ongaji Francisca followed, as PW3. She described herself as wife of the deceased, for 19 years. She said that she knew the administrators, as children of the deceased, for she lived with them and the deceased, ever since the deceased married her. She identified them as her children. She said that she got to know the protestor after the demise of the deceased. She identified Joan and Evelyne as co-wives, adding that she lived with their children. She stated that she met Valencia and Collins Nduati, the children of the protestor, after the demise of the deceased, at his burial. She said that she lived with the deceased at Kitisuru, and only learnt that he had rented a house for the protestor. She testified that she was with the deceased at Amukura, when he fell ill, and they rushed him to hospital, where he died. She informed 2 of the daughters, PW1 and Diana, and the 2 joined her at the hospital. The protestor was not with them, but she came to the hospital later, a day before the deceased died. She said that she did not call the protestor to inform her of the hospitalisation of the deceased. She said that she had never heard that the deceased had visited the parents of the protestor at Murang'a. She testified that the deceased was close to PW2, and he would only go to events with him. She stated that the deceased never built a house for the protestor, adding that there was only 1 house, where she, the witness, lived with the children. About the eulogy, she testified that the same was prepared by Vincent, at Eldoret, and the family did not approve it, and they had not been informed of its contents. She asserted that the deceased did not marry another wife, after her, Joan and Evelyne.

17. During cross-examination, she testified that she was married by the deceased as his third wife in 1999, and a marriage ceremony was conducted in 2003, after her son, Quintus, was born. She stated that even without that ceremony, Quintus would still have been treated as a child of the deceased, and if the deceased had died before 2003, it would have been unfair to have her excluded from his succession. She stated that Joan, the first wife, did not attend the 2003 ceremony, but said that she wrote to authorise her marriage. She stated that she had heard that the deceased was supporting the protestor, and she was aware that the 2 had had a child together. She said that the deceased was living with her full time, and he could not have been visiting the protestor at any time. She explained that the deceased and Joan had differences, and he never used to visit her, although she lived in Nairobi. She said that when the deceased was not with her, PW3, he would be at Amukura. On the eulogy, she reiterated that the family did not participate in its preparation, although it carried a message or tribute that she had authored. She said she only saw the funeral programme at the burial ceremony. She confirmed that it mentioned the parents of the protestor, the protestor and Collins Nduati Ekessa. She identified pictures, with the images of the protestor, the deceased and the siblings of the deceased in them. She confirmed that the protestor and her children attended the burial of the deceased. She said that, on that occasion, the protestor spent the night at the house of Fidelis, a brother of the deceased. The protestor had a key to a car, at the funeral, which she, PW3, later sought to retrieve from her. She said that she was only aware of the bank account with Equity Bank, adding that the administrators ought to pursue the other accounts. She conceded that the Kitisuru property had not been listed in the schedule of assets, yet it belonged to the deceased. She conceded that the protestor had paid for the bus, KCJ 458N, and suggested the property of another ought not be distributed in these proceedings, although she added a rider that she had not seen the registration book for that property. She later said that the deceased had bought that bus during his lifetime. She also mentioned that there were houses that were generating rental income but said she had not seen the accounts for the rents collected.

18. Phyllis Arubia testified as PW4. She described herself as a domestic worker, employed by the deceased at the house of the protestor, to take care of Valencia. She said that she lived there with the protestor and the child, and that she did not see Collins at the time. She was with them between 2015 and 2019. She said that she left after the deceased brought another woman to the house, and she, the witness, reported that to the deceased, leading to a dispute between the deceased and the protestor. She said that she did not see the deceased attend functions with the protestor, and that she did not know Pamela Imote. During cross-examination, she said that it was the deceased, who she had known for a long time, who had hired her. She said that she knew his wives, and that at one point she got to live with Francisca, who she said raised her, adding that it was Francisca who brought her into this case. She said she did not know who paid the rent for the house where the protestor lived. She testified that the deceased would visit the house, and spent 1 day there, and then go to the house of Francisca. He would sleep at the house of the protestor for 1 night only. He would bring shopping for the child. She said that he would visit once a week. She said that the child was taken home for shaving, and that she, the witness, was at that function.

19. Joan Awinja Mora Ekesa was the last witness for the administrators. She testified as PW5. She was the first wife of the deceased, and the mother of 3 of his children. She testified that she did not know the protestor, for the deceased never introduced the protestor to her as his wife. She said that she was not party to the preparation of the eulogy and funeral programme. She said that she saw the programme for the first time at the funeral, and was surprised by its contents, but chose not to cause any drama. She explained that she and the deceased had misunderstandings after he brought another woman home, and she moved to another house, hence she lived apart from him. She said that the deceased occasionally visited her house and was involved in the lives of her children. She said she also used to occasionally visit Amukura. When the deceased was admitted for the last time at Kisumu, she travelled to see him, but found that he had died. She viewed his remains at the hospital morgue and returned to Nairobi. She had wanted to have him transferred to Karen Hospital, Nairobi, but he died before she could do so. She described the house at Amukura as a family house, built for the family. She said that the deceased had informed her, when he married Evelyne and Francisca, adding that the shaving of the head of a baby cannot make the mother of the baby a wife, under Teso customs. She said that she was not aware of any ceremony that the deceased might have conducted relating to the protestor.

20. During cross-examination, she stated that the deceased married her in 1976. She denied being separated from him, asserting that they only lived apart, in separate houses. She said that the Amukura house was built in 1993 and was opened in an event that happened in 1994, which she did not attend. Evelyne was married in 1987, while PW3 was married in 2000. She did not attend their marriage ceremonies. She said that she was informed of those marriages verbally. She asserted that the deceased needed to introduce the protestor to her and to the rest of the family. She said that although she was not a regular visitor to Amukura, she would have known if the protestor had visited. She said that she only saw the protestor once, at the funeral. She said that she had prepared a tribute, to be featured in the funeral programme, but it was excluded, as she was not in good terms with the person who prepared the programme. She stated that there were assets that had been omitted from the confirmation application, the ones which had not been transferred to the name of the deceased. She explained that the administrators were in the process of verifying and processing the said assets. She testified that she did not recognize Collins Nduati as a child of the deceased. She asserted that Patricia and PW1 were her daughters with the deceased. She stated that she had no issue with Valencia, as she was a daughter of the deceased. She explained that the Kitisuru property belonged to NSSF, and the financial bit of its acquisition had not been completed. She stated that she was unaware that debts ought to have been disclosed in the application.

21. Monica Wambui Njung'e, the protestor, testified as DW1. She stated that she and the deceased met in 2015, and lived as husband and wife since 2016, but upon his demise his first wife and the children began to denounce her. She stated that the deceased had informed her that he was also married to PW3, who lived at Kitisuru, and Mama Diana, who was then deceased. The deceased rented for her a residence at Kabete, where they began living together, and he also assumed responsibility over her son, Collins. She said that the deceased then swore a marriage affidavit. She said that PW3 had no issues with her at the beginning, and that they had met at Christ Is The Answer Ministries, CITAM, church, at Karen, and she was introduced to her. They exchanged numbers. She also described another occasion when she gave PW3 a lift, after she met PW3 on the road, as she was driving to Kitisuru, to drop the children there. She claimed that Evelyne had been married at a civil ceremony, and there was a certificate of marriage. Regarding PW5, she said that she came up after the demise of the deceased, claiming to be the first wife. She said that she participated in the burial arrangements, and that rifts only emerged after that, with one of the daughters claiming that she should not use the master bedroom at Amukura. She said that she was recognized as a widow of the deceased, and so were her children and her parents. She gave a tribute, after PW3. She said that the eulogy said it all. She protested that she was not in the initiation of the succession cause and explained that that was why she filed an objection, after she learnt of it. She also stated that she was not mentioned in the confirmation application, together with her son, and that was why she had protested. She said that she was not satisfied with the list of assets, as some assets had been omitted. She said that she had listed all the assets in her protest affidavit. She protested that she should have been involved in the distribution. She stated that KCJ 458N did not belong to the estate, as it belonged to Lincoln Holdings Limited, and it had a loan. She asserted that PW1 was not a biological daughter of the deceased, and yet she was being recognized as a child of the deceased. She urged that the treatment being given to PW1 should also be extended to her son, Collins. She stated that she had not provided her own proposed mode of distribution, saying that she had left that to the court.

22. During cross-examination, she conceded that Collins was not a biological child of the deceased and said that she had not provided a document to show that he used the name of the deceased as his surname. She said that she had provided documentary evidence that the deceased used to support Collins. She said that she did not recognize PW5 as a co-widow, and PW1 as a daughter of the deceased. She said that she had no evidence that PW5 was not a biological daughter of the deceased, saying that it was the deceased who informed her so. On the assets omitted from the schedule of assets, she stated that she had no documents to support the claim that the deceased had bought the 4 acres at Kidera, the 3 acres at Kamunoit and the 4 plots at Amukura. On KCJ 458N, she stated that the same was sold or auctioned, and it was transferred to her name, after she paid off the balance of the loan outstanding. She said that that happened after the demise of the deceased. She asserted that that vehicle did not form part of the estate of the deceased. She testified that the automated teller machine, ATM, cards for the bank accounts were with a brother of the deceased, and should be accessible to the administrators, although she stated that she did not have any proof that the same belonged to the deceased. She said she could not tell whether Patricia had not consented to the proposed distribution. She stated that she was married at a customary law ceremony that was conducted towards the end of 2018, when the deceased and other visited her parents.

23. DW2, Moses Njung'e Njau, was the father of the protestor. He identified the deceased as his son-in-law, having married his daughter, the protestor herein. He stated that the deceased, his brother and others did visit him, at his home village at Murang'a, after the deceased started living with his daughter. They had come for introduction, at which event the desire to marry the protestor was voiced by the deceased. The request was accepted, and some money was paid. They visited a second time, for formal rites for the relationship, and more money, towards dowry, was paid, together with he and she goats,

what was known as mwati na harika. He explained that once mwati na harika was paid, the traditional marriage was completed under Kikuyu customary law. He said that the first visit was in January 2018, and it was known as kumenya mucii. The second visit was in August 2018, and it was for the purpose of taking the mwati na harika, and it was known as kuhanda ithigi. He explained that the dowry could not be completed in August 2018, as the protestor was pregnant. He also visited the couple, at Wangige wa Kabete, where the 2 lived as husband and wife. He also visited the deceased at hospital at Kisumu, before he died, and his home at Amukura, after he died, for mourning. He was recognized there as a father-in-law and introduced as such. He was also mentioned as such in the obituary.

24. In cross-examination, he explained that it was the mwati na harika, given in August 2018, that enabled the protestor to be taken away by the deceased as a wife. He explained that money had also been received as part of the dowry. He stated that dowry payment was a process, and not a one-off affair. He said that whatever was exchanged as dowry was never reduced into writing under Kikuyu customs. He stated that the deceased had come with his brother, Vincent Imamai, on both occasions, and he found him, DW2, with his brother, wife and other relatives. He said that dowry payment was not completed before the deceased died, for it had only began, adding that it was usually an unending process. He said that the elders present blessed the relationship and allowed the deceased to live with the protestor as his wife. He stated that he handed over the protestor to be the deceased's wife on 18th August 2018.

25. Vincent Imamai testified as DW3. He was a brother of the deceased. He described the protestor as a second wife of the deceased. He testified that the deceased brought the protestor to the home at Amukura and introduced her as his future wife. They thereafter went to the home of her parents at Murang'a, to seek her hand in marriage. The 2 later got a child. He averred that prior to that the deceased had lived together with PW5, but he never married her, after which he married Evelyne, and after that cohabited with PW3 without marrying her. He explained that the deceased had 3 children with PW5, being Patricia, PW1 and Ronald; Annetriza with a woman that he never married; Diana and another with Evelyne; 2 daughters with PW3; 1 child with the protestor; and adopted another child of the protestor. he said that there was no marriage ceremony between PW3 and the deceased. He stated that the family of the protestor contributed some money for the funeral and sent a group from Murang'a to attend the burial. He stated that PW2 was not a member of their clan and explained that non-clan members were not involved in marriage arrangements. He stated that many of the individuals mentioned in the eulogy were family members, although PW3 and PW5 were not, as they were cohabitees. He stated that PW3 lived in a house of the deceased in Nairobi, while the Amukura house had been built for Evelyne.

26. At cross-examination, he stated that he and the deceased visited Murang'a only once. They were to go back, but the deceased died. That sole visit allegedly happened in January 2018. He said that some money was paid on that occasion. He testified that the protestor visited Amukura in 2018, when she came with the deceased and her friends, and they stayed for several weeks. He conceded that he was party to the preparation of the eulogy, but added that his role was limited to editing, for the original draft had come from the family. He said that he chose not to make an issue of PW5 being described as a widow.

27. At re-examination, he explained that he and the deceased made 2 visits to Murang'a, in January and August, and a third was due in December 2019, but it did not happen, as the deceased died. He said dowry negotiations were midway, but payments had begun to be made. He described his relationship with the deceased as excellent. He described PW2 as a friend of the deceased, who was not a member of their clan.

28. Pamela Imote Emose, alias Riziki, was the last witness for the protestor. She testified as DW4. She stated that she had been employed by the deceased, for the purpose of taking care of the children of the

protestor. She said that she was engaged in 2019. Her evidence was that the protestor and the deceased used to live together as husband and wife, and would travel together to their upcountry home at Busia. She stated that PW2 and his wife, and PW3, often visited the home of the protestor. The deceased and the protestor would visit Collins in school and pick him up whenever schools closed. She testified that the protestor was a member of a chama, which was often hosted at the residence.

29. At the close of the oral hearings, the parties filed written submissions.

30. In their written submissions, the administrators have identified 2 issues, whether the protestor was married to the deceased under Kikuyu and Teso customs; and whether Collins Nduati was entitled to inherit from the estate of the deceased.

31. On the first issue, they cite Re Estate of JNK (Deceased) [2017] eKLR (Muigai, J), on the essentials of a Kikuyu customary marriage. They posit that if the essential customary law rites were performed, there ought to be evidence to corroborate that, which, they submit, was not adduced. They submit that the affidavit of marriage, relied on by the protestor, did not cure the failure to comply with Kikuyu customs on marriage, and they cite In Re Estate of the late Selina Akinyi Oketch [2017] eKLR (Ndung'u, J) in support. They assert that there was no valid marriage between the deceased and the protestor. On the second issue, they submit that there was no evidence that the deceased had assumed permanent parental responsibility over Collins Nduati.

32. The protestor has identified 4 issues: whether the protestor ought to be considered as a wife or spouse of the deceased for succession purposes; whether the children of the protestor should be considered as children for succession purposes; whether the estate ought to be shared equally amongst the beneficiaries as proposed by the administrators; and whether the administrators have rendered accounts of their administration.

33. On the first issue, the protestor cites section 3 of the Law of Succession Act, In Re Estate of DMM (Deceased) [2018] eKLR (C. Kariuki, J), Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie [2010] KLR 159 [2010] eKLR (Bosire, Tunoi & Nyamu, JJA), MNM vs. DNMK & 13 others [2017] eKLR (Waki, Makhandia & M'Inoti, JJA), In re Estate of Robert Ngundo Nyiva (Deceased) [2021] eKLR (also referred to as In re Estate of RNN (Deceased) [2021] KEHC 6140 (KLR))(Ng'etich, J) and In the Matter of the Estate of Chesaina Lemiso Kipkuto (Deceased) Eldoret P&A No. 161 of 1996 (unreported), to support the contention that the protestor was a wife for purposes of succession. On whether PW5 should be entitled to a share in the estate, the protestor has cited sections 39 and 66 of the Law of Succession Act, Cap 160, Laws of Kenya, to assert that she was not. She argues that, under sections 3(5), 29 and 35 of the Law of Succession Act, and Beatrice Ciamutua Rugamba vs. Fredrick Nkari Mutegi, Linus Njue Mutegi, Alexander Regendo Mutegi, Advin Nyaga Sospeter, Virginia Ruguru Mutegi & Elias Njoka Karume [2016] KEHC 3911 (KLR)(Mabeya, J), she, the protestor, is entitled to share in the estate herein.

34. On whether the estate should be shared equally amongst the children of the deceased, she cites In Re Estate of John Musambayi Katumanga – Deceased [2014] eKLR (Musyoka, J), Stephen Gitonga M'Murithi vs. Faith Ngira Murithi [2015] eKLR (Waki, Nambuye & Kiage, JJA), Rono vs. Rono & another [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA), Elizabeth Chepkoech Salat vs. Josephine Chesang Chepkwony Salat [2015] eKLR (Githinji, Musinga & J. Mohamed JJA) and Douglas Njuguna Muigai vs. John Bosco Maina Kariuki & Jerioth Wangechi Muigai [2014] KECA 753 (KLR)(Visram, Koome & Odek, JJA). She also cites Scolastica Ndululu Suva vs. Agnes Nthenya Suva [2019] KECA 1053 (KLR)(Githinji, Okwengu & Mohammed, JJA, to argue that there is discretion, which ought to be exercised in cases where some of the children are minors, requiring a larger share than that due to the adult children of the deceased. On the duty on the part of the

administrators to render accounts, she cites section 83 of the Law of Succession Act and In Re Estate of Julius Mimano (Deceased) [2019] eKLR (Musyoka, J). She also makes a pitch against gender discrimination, and cites Articles 10(2)(b) and 27 of the Constitution, Stephen Gitonga M'Murithi vs. Faith Ngira Murithi [2015] eKLR (Waki, Nambuye & Kiage, JJA), Rono vs. Rono & another [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA), In Re Estate of Francis Andachila Luta (Deceased) [2022] KEHC 16900 (KLR)(Musyoka, J) and Eliseus Mbura M'Thara vs. Harriet Ciambaka & another [2012] eKLR (Lesiit, J).

35. The deceased herein died on 9th November 2019, long after the Law of Succession Act had come into force on 1st July 1981. The effect of that would be that his estate would be subject to administration and distribution in accordance with section 2(1) of the Law of Succession Act. See In Re Estate of Chandrakant Shamjibhai Ghweewala (Deceased) [2006] eKLR (Koome, J), In Re the Estate of Rachael Wairimu Mbugua (Deceased) [2006] (Rawal, J) and In re Estate of Bedan Gachubiri Kathamari (Deceased) [2020] eKLR (Gitari, J). He died intestate. Representation herein has been sought and granted in intestacy, and no will has been brought forth, nor any claim made that he had died testate. See In the Matter of the Estate of Alloyce M. Obiero (Deceased) [2011] eKLR (Nambuye, J), In Estate of Stanley Kori Kiongo alias Kori Kiongo-Deceased [2016] eKLR (Mativo, J), Agnes Wanjugu Ndunyu & another vs. Godfrey Nguyo Mwai & 2 others[2018] eKLR (T. Matheka, J) and Elijah Matumbi M'Nkanata vs. David Mutuma M'Nkanata [2021] eKLR (Muriithi, J). He hailed from Busia County. None of the assets that make up his estate are subject to the exceptions in sections 32 and 33 of the Law of Succession Act, which would mean that customary law shall not apply to their distribution. See Legal Notice number 94 of 1981.

36. The administrators have approached the court for distribution of his estate. Confirmation of grants is regulated by section 71 of the Law of Succession Act. Confirmation serves several purposes. The first is that it paves way for distribution of the capital assets of the estate, according to sections 55 and 71(1) of the Law of Succession Act. See Shital Bimal Shah and others vs. Akiba Bank Limited and four others [2005] KLR [2005] eKLR (Emukule, J), Paul Tono Pymto & another vs. Giles Tarpin Lyonnet [2014] eKLR (F. Ochieng, J), Nirmal Singh Dhanjal vs. Joginder Singh Dhanjal & 4 others [2018] eKLR (Visram, Karanja & Koome, JJA), In re Estate of Zakaria Indogo Shivogo (Deceased) [2020] eKLR (Odeny, J) and Simon Mwangi Ngotho & another vs. Susannah Wanjiku Muchina [2022] eKLR (Kasango, J).

37. Sections 55 and 71(1) of the Law of Succession Act state as follows:

> " 55. No distribution of capital before confirmation of grant
>
> (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.
>
> (2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death."
>
> "71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets."

38. At the secondary level, according to section 71(2) of the Law of Succession Act , it provides an opportunity for the court to audit the appointment of the administrators, in terms of the process leading up to their appointment, and to the administrators to render an account of their administration of the estate since appointment, to justify their being confirmed to go on to distribute the estate. See In re Estate of Walter Ndolo Nyarima (Deceased) [2019] eKLR (Musyoka, J) and In re Estate of Chesimbili Sindani (Deceased) [2021] eKLR (Musyoka, J). The effect of section 71(2) would be that where the administrators were not properly appointed, or did not administer the estate in accordance with the law, or were unlikely to administer the estate according to the law upon their confirmation, there would be discretion, on the part of the court to remove them, and appoint other individuals to take up their positions, or to give such directions as it may deem appropriate to remedy the situation, and bring it within compliance.

39. Section 71(2) of the Law of Succession Act states as follows:

"71. Confirmation of grants

(1) ...

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may —

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case ..."

40. I will first consider the issue as to whether the administrators herein should be confirmed, before I go on to consider the issues around distribution. Confirmation of administrators turns around 2 issues, firstly, the process of their appointment, and, secondly, whether, upon being appointed, they had

administered the estate in accordance with the law, as at the date they seek confirmation of the grant, and whether, should they be confirmed, they would administer the estate in accordance with the law.

41. The issue of the appointment of the administrators herein is not directly raised, by the protestor, but the way she conducted her case suggests that it is an issue in this case. Her case is that she is a widow of the deceased, and she should have been recognised as such in these proceedings and she should have been involved in the process. She began to mount a challenge to the process, on those grounds, right from the onset, even before the initiation of the cause had been published in the Kenya Gazette. When her initial application was dismissed, on a technicality, she filed a similar one once gazettement was done, which was also dismissed on a technicality. She has raised the same issues in her affidavit of protest. She has been quite consistent in her quest in that respect.

42. As indicated above, the deceased died intestate. According to Part V of the Law of Succession Act, that is the intestacy provisions, a surviving spouse is entitled to a share in the estate of their deceased spouse, taking the form of life interest, according to sections 35 and 36 of the Law of Succession Act. The courts have described the surviving spouse as a principal stakeholder, alongside the children, in the distribution of the estate of their departed spouse. See Re Kibiego [1972] EA 179 (Madan, J). Indeed, the surviving spouse and the children are entitled to the intestate estate of the departed to the exclusion of everyone else. See In re Estate of Joshua Orwa Ojode (Deceased) [2014] eKLR (Musyoka, J). When it comes to administration, section 66 of the Law of Succession Act gives the surviving spouse a prior right or entitlement, followed only by the children. See In re Estate of Aggrey Makanga Wamira (Deceased) [2000] eKLR (Waki, J). The process of applying for appointment as administrators is provided for under section 51 of the Law of Succession Act. Under that provision, at section 51(2)(g), there are disclosure requirements on the survivors of the deceased, and the first in line, for disclosure purposes, are the surviving spouses and children. See Stephen Marangu M'Itirai vs. Silveria Nceke & 4 others [2015] eKLR (JA Makau, J) and In re Estate of George Muriithi Gitahi (Deceased) [2019] eKLR (Nyakundi, J). In short, the process of succession expects that surviving spouses and children should be at the forefront.

43. For avoidance of doubt, section 66 of the Law of Succession Act provides:

> " 66. Preference to be given to certain persons to administer where deceased died intestate
>
> When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—
>
> (a) surviving spouse or spouses, with or without association of other beneficiaries;
>
> (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
>
> (c) the Public Trustee; and
>
> (d) creditors ..."

44. Section 51(2)(g) of the Law of Succession Act provides:

> " 51. Application for grant

(1) ...

(2) Every application shall include information as to—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) ...

(i) ...

(3) ...

(4) ..."

45. Section 76 of the Law of Succession Act provides for revocation of grants. Under section 76(a)(b) and (c), a grant would be liable for revocation, where the process of obtaining it was defective, or tainted with fraud, misrepresentation and concealment of matter from the court. The process would be defective, where section 51 of the Act is not complied with, in terms of non-disclosure of a surviving spouse or a child of the deceased. Section 66 of the Law of Succession Act envisages that a spouse has a prior entitlement to administration, even over the children. Rules 7(7) and 26 of the Probate and Administration Rules, on the other hand, envisage that should anyone with a lesser right seek representation, they ought to cite those with prior right, or get them to renounce their prior right, or get them to consent to those with lesser right applying. See AKM & another vs. AKA [2015] eKLR (Mrima, J), Monica Adhiambo vs. Maurice Odero Koko [2016] eKLR (Nagillah, J), In re Estate of M'Ikiara Kimiri [2018] eKLR (Ongínjo, J) and In re Estate of Reuben Mutuku Kiva (Deceased) [2021] eKLR (Odunga, J).

46. Failure to comply with Rules 7(7) and 26 of the Probate and Administration Rules, would be a defect in respect of which the grant could be revoked. See Albert Kithinji Njagi vs. Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/Interested Parties) [2020] eKLR (Njuguna, J), In re Estate of Rahemtulla Ali Bux (Deceased) [2020] eKLR (Thande, J) and In re Estate of Reuben Mutuku Kiva (Deceased) [2021] eKLR (Odunga, J). Non-disclosure of a surviving spouse or child would be a matter either of fraud, or misrepresentation or concealment of matter from the court, in addition to being a non-compliance with section 51 of the Law of Succession Act, and Rules 7(7) and 26 of the Probate and Administration Rules. It is a ground for which a grant could be revoked. Under section 76 of the Law of Succession Act, a grant may be revoked on application, or by the court of its own motion. The court would act on its own motion, or suo moto, in cases where it stumbles on material, in the absence of a formal application for revocation, which material would justify revocation, and one such case, where that could happen, is when the court is handling a confirmation application.

47. For avoidance of doubt, section 76(a)(b)(c) of the Law of Succession Act states:

> "
>
> "76. Revocation or annulment of grant
> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (a) that the proceedings to obtain the grant were defective in substance;
>
> (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> (d) ..."

48. Rules 7(7) and 26 of the Probate and Administration Rules state as follows:

> "7(7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –
>
> a. renounced his right generally to apply for grant; or
>
> b. consented in writing to the making of the grant to the applicant; or
>
> c. been issued with a citation calling upon him to renounce such right or to apply for a grant."
>
> "26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
>
> (2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

49. Section 71(2)(a) of the Law of Succession Act deals with these matters, when it requires the court, at confirmation, to be satisfied that the administrators, seeking confirmation, had been properly appointed. At confirmation, the court considering the grant for confirmation, must evaluate whether the grant was obtained through a proper process, or a defective process, or a process which was fraudulent, or marred by misrepresentation and concealment of matter from the court. See In re Estate of Cecil Peter Okumu (Deceased) [2019] eKLR (Musyoka, J). Under section 71(2)(b), where the court is satisfied that there were problems with the manner the grant was obtained, it should not confirm it to the administrators seeking confirmation, instead it may confirm it to another person, meaning that it ought to remove the initial administrators, appoint fresh administrators, and confirm the grant to the new administrators. See In re Estate of Chesimbili Sindani (Deceased) [2021] eKLR (Musyoka, J) and In Re Estate of Samson Amasini Adeya (Deceased) [2022] KEHC 14839 (KLR) (Musyoka, J).

50. I understand the protestor to be arguing that the administrators were appointed through a process that was defective or was marred by fraud, misrepresentation and concealment of matter. Her case is that she and her son, Collins, were not disclosed, yet they were a surviving spouse and a child of the deceased. Such non-disclosure would be a defect in the process, and an act of fraud. If the protestor was a widow of the deceased, it would mean that she has prior right to administration, over the administrators herein, who are all children of the deceased, yet her consent was not obtained, or her renunciation of probate obtained, or citations issued to her to either renounce or take up probate. That omission would amount to a defect in the process. It can also be looked at from the perspective of fraud.

51. So, I will have to evaluate whether the administrators herein properly obtained their grant. If I find that they obtained it regularly, then there would be justification for me to confirm them as administrators to go on to administer the estate to completion. If I find that they did not, then there would be discretion for me to remove them as administrators, and to replace them with other individuals. That issue revolves solely around how the protestor and her son, Collins, were handled. I will have to determine whether the protestor was married to the deceased or qualified to be treated as a wife of the deceased, and whether her son was a child for succession purposes. For if I find that they were wife and child of the deceased, then I will have to conclude that their exclusion made the process of obtaining the grant defective and fraudulent, and I should decline to confirm the administrators as such.

52. So, was the protestor a wife of the deceased? She presents 2 arguments. One, that she was married under customary law, for the deceased did fulfil the requirements of Kikuyu customary law with respect to her. Two, even if those requirements were not met, she would still be a wife, on account of her association with the deceased, as she was treated by him, and others, as a wife.

53. Let me start with customary law. She is a Kikuyu, by ethnicity, from Murang'a County. Anyone purporting to marry her, under customary law, must comply with Kikuyu customs relating to marriage. She says that there was such compliance, for the relevant customary rites were performed, for the deceased visited her parents and did those rites. She called her father, DW2, and a brother of the deceased, DW3, both of whom testified along those lines. Her father stated that the deceased and his relatives did visit him, seeking the hand of the protestor, and he accepted. They paid some money, towards dowry, and they presented the mwati na harika as required. That was corroborated by the brother of the deceased, DW3, who confirmed those visits, and what transpired. There was evidence, corroborated even by the witnesses presented by the administrators, that the parents of the protestor attended the burial of the deceased, and were acknowledged as in-laws, in that event, and in the obituary and the funeral programme. The parents of the protestor were so closely embedded in the picture around the deceased, as to suggest that the alleged customary rites were performed, for it would be inconceivable for an elderly man to travel all the way from Murang'a, to attend a burial at Busia, some 400 kilometres away, if there was no marital relationship between his daughter and the deceased.

54. The essentials of a Kikuyu customary law marriage were detailed in two writings by Eugene Cotran on customary law, the Restatement of African Law: Volume I, The Law on Marriage and Divorce, Sweet & Maxwell, 1968 and the Casebook on Kenyan Customary Law, Nairobi University Press, 1995. They have also been discussed in a number of cases such as Edith Wagithi Chiira vs. Rebecca Wangui Gichuhi [1998] eKLR (Akiwumi, Shah & Lakha, JJA), Jane Mbere Komu & 3 others vs. Leah Ngendo Komu & another [1999] eKLR (Githinji, J), In Re The Matter of the Estate of Samuel Kiarie Kirimire (Deceased) [1999] eKLR (Githinji, J), Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi [2013] eKLR (Nambuye, Karanja & M'Inoti, JJA), In re Estate of Johnson Githaiga Joshua Ng'ang'a (Deceased) [2019] eKLR (Kimondo, J), In re Estate of Kihara Thatu Gatu (Deceased) [2019] eKLR (Ndung'u, J), In re Estate of Boniface Njenga Mweru (Deceased) [2020] eKLR (Ougo, J), among others. The requisite ceremonies include the offering of the njohi ya njurio by the man to the woman's

parents, payment of Mwati na harika on the day following the ceremony of njohi ya njurio. Mwati na harika symbolize the marriage relationship, and the couple may start cohabiting thereafter. Other ceremonies, such as ngurario, guthinja ngoima and ruracio are also in the mix.

55. The courts have observed that customary law is dynamic, elastic and fluid, and not static, and most of the ceremonies referred to in the writings by Cotran, and in the older court decisions, do not necessarily happen in exactly the manner narrated in those materials, with some of the ceremonies and practices even becoming obsolete. They involved a lot of slaughter and offering of animals, but much of them have since been replaced by exchange of money. What is critical is that the essential steps and ceremonies under custom must be observed in some form or other. See Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi [2013] eKLR (Nambuye, Karanja & M'Inoti, JJA). The testimonies by DW2 and DW4 satisfy me that the relevant Kikuyu customs relating to marriage were fulfilled, and that made the protestor a customary law wife of the deceased.

56. On whether marriage could be presumed, should it be the case that there was no customary law marriage, there are elements that came out, which placed the deceased and the protestor so intimately together as to suggest that their relationship went beyond mere friendship and teetered towards marriage. In the first place they had a child together. Secondly, the deceased rented residential premises for the accommodation of the protestor and her child. Thirdly, there is evidence that the deceased used to spend nights at that residence, never mind that it was once a week or so. Fourthly, the deceased employed house helps, to assist the protestor raise his daughter. Fifthly, the said child was taken to the ancestral home of the deceased, at Amukura, for the purpose of fulfilling the Teso custom of shaving off the hair of that child. Sixthly, the protestor was incorporated into a chama, which comprised of the relatives of the deceased and his friends. Seventhly, the protestor took time to travel from Nairobi to Kisumu to visit the deceased in hospital, where he lay dying. It would have taken immense and extraordinary courage, on the part of a girlfriend, to visit a dying boyfriend in hospital, in circumstances where such a boyfriend would be surrounded by his close family members, such as wives, children and siblings. Eighthly, when the deceased died, the family recognised her, her parents and her children in the obituary, eulogy and funeral programme, and allowed them to fully participate in the funeral programme. Ninthly, the protestor had possession of a motor vehicle allegedly belonging to the deceased, at her disposal, in respect of which PW3 had to call her to retrieve its keys.

57. The courts have stated that, in certain circumstances, parties who lack capacity to marry, may be presumed to be married, if, the facts and the circumstances, show the parties, by a long cohabitation or other circumstances, to have evinced an intention of living together as husband and wife. See Hottensiah Wanjiku Yawe vs. Public Trustee [1976] eKLR (Wambuzi, P, Mustafa & Musoke, JJA). In In re Estate of Kihara Thatu Gatu (Deceased) [2019] eKLR (Ndung'u J), it was emphasized that cohabitation was a critical component in proof of existence of a presumed marriage, and more so where there was evidence that the two were reputed by the community to be man and wife. The more recent decision, on presumption of marriage, is that by the Supreme Court, in Mary Nyambura Kangara alias Mary Nyambura Paul vs. Paul Ogari Mayaka & another Supreme Court Petition No. 9 of 2021 (Mwilu, DCJ&VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)(unreported), which laid out what was referred to as the strict parameters within which presumption of marriage can be made, as including the parties having lived together for a long period of time, having the legal right or capacity to marry, having intended to marry, the presence of consent by both parties to marry, they must have held themselves out to the outside world as being a married couple, the onus of proving presumption is on the party alleging it, the evidence to rebut it must have been strong distinct satisfactory and conclusive, and the standard of proof should be on a balance of probability.

58. There is the submission that the protestor could not possibly be a wife of the deceased as a matrimonial home was never set up for her. I believe that there is a misconception here. A matrimonial home, according to the Matrimonial Property Act, Cap 152, Laws of Kenya, section 2, is the residence occupied by a married couple. It could be property owned by them, or even rented or leased, and a couple can have several matrimonial homes. There is overwhelming evidence, even from the administrators, that the deceased had set up the protestor at a residence at Wangige, which he rented for her and their child. If the 2 were married, that residence qualified to be and was a matrimonial home, going by the provisions of the Matrimonial Property Act.

59. When all the facts, that I have discussed above, are considered, the irresistible conclusion would be that the relationship between the protestor and the deceased was more than mere friendship, and amounted to a marriage relationship, which made her a spouse of the deceased. In the circumstances, she should have been treated, at the time representation was being sought, as a spouse of the deceased. She should have been disclosed as such, in the papers that were filed in court, and she should have been involved in the process. She had prior right to administration, by dint of section 66 of the Law of Succession Act, over the administrators, and they should have sought compliance with section 51 of the Law of Succession Act, and Rules 7(7) and 26 of the Probate and Administration Rules. These non-disclosures and non-compliances would mean that the process of obtaining that grant was defective, and was marred by the improprieties of lack of integrity, fraud, misrepresentation and concealment of matter from the court.

60. Are the children of the protestor children for the purposes of succession? There is no dispute that Valencia was a biological child of the deceased. In line with that, she was disclosed in the petition and the confirmation application, and there is a proposal for her to benefit from the assets proposed for distribution. So, there is no issue with respect to that child. The contest is around Collins. It is common ground that he is not a biological child of the deceased. Ideally, such a child ought not be reckoned for succession purposes. However, section 3(2) of the Law of Succession Act provide that such child would be treated as a child of a person who assumes permanent parental responsibility over them. See In re Estate of Joseph Masila Mutiso (Deceased) [2017] eKLR (DK Kemei, J), Robert Kavivya Yeova vs. Joyce Mwende Yeova [2017] eKLR (Muigai, J), In re Estate of JCG (Deceased) [2018] eKLR (Muigai, J) and In re Estate of Japhet M'Tuamwari M'Ikandi (Deceased) [2019] eKLR (Gikonyo, J). During lifetime, such a person would be obliged to maintain such a child, and after his death such a child should be treated as a child of the deceased for purposes of succession.

61. Section 3(2) of the Law of Succession Act reads:

> " 3. Interpretation
>
> (1) ..."
>
> (2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
>
> (3) ..."

62. Did the protestor adduce evidence demonstrating that the deceased had assumed parental responsibility over that child? Not much evidence was placed before me, on the relationship between

the deceased and Collins. There is a bank statement, showing that he catered for his educational expenses. Collins was also featured in the funeral programme and eulogy as a child of the deceased. That programme was not done by the protestor. It came from the family of the deceased. I am alive to the claim that the deceased was not close to his siblings, and the immediate family was not directly involved in the preparation of the programme. That could be so. However, when it comes to family matters, such as marriage ceremonies and burials, the family takes the driving seat, given the fact that such events are uniquely family matters, and friends step back, and play a more supportive or facilitative role. No evidence was placed before, pointing to the protestor exercising an overbearing role on the preparation of the funeral programme, or even the burial arrangements in general, so much so that she influenced the inclusion of names of individuals into the eulogy and funeral programme who should not have been there. My inclination is to find and hold that the family treated Collins as a child of the family, based on how they understood him to have related with the deceased. I shall, accordingly, treat him as a child that the deceased had accepted as his own, upon marrying his mother, and that he had assumed parental responsibility over him. He should have been disclosed in the succession papers filed in court, and his omission meant that the process of obtaining the grant was deficient and defective to that extent.

63. The second consideration, with respect to confirmation of administrators, would be whether they administered the estate in accordance with the law, upon the grant being made to them. This should take us to the discharge of their duties as administrators. According to section 79 of the Law of Succession Act, upon being appointed via the grant, the assets of the estate get vested in the administrators as such. It gives them legal rights over the assets, so that they literally step into the shoes of the deceased, to deal with the assets as the deceased himself would have done, to facilitate and ease administration. See In re Estate of Barasa Kanenje Manya (Deceased) [2020] KEHC 1(KLR) (Musyoka, J), In re Estate of Stephen Saitieu Kaloi (Deceased) [2021] eKLR (DK Kemei, J), Kabete Mbuga vs. Nyakangi Nyamache [2021] eKLR(Mugo Kamau, J) and Simon Mwangi Ngotho & another vs. Susannah Wanjiku Muchina [2022] eKLR (Kasango, J). That vesting enables them to exercise powers, over those assets, as enumerated in section 82 of the Law of Succession Act, to enforce causes of action in favour of the estate and defend suits against the estate; to collect, gather and bring assets into the estate; to expend estate resources, for the purposes of administration and distribution of the estate; conversion and disposal of the assets of the estate, subject to limitations; among others. See In re Estate of Damaris Njeri Kimani (Deceased) [2015] eKLR (Musyoka, J) and Kabete Mbuga vs. Nyakangi Nyamache [2021] eKLR(Mugo Kamau, J). It also imposes on the administrators, the duties specified in sections 71 and 83 of the Law of Succession Act, with respect to ascertaining the assets, debts and liabilities of the estate; ascertaining beneficiaries of the estate; settlement of debts and liabilities; rendering accounts of their administration of the estate; applying for confirmation of the grant; and distribution of the estate. See In re Estate of Stanley Omambia Ogero (Deceased) [2020] eKLR (Maina, J).

64. What would be critical at the confirmation stage should be the duties expected to be discharged by the administrators prior to confirmation. Ideally, a confirmation should only be mounted after certain things have been done. Confirmation is about distribution of the assets. That would presuppose that assets have been identified or ascertained, and those that are outside the estate collected and brought within the estate. See Loise Wambui Njoroge vs. Albert Thuo Cege & 5 others [2017] eKLR (Muchelule, J) and In re Matter of the Estate of Luke Owuor Ochido (Deceased) [2022] eKLR (F. Ochieng, J). Collection and getting in of assets include perfecting titles that are imperfect, completing transactions that the deceased had left incomplete, and collecting debts and liabilities that would be due to the estate. A confirmation should not be mounted before a substantial portfolio of the assets

has been ascertained and perfected. Distribution is of the assets of the estate, the property that is in the name of the deceased, or within the estate.

65. Again, distribution should be only of free property, that is property that the deceased himself would have been free to dispose of during his lifetime. See In re Estate of M'Ikiugu M'Mkindia (Deceased) [2019] eKLR (Sitati, J) and In Re Estate of Stephen Nzau Koka (Deceased) [2019] eKLR (Odunga, J). That would include property that is undisputedly in his name, property that is unencumbered, and property whose ownership is not contested. It is also the principle that it is the net intestate estate that is distributed, that is after debts and liabilities are ascertained, determined and settled. See In re Estate of Mukhobi Namonya (Deceased) [2020] eKLR (Musyoka, J).

66. Distribution should be to the persons beneficially entitled. For an intestate estate of a person who died after 1st July 1981, the persons beneficially entitled would be those named in Part V of the Law of Succession Act, and section 66, that is the surviving spouses and children, if any, and in their absence, the parents, siblings and other relatives of the deceased. See Gichohi Mwangi vs. Simon Irungu Joshua [2016] eKLR (Waweru, J) and In re Estate of Gaitho Kimani (Deceased) [2021] eKLR (Meoli, J). The next category should be of creditors. See In re Estate of the late Kibowen Komen (Deceased) [2019] eKLR (T. Matheka, J) and In re Estate of Edward Epeni Oracho (Deceased) [2019] eKLR (Musyoka, J). All these must be ascertained.

67. The administrators are expected to carry out those duties before they mount the confirmation application. The confirmation application should be an account by the administartors of what they have done, since appointment, in terms of administration. They should disclose the persons that they have ascertained as beneficiaries of the estate, both survivors and creditors. See In Re Njoroge Mbote [2002] eKLR (Khamoni, J), In the Matter of the Estate of Ephrahim Brian Kavai (Deceased), Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported) and In re Estate of Gaitho Kimani (Deceased) [2021] eKLR (Meoli, J). They must also disclose the assets of the estate that they have ascertained. See Jane Wairimu Mathenge vs. Joseph Wachira Mathenge & 3 others [2016] eKLR (Ngaah, J) and In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR (Gikonyo, J). Disclosing which of them were indisputably in the name of the deceased, those that are not free for being encumbered, and those that are imperfect or incomplete. They should disclose the assets that they have collected or gathered, detailing the steps that they have taken in the process. They should also disclose the assets that they had not managed to collect, or recover, or trace, and detail the efforts that they were making to collect and bring the assets within the estate. See In re Estate of Reuben Musonye Kugu (Deceased) [2021] KEHC 9747 (KLR) (Musyoka, J). If any suits have been filed, to recover assets or perfect titles, they ought to be disclosed. There ought, too, to be disclosure of the debts and liabilities ascertained as owing by and against the estate, of what has been recovered and settled, and the efforts being made to deal with the outstanding.

68. The obligation to account, along the lines indicated above, has its foundation in various provisions. The first is section 71(2)(a) of the Law of Succession Act, where there is an obligation on the court to be satisfied that the administrator "is administering, and will administer, the estate according to law," before it confirms the grant. That satisfaction can only come from an account of what the administrators have done, by way of administration, from the date of their appointment up to the date they propose confirmation. The second is in the proviso to section 71(2) of the Law of Succession Act, where "in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled." Again, the court has to be satisfied, from an account, that the identities of all the persons beneficially entitled have been ascertained, and the assets, from which they should be getting shares, have all been ascertained, and made available for distribution, by way of being collected, freed and brought within the estate. The

third is in section 83(e) of the Law of Succession Act, where the administrator is obliged, "within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account."

69. There is a coincidence between sections 71(1) and 83(e) of the Law of Succession Act, in that under section 71(1), confirmation of grant is to be sought after 6 months of its making, while under section 83(e), accounts are to be rendered within 6 months of the making of the grant. Where such accounts have not been so rendered within 6 months, then the administrators ought to render such account simultaneously with seeking confirmation of their grant. They would literally be telling the court, "confirm us as administrators, for we have done what was required of us by the law, so that we can now go on to distribute the estate." That confirmation should only be done where there is demonstration that the administrators have done what was required of them, and that demonstration can only be by way of an account.

70. Have the administrators herein rendered an account of what they have done, by way of administration of the estate, to warrant their confirmation as administrators, and to satisfy the court that all the beneficiaries, the assets and the shares due to the beneficiaries have been appropriately ascertained or identified to enable the court distribute the estate? I do not think so. What the administrators have done, in the affidavit in support of their application, is to list the persons that they have ascertained as beneficiaries, and the assets that they believe they have ascertained or identified as belonging to the deceased, and, therefore, available for distribution.

71. On the beneficiaries, the protestor had filed objections, which fell on technical grounds, and directions had been made that the protestor be served with the confirmation application. That meant that the issue of the status of the protestor, and her son, Collins, was still alive. The administrators ought to have addressed that issue in their affidavit, by way of an account to the court, that they were aware of the claim by the protestor, to be a widow of the deceased, and Collins, to be a son of the deceased, but they had evaluated the same, and established that the 2 were not survivors of the deceased. They ought not have kept quiet about the issue, in their supporting affidavit, as if that issue did not exist or arise.

72. Regarding the assets, the protestor, in her affidavit in response to the application, has asserted that the deceased had bought several assets, that were not in the list proposed for distribution. She mentioned the individuals from whom those assets were bought, and their locations. The only administrator to testify was PW1. She pleaded ignorance of the existence of these assets. Her mother, PW5, appeared to acknowledge existence of these assets, and sought to explain that there were no official documents on the same, and that the administrators were still processing and verifying the assets of the deceased. She explained that confirming assets was a continuous thing, which could not be done in 1 day. PW2, the friend and confidant of the deceased, also acknowledged existence of these undisclosed assets. Indeed, it transpired that the deceased acquired most of them through him. He said some were even registered in his own name, such as the one bought from Omondi. He acknowledged the sales from Albano, Opili and Omondi. He disclosed that the 4 acres bought at Kidera were subject to court proceedings, between the estate and the seller. He stated that he showed the administrators and other survivors plots number South Teso/Apokor/1833, South Teso/Amukura/2940, South Teso/Amukura/4326 and South Teso/Apokor/4363. Regarding the Kidera plot, he stated that he showed the same to the deceased, the protestor and PW1.

73. Apparently, these assets, that the protestor claims to exist, but were not disclosed, do in fact exist. The testimonies of PW2 and PW5 are clear that the administrators are aware of them, despite the reticence shown by PW1 regarding them. Yet, the administrators did not disclose them. Even if the said assets were either imperfect or the transactions relating to them were incomplete, it ought to have been

disclosed that the deceased had bought them, but they had not yet been collected and brought into the estate, in terms of the transactions being completed and the titles perfected. The administrators should have given an account of the steps that they were taking, in terms of collecting those assets and bringing them into the estate, in readiness for distribution. It transpires that 1 of them is subject to active litigation, between the administrators and the seller. That should have been disclosed, and an account given of the progress in the land case, and documentation placed on record. The administrators were bound to give a clear account of all these assets, by disclosing them first, and giving an account of their status, and of what is being to collect them. The same would apply to bank accounts that the deceased operated, apart from the Equity Bank account disclosed.

74. It transpired that the larger part of family resides at the Kitisuru property and could be the most valuable of the assets. Yet, no disclosure was made of the existence of this property. It was claimed that the same was not yet registered in the name of the deceased, for the transaction relating to its purchase was not complete, and it was suggested that it was still in the name of the seller. The mere fact that a transaction relating to the property is incomplete does not preclude its disclosure. The deceased would have an interest in it, and there would be a duty to complete the sale and collect the asset. If there be a debt relating to it, that liability should have been disclosed, an account given of what is outstanding, and of the efforts being made to settle the debt, in order to free the property, and collect it. That is what administration is about. The story around the Kitisuru property would suggest that the administrators have not properly ascertained the debts and liabilities of the estate.

75. The impression that I get is that the administrators herein do not understand their role as such. The assets of the estate are vested in administrators. Such assets do not become the property of the administrators, so that they would have no obligation to account to anyone. They hold the same on behalf of the estate. They hold the assets in trust for the beneficiaries, and any other person who may have a beneficial interest or claim over them. See In re Estate of M'Mbwiria M'Mairanyi [2019] eKLR (Mabeya, J). They hold them for the purpose of administration, in terms of settling any debts of the estate or relating to those assets, and ultimately, to distribute the surplus or net intestate estate, after payment of debts and settlement of liabilities, among the survivors. The administrators, since they hold the assets in trust, stand in a fiduciary position, in relation to those assets, and they are obliged to account to the individuals who are beneficially entitled to the assets, be they survivors or creditors. See In re Estate of Des Raj Gandhi (Deceased) [2021] eKLR (Achode, J). That account is through the court, for it is also an account to the court, which appointed the administrators in the first place. Rendering of such accounts is mandatory. It is demanded of the administrators by the law. Rendering of an account by administrators, as trustees, is so critical, that the grant they hold is liable to revocation, under section 76(d)(iii), for failure or omission to render accounts as and when required. See In re Estate of Daudi Owino Olak (Deceased) [2022] eKLR (Thande, J). The administrators cannot afford to be opaque about estate property, for it is not their property, it belongs to the estate, and they should answer to everyone who is entitled to a share in it. An account should have been rendered as part of the confirmation application, for the court will only confirm the grant, where it is satisfied that the administrators have done what is required of them by the law in the first place.

76. Section 76(d)(iii) of the Law of Succession Act, says:

> "76. Revocation or annulment of grant
>
> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (a) ...

(b) ...

(c) ...

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) ...

(ii) ...

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) ..."

77. An account would include presentation of documentary material to demonstrate that the assets that the administrators claim to have ascertained as existing and free for distribution do in fact exist, are free and available for distribution. See Paul Tono Pymto & another vs. Giles Tarpin Lyonnet [2014] eKLR (F. Ochieng, J). There are no documents annexed to the affidavit in support of the confirmation application, at all. However, I have come across certificates of title that were filed simultaneously with the petition. These relate to South Teso/Amukura/4326, registered in the name of the deceased on 3rd May 2017; Olchoro/Onyore/4490, registered in the name of the deceased on 25th May 1999; Kabete/Kibichiko/2169 (Unit No. 16), registered in the name of the deceased on 24th April 2018; Kabete/Kibichiko/2169 (Unit No. 17) and registered in the name of the deceased on 24th April 2018. There is also a registration certificate for motor vehicle registration mark and number KCG 951U. Besides these 5 assets, there is no other documentation, to establish existence of the other assets, and proof that these others are assets owned by the deceased, and available for distribution. Ideally, therefore, only the 5 - South Teso/Amukura/4326, Olchoro/Onyore/4490, Kabete/Kibichiko/2169 (Unit No. 16), Kabete/Kibichiko/2169 (Unit No. 17) and KCG 951U – are available for distribution in these proceedings, as I have not found any encumbrances registered against them. See In re Estate of Charles David Etyang Ichani (Deceased) [2023] KEHC 24174 (KLR) (Musyoka, J) and In re Estate of Raphael Charles Makokha (Deceased) [2024] KEHC 12277 (KLR) (Musyoka, J).

78. Before distribution is undertaken, there should be compliance with the proviso to section 71(2), about ascertainment of the beneficiaries and their shares. As indicated above, the ascertainment of shares would be predicated on the assets ascertained. The beneficiaries have largely been ascertained. The principal contest was over the protestor and Collins, which I have resolved above. There is a secondary 1, on PW3 and PW5, raised by the protestor and DW3, they have been labelled cohabitees. I do not have any material before me which would point to PW3 and PW5 not being surviving spouses of the deceased. PW5 and the deceased cohabited for a long time and had 3 children between them. PW3 also cohabited with the deceased at the Kitisuru home, right up to the date of his death, and she is still in occupation of that premises. It was PW3 who was in fact with the deceased at the home at Amukura, when he was taken ill. It could be that PW5 was separated from the deceased, however, separation alone does not terminate a marriage. I hereby ascertain the surviving spouses of the deceased to be PW3, PW5 and the protestor.

79. Regarding the children, I have already decided on or determined the status of Collins. There is no other serious contest on the statuses of the rest, except perhaps the claim by the protestor that PW1 was not a biological child of the deceased, she said she got that from the deceased himself. However, she did not state whether the deceased renounced PW1 as his child. A person is not a child for succession purposes purely or only on grounds of biology. Section 3(2) of the Law of Succession Act and section 31 of the Children Act would also apply, to make a child, that the deceased had recognised and assumed parental responsibility over, a child for purposes of succession. There is no documentary evidence that the deceased ever renounced PW1 as his child. There is no evidence that he did not assume parental responsibility over her. No court proceedings were produced where those issues were canvassed, and a declaration made that PW1 was not a biological child of the deceased, or that the deceased was not to have parental responsibility over her. I shall treat her as a child of the deceased, entitled fully with the rest to a share in the estate. See In re Estate of Joseph Masila Mutiso (Deceased) [2017] eKLR (DK Kemei, J), Robert Kavivya Yeova vs. Joyce Mwende Yeova [2017] eKLR (Muigai, J), In re Estate of JCG (Deceased) [2018] eKLR (Muigai, J) and In re Estate of Japhet M'Tuamwari M'Ikandi (Deceased) [2019] eKLR (Gikonyo, J).

80. On the shares, I note that the proposed distribution divides the estate only amongst the children, with no provision for the surviving spouses. I see a consent, dated 22nd November 2023, executed by 2 of the surviving spouses, which would mean that they are ready to forgo whatever it is that they are entitled to, which is principally life interest. However, the protestor was not party to that consent, and she did not waive her interest. I am alive to the fact that succession is meant to be a transfer of family wealth from one generation to the next, which makes the children of the dead the principal beneficiaries, as against any surviving spouse. The property is meant to descend from the parent to the children, and that is why succession is descendent, and not ascendent, moving from the ancestor to the descendant. See Odipo vs. Odongo (Sued as Co-Administratrix of the Estate of the Late Bernard Peter Odipo) [2024] KEHC 14889 (KLR) (Musyoka, J). Surviving spouses only inherit as an exception to that general principle, and their entitlement is not absolute, but limited to life interest, which only entitles them to utilise the assets during their lifetime, before they revert to the children absolutely upon termination of life interest, upon remarriage or death. That is the purport of section 35(1)(5) of the Law of Succession Act.

81. The deceased had married 4 times and had children with all 4 wives. There could be a debate, as to whether all the said marriages were contracted under customary law, to provide justification for a conclusion that the deceased died a polygamist. Whatever the case, by the time he died, the deceased had married 4 times, and had children with the 4 wives, and 1 child outside of the marriage arrangements. That ought to bring his case within section 40 of the Law of Succession Act, which provides for how the estate of an intestate is to be shared out. The property is initially shared out amongst the houses, depending on the number of children in each house. After that the property is shared in each house, in accordance with sections 35(1)(5) and 38, depending on the configuration of each house.

82. Sections 35(1)(5), 38 and 40 provide as follows:

> " 35. Where intestate has left one surviving spouse and child or children
>
> (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
>
> (a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

"38. Where intestate has left a surviving child or children but no spouse

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

"40. Where intestate was polygamous

(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."

83. As stated above, there were 4 wives, each and her children would make a unit. There is also Annetriza, whose mother was never married the deceased or became his wife. I shall treat her as a separate unit. That would mean that the polygamous household comprised of 5 houses. PW5 has 3 children, and when she is added as an additional unit, her house would comprise of 4 units. The late Evelyne had 2 children, she passed on, which would mean her house comprises of 2 units. PW3 has 2 children, and when I add her as an additional unit, her house shall comprise of 3 units. The protestor has 2 children, and when I add her as an additional unit, her house shall comprise of 3. I shall treat Annetriza as a separate house, comprised of 1 unit. In total the household of the deceased comprises of 13 units. The assets available for distribution shall be divided into 13 units, after which the 13 units shall be shared out in the ratio of 4:2:3:3:1. See Kuria and another vs. Kuria [2004] KLR (Musinga, J), Rono vs. Rono & another [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA), In re Estate of Katama Nyaki (Deceased) [2019] eKLR (Muchemi, J) and Munyole vs. Munyole [2022] KECA 373 (KLR) (M'Inoti, Kiage & M Ngugi, JJA).

84. For avoidance of doubt, the first house comprises of Joan Khainja Mola Ekessa, and her children, Patricia Amoit Ekessa, Julie Wendy Ekessa and Roanld Ikamar Ekessa; the second house comprises only the 2 children there, Diana Akisa Ekessa and Eileen Nyagoha Ekessa; the third house comprises of Francisca Ongaji, and her children, Quintus Junior Ekessa and Venecius Masiva Ekessa; the fourth house comprises of the protestor, and her children, Collins Nduati Ekessa and Valencia Amoit Ekessa; with the additional unit of Annetriza Ekessa standing on its own.

85. Upon the property being devolved according to the said ratio, the share devolving to each house shall be shared in accordance with sections 35 and 38, so that the share due to the household of Joan Khainja Mola Ekessa shall be devolve upon her during life interest, and thereafter to her children in equal shares; the share due to the house of the late Evelyne Mandela Angogo Ekessa shall devolve equally and absolutely to the 2 children in that house; the share due to the house of Francisca Ongaji shall devolve upon her during life interest, and upon termination of the life interest to her 2 children equally and absolutely; the share due to the house of the protestor shall devolve upon her during life interest, and upon termination of life interest, to her 2 children equally and absolutely; and the share due to Annetriza shall devolve upon her absolutely. The shares due to the first, third and fourth houses shall be distributed under section 35(1)(5) of the Law of Succession Act; while the shares due to the second house, and to Annetriza Ekessa, shall devolve in terms of section 38 of the Act.

86. There is the submission that the house of the protestor should get a slightly larger share of the estate since her children are minors, while the children in the other houses are all adults. I have considered the authorities cited in support, and I am not persuaded by them. The Judges, in those matters, only discussed the implicit unfairness, if at all, in the provisions of section 40 of the Law of Succession Act. They did not proffer any solutions. There has been debate about distribution being equitable rather than equal. I have recited sections 35(5) and 38 of the Law of Succession Act, which deal with distribution amongst the children. Section 40 is dependent on these other provisions, and it does not stand on its own. I see nothing in sections 35(5) and 38 of the Law of Succession Act which can be construed to mean that distribution is intended to be equitable as between the children. Section 35(5) says "the net intestate estate shall ... be equally divided among the surviving children;" while section 38 says that "the net intestate estate shall ... be equally divided among the surviving children." The distribution amongst the houses, according to the number of children in each house, that section 40(1) of the Law of Succession Act talks about, is intended to achieve the equality in distribution amongst or between the children, that sections 35(5) and 38 of the Law of Succession Act are about.

87. It transpired that some of the assets generate income. The administrators did not disclose that fact in their affidavit. They did not disclose the assets which generate income, and they did not disclose the income they have collected so far from those assets, and they have not accounted for how they have expended the moneys collected. During the confirmation hearing, the court did make several orders, relating to an account where the moneys in question are held, in Equity Bank, for payment of school fees for 1 of the children of the deceased. I reiterate that the office of an administrator is that of a trustee and a fiduciary. There is a mandatory statutory obligation, on the administrators, to account for every single cent that comes into their hands. That account should have been rendered in the confirmation application, or at the oral hearing, and the moneys held by the said administrators placed before the court for distribution, or otherwise for directions to be given on how the said funds are to be expended.

88. As I have found and held that the protestor was a spouse of the deceased, she would have priority in administration over the children of the deceased, by dint of section 66 of the Law of Succession Act. It would also be the case that her house is the only 1 that is not represented in the administration of the estate. For continuity and to move the matter forward, to prevent further delay in the completion of administration, I shall not remove the administrators, on account of how they obtained the grant,

and administered the estate, I shall, instead, go on to distribute the assets that have been proved to demonstrably belong to be the deceased, and to be free and available for distribution, and, on the administration, I shall only make adjustments to create room for the protestor, by removing 1 of the administrators, for in a polygamous setting administration should be as democratic as possible. See Obadiah Ndung'u Mungai vs. Veronicah Wanjiru [2015] eKLR (Muigai, J) and In re Estate of Kariuki Gachenga (Deceased) [2018] eKLR (Musyoka, J). I note that the other widows consented to remain outside the administration, I shall not interfere with that.

89. I believe that I have addressed all the major issues raised in the proceedings. I may not have addressed some of the peripheral issues, but I trust that I have said enough to justify the orders that I am about to make.

90. The final orders are:

a. That I do hereby confirm Annetriza Ekessa, Julie Wendy Ekessa and Diana Akisa Ekessa as administratrices of the estate, but I shall remove Ronald Ikamar Ekessa as administrator, and I shall appoint the protestor herein as a co-administratrix alongside the rest, and a fresh grant of letters of administration intestate shall be issued to them accordingly forthwith;

b. That I declare the deceased died a polygamist, having married 4 times, and his survivors are Joan Khainja Mola Ekessa, Francisca Ongaji, Monica Wambui Njung'e, Annetriza Ekessa, Patricia Amoit Ekessa, Julie Wendy Ekessa, Ronald Ikamar Ekessa, Diana Akisa Ekessa, Eileen Nyagoha Ekessa, Quintus Junior Ekessa, Venecius Masiva Ekessa, Collins Nduati Ekessa and Valencia Amoit Ekessa;

c. That the assets available for distribution are South Teso/Amukura/4326, Olchoro Onyore/4490, Kabete/Kibichiko/2169 (Unit No. 16), Kabete/Kibichiko/2169 (Unit No. 17) and KCG 951U;

d. That the said assets shall be distributed in the manner spelt out in paragraphs 82 and 84 hereabove, the distribution in each house shall be as follows,

i. To the house of Joan Khainja Mola Ekessa, 4/13 share, devolving upon the surviving widow during life interest, and thereafter to Patricia Amoit Ekessa, Julie Wendy Ekessa and Ronald Ikamar Ekessa, equally,

ii. To the house of the late Evelyne Mandela Angogo Ekessa, 2/13 share, with the said share devolving equally between Diana Akisa Ekessa and Eileen Nyagoha Ekessa,

iii. To the house of Francisca Ongaji, 3/13 share, which shall devolve upon the surviving widow during life interest, and thereafter to Quintus Junior Ekessa and Venecius Masiva Ekessa equally,

iv. To the house of Monica Wambui Njung'e, 3/13 share, which shall devolve upon the surviving widow during life interest, and thereafter to Collins Nduati Ekessa and Valencia Amoit Ekessa, and

v. To Annetriza Ekessa, 1/13 share, which shall devolve to her absolutely;

e. That a certificate of confirmation of grant shall issue accordingly, and the administratrices shall have 6 months, from date hereof, to transmit the estate, as required of them by section 83(f)(g) of the Law of Succession Act;

f. That, in the event any assets cannot be conveniently subdivided, for distribution purposes, the same shall be sold, and the proceeds of the sale distributed in the ratio of 4:2:3:3:1, as worked out in paragraph 82 hereabove;

g. That the said administratrices shall render a written account, in the next 45 days, of all the other assets of the estate, whether or not in the name of the deceased, which have been identified in the body of the ruling, and others, detailing their status, and the efforts being made to free and collect the same, supported by relevant documentation;

h. That the administratrices shall also, within 45 days, render a written account of all the assets of the estate which generate income, indicating the amounts collected since the demise of the deceased, and how the same have been expended, supported by relevant documentation;

i. That as Valencia Amoit Ekessa is still in school, and as there are moneys held in the account collecting the income of the estate, which have not been distributed, in this ruling, pending rendering of an account, the administratrices shall cause her school fees and other educational/school-related expenses to be promptly met out of the said account;

j. That the matter shall be mentioned, after 60 days, on 24th March 2025, for compliance and further directions;

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

l. That any party aggrieved, by the orders made above, has leave of 30 days, to challenge the orders made herein, at the Court of Appeal.

91. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS AT BUSIA ON THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Odumbe, instructed by Odumbe & Ayieta, Advocates for the administrators.

Mr. Duncan Okatch and Mr. Ng'etich, instructed by Okatch & Partners, Advocates for the protestor.