



REPUBLIC OF KENYA



**Mulungye v Kisangi & another (Family Appeal E004 of 2021)
[2025] KEHC 9430 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 9430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
FAMILY APPEAL E004 OF 2021
TM MATHEKA, J
MARCH 28, 2025**

BETWEEN

CAROL MUENI MULUNGYE APPELLANT

AND

MARY NDUKU SAMMY KISANGI 1ST RESPONDENT

JOHN KIOKO SAMMY 2ND RESPONDENT

JUDGMENT

1. The Appellant Caroline Mueni Mulungye is a daughter of the 1st Respondent Mary Nduku Sammy Kisangi and deceased Sammy Kisangi Mutie and a sister to the 2nd Respondent John Kioko Sammy.
2. The Respondents petitioned the trial court for grant of letters of administration for the estate of the deceased who died intestate on 04/06/2016. The grant of letters of administration was issued to the Respondents on 03/03/2017 and confirmed on 09/10/2017.
3. Through an application dated 04/12/2019, the Appellant sought the following orders;
 - a. That such shares as the court thinks fit by the capital of the net estate of the above-named Sammy Kisangi Mutie (deceased) who died intestate on 4th June 2016 be appointed by way of share due to the Applicant with the following variations in the appointment already made;
 - i. Plot No. 618 Phase II A Mlolongo
 - ii. Plot No. 33 11A Mavoko Land Development Co. Ltd
 - iii. Plot No. Replan 135(406) Mavoko Land Development Co. Ltd iv. A/C No. 07100XXXX039
 - v. Plot No. 9 Phase 1 Mlolongo



- b. That the 1st Respondent be restrained from selling, disposing off, transferring or in any way dealing further with the estate of Sammy Kisangi Mutie (Deceased) until the hearing and final determination of this application.
- c. That the Respondents be compelled to submit to the honorable court accounts on the estate income from date of confirmation of grant upto date.
- d. That the costs of this application be provided for.

The Appeal

- 4. The application was dismissed and being aggrieved by that ruling, the Appellant filed this appeal on the following grounds;
 - a) The learned magistrate erred in law and fact in failing to appreciate that the Appellant had proved her case on a balance of probabilities having adduced evidence that showed that;
 - i. The Respondents hold the estate in trust for their benefit and beneficiaries named of which the Appellant is one of them.
 - ii. The beneficiaries are entitled to an income derived from the properties set out in the Certificate of Confirmation of Grant and as such, the Respondents as trustees are duly bound to account.
 - iii. All beneficiaries are to hold in equal shares the estate of their deceased father and none should have priority over the other.
 - b. The Learned Magistrate erred in failing to consider and evaluate fully or at all the effect and import of the Succession Act, the evidence and documents produced as evidence more so the Certificate of Confirmation of Grant in support of the Appellant's case.
 - c. That the Learned Magistrate erred in law and fact in ignoring the submissions and authorities/ precedents relied upon by the Appellant that could have led to a different finding/conclusion.
 - d. That the Learned Magistrate erred in law by failing to address himself properly or at all to the main issues raised in the suit and in particular that the Administrators held the estate in trust for the beneficiaries.
 - e. The Learned Magistrate was biased and failed to consider and address in totality the issues before him.
 - f. The Learned Magistrate erred in failing to consider and evaluate fully or at all the effect and import of trustees as provided for in the Succession Act.
 - g. That the Learned Magistrate decision was against the weight of evidence and was based on wrong principles of law and this has thereby occasioned a miscarriage of justice.
- 5. On the election of parties through their respective counsel the appeal be canvassed through written submissions.

Appellant's Submissions

- 6. The Appellant submitted that she depended on the deceased person during his life time and the delay by the administrators of the estate to execute the confirmation of grant, as was consented to, precipitated the filing of the summons dated 04/12/ 2019, whose order is now impugned.



7. She submitted that the deceased died after the enactment of the Law of Succession Act (the Act) hence it is the applicable statute for resolving the instant appeal.
8. Relying on Section 79 of the Act, she submitted that the letter of Administration was issued to the Respondents on 03/03/2017 and confirmed on 09/10/2017 hence the estate was vested in the Respondents.
9. She submitted that the jurisdiction of the trial court was invoked pursuant to Section 35(3) of the Act and that in her averments, she stated that she was apprehensive that there were reasonable grounds to believe that the Respondents were exercising their power unreasonably and or improperly and as a consequence, she needed her shares as contained in the Certificate of confirmation of grant to be allocated to her. That she also sought for an audit of the estate property in her application.
10. She submitted that under Section 83(e) of the Act, the Respondents were required to produce to the court a full and accurate inventory of the assets and liabilities of the deceased within 6 months. That the learned trial Magistrate issued an order in furtherance with the compliance on 08/12/2020 but failed to ensure its enforcement.
11. She submitted that the form of the confirmed grant provided for the equal share of the estate to the beneficiaries and it limited the 1st Respondent to exercise only the power of a trustee on behalf of herself and the other beneficiaries listed thereon. That by construction of Section 79 of the Act, the 1st Respondent was limited to perform only the duties of a trustee and her appointment did not confer upon her the benefits as contemplated under Section 35 (1) of the Act. That the intent is contained in the minutes from the meeting of the beneficiaries held on 27/01/2020.
12. She submitted that the 1st Respondent did not specifically plead in any of her affidavits that the estate vested upon her as a spouse pursuant Section 35(1) of the Act. That the learned trial Magistrate failed to evaluate the overwhelming facts which were provided by both parties and to apply the same on Section 35 (4) of the Act in considering whether she(Appellant) had met the threshold under those provisions. That the ruling delivered on 26/06/2021 does not disclose that the summons dated 04/06/2019 was dismissed on the basis of those facts in support or opposition to the summons. That the learned trial Magistrate delivered his ruling based on extraneous facts which did not form part of the pleadings before him.
13. She submitted that the learned trial Magistrate ignored overwhelming facts and evidence which were placed before him and as a consequence, he arrived at a wrong decision, which occasioned miscarriage of justice. That no effort was made to address the question of improper exercise of power of appointment on the strength of the evidence placed before the court.
14. She submitted that the 1st Respondent did not plead that she was enjoying the entitlement under Section 35(1) of the Act and placed reliance on *World Explorers Safaris Limited -vs- Cosmopolitan Travel Limited & Anor* [2021] eKLR, where the court stated that;

“ 35. It is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. This being the case, there was no basis for the court to award sums which were not pleaded in the Plaint. On this ground alone, the Appellant’s appeal collapses” and in the case of *Athumani & another v David (Civil Appeal 22 of 2020)* [2022] KEHC 10385 (KLR) (28 April 2022) (Judgment), with the approval of Independent electoral and Boundaries commission & *Another vs Stephen Mutinda Mule & 3 Others* [2014]eKLR, where the court held that “It is now very trite principle



of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded”.

15. She submitted that the question of life interest under Section 35(1) of the Act was not pleaded and it amounted to enlargement and amendment of the pleadings from the bar for the learned trial Magistrate to entertain submissions from what the Respondents did not plead. That such submissions went to no issue and should have been disregarded.
16. She submitted that the trial court became functus officio after issuing the certificate of confirmation of grant as it showed how the estate properties were to be shared. That the grant was registered in the name of the 1st Respondent as a trustee. Reliance was placed on in re Estate of Daniel Khasievera Anusu (Deceased) [2022] eKLR, where the court held;

“The High Court handled this matter while sitting as a probate court. Its remit as such is limited, to distribution of the assets of the estate. It pronounced itself on that in the ruling of 25th May 2017. The land is to be shared equally. A certificate of confirmation of grant issued. Once a grant is confirmed, the work or role of the probate court would largely be at an end. It is not the role or function or mandate of the probate court to superintend over how the land is to be thereafter distributed on the ground. The provisions of the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules do not deal with that. They do not provide for it. The probate court is pretty functus officio, once it confirms the grant.... What follows confirmation of a grant is transmission of the assets to the named beneficiaries as per or according to the certificate of confirmation of grant. Transmission of property as per the certificate of confirmation of grant is a concept in land or property law. It is not regulated by succession law, hence the silence in the Law of Succession Act and the Probate and Administration Rules on it. It is not a succession matter whatsoever, and, therefore, transmission of assets as per the certificate of confirmation of grant should not tax the mind of the probate court at all. I even doubt whether the High Court has any jurisdiction to touch anything to do with transmission of property after confirmation of the grant”.

17. The Appellant submitted that the Learned Trial Magistrate had no jurisdiction to reopen the case, except to enforce Section 83(e) of Act, its orders issued on 08/12/ 2020 and the application of Sections 35(2) (3) & (4) of the Act.
18. She submitted that the learned trial magistrate gave a wide berth to the interpretation of the Letter of Administration viz-a-viz the certificate of confirmation of grant. Relying on Section 79 of the Act, she submitted that the certificate of confirmation of grant has no form and is like an order extracted from a ruling or a decree from a judgment. That it only carries the intention of the beneficiaries. That the confirmation of grant dated 09/10/2017 was issued in favor of all beneficiaries and the 1st Respondent was only appointed as a trustee.



19. She contended that where it was intended that the 1st Respondent would enjoy the rights as per Section 35(1) of the Act, the Certificate of confirmation of grant would have taken the form of

“the schedule of all properties of the estate and all registered in her name without the list of the other beneficiaries. Reliance was placed on in re Estate of Prisca Ong’ayo Nande (Deceased) [2020] eKLR, where the court (Musyoka J) stated;

“A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the *Law of Succession Act*, as evidence the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant. The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the *Law of Succession Act*.”

20. On the question of the right of the 1st Respondent to pursue her share of the estate under Section 35(3) of the Act, the Appellant relied on in re Estate of Walter Kiplangat Arap Chamdany (Deceased) [2021] eKLR where the court stated;

“I must state however, that Section 35 (2) of the *Law of Succession Act* empowers the Petitioner to apportion any part of the intestate Estate to any of her children who were the ultimate beneficiaries of the Estate. Conversely, the law gives a remedy to a beneficiary aggrieved by a surviving spouse during the subsistence of the life interest. Section 35 (3) provides: -

21. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

22. Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

- “a. the nature and amount of the deceased’s property;
- b. any past, present or future capital or income from any source of the applicant and of the surviving spouse;
- c. the existing and future means and needs of the applicant and the surviving spouse;



- d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
- e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
- f. the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
- g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

In this case however whereas the Applicant would be entitled by way of appointment, she must demonstrate that the Petitioner has unreasonably exercised or withheld the power of appointment.

The fact of having a personal loan as pleaded by the Applicant is not sufficient. To the contrary, the Petitioner has demonstrated that she has made provision for the beneficiaries. Indeed, the Applicant has not controverted the Petitioner's claim that she has apportioned her land to build a home and carry out tea farming".

23. She contended that a court ordered audit of accounts of the estate by an independent auditor will reveal the accurate state of affairs and inform an appropriate and just order by the court in the circumstances. In the interim, she submitted that a reasonable provision be made for her to meet her subsistence and other needs pending an audit and eventually an apportionment of her share of the net estate.

Respondents' Submissions

24. The Respondents identified the issues for determination to be;
- a. Whether summons dated 04/12/ 2019 were for revocation of grant or were summons for apportionment of a share.
 - b. Whether the trial court erred in finding that the 1st Respondent is exclusively entitled to the income derived from properties listed in the schedule of the certificate of confirmation and therefore not obligated to neither give a share to the beneficiaries nor to account for the same.
 - c. Whether the trial court erred in finding that the Appellant had failed to prove that the 1st Respondent had shared the estate to the exclusion of the Appellant.
 - d. Whether the trial court determined that the 1st Respondent held the estate in trust and whether the beneficiaries are entitled to an equal share in the estate of their deceased father and none should have priority over the other.
 - e. Whether the trial court considered all the facts, evidence, law and submissions of the parties.
25. As to the nature of the summons dated 04/12/ 2019, reliance was placed on section 35 of the Act for the submission that upon perusal of the orders sought therein, it is clear that the summons are for apportionment and are in fact made under sections 35(2)3, 4, 37 and 47 of the Act. That the trial court was right in determining the same under the operative law. They acknowledged that the 1st Respondent holds the estate in trust of the beneficiaries and submitted that has never disposed or



attempted to dispose off any of the properties of the estate and therefore not in breach of her duties as a Trustee.

26. As to whether the 1st Respondent is exclusively entitled to the income derived from properties listed in the schedule of the certificate of confirmation and therefore not obligated to neither give a share to the beneficiaries nor to account for the same, it was submitted that Section 35(1) of the Act was clearly explained by Hon Justice W. Musyoka in *Tau Katungi -vs- Margrethe Thorning Katungi & another* [2014] eKLR in the following terms;
- “16. Life interest” is not defined in the *Law of Succession Act*. Black’s Law Dictionary, ninth edition, West, 2009, defines it as “an interest in real or personal property measured by the duration of the holder’s or another person’s life.” In the context of Section 35 it is an interest held by the surviving spouse during their life “in the whole of the residue of the net intestate estate.” Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage if she be a widow.
27. The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income, she would be the person entitled exclusively to the income so generated.
28. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”
29. They submitted that the provision therefore means that a surviving spouse is entitled to the whole of the residue estate until her demise or her re marriage and, as emphasized by the Court, if the net estate is generating income, the surviving spouse would exclusively be entitled to the income so generated.
30. It was submitted that the estate herein is intestate and therefore governed by the provision of section 35(1) of the Act. That the 1st Respondent being the surviving spouse and widow of the deceased, she is entitled to the net estate, being incomes generated, which she is entitled to the exclusive use until her demise or remarriage. That the trial court was apt in finding that the summons purporting to probe the extent of the incomes of the estate is bad in law and premature as the 1st Respondent is the surviving spouse of the deceased and since no allegation of embezzlement or misuse has been alleged and or proved, she is legally entitled to the net estate incomes.
31. As to Whether the trial court erred in finding that the Appellant had failed to prove that the 1st Respondent shared the estate to her exclusion, it was submitted that Section 35 (2) (3) of the Act



empowers the surviving spouse to distribute the residue estate to the beneficiaries during her lifetime by way of gift and if the same happens and any beneficiary feels aggrieved by the appointment then they can move Court. Reliance was placed on *Tau Katungi (supra)* where the court stated;

“The power of appointment provided for in Section 35(2) of the Act enables the holder of the life interest to distribute the property the subject of the life interest prior to the life interest determining in a manner envisaged in the proviso to Section 35(1). He or she can distribute any or all the property the subject of life interest. Section 35(3) provides a remedy to any child who feels aggrieved with the manner of the exercise of the power of appointment or by what he or she considers to be an unreasonable withholding of the exercise of the said person.

32. In the case before me the surviving widow is yet to exercise the power given to her under Section 35 (2) of the Act. The applicant has not indicated whether he has requested the widow to exercise the said person in his favour by gifting her with a part of the net intestate estate, and that the widow has declined or unreasonably withheld the exercise of that power.
33. As matters stand the widow holds life interest over LR No. 7583/17 Mwituu Estate, Karen and she is entitled to whatever income that is generated from the said property. She enjoys interest over the whole property, and the three surviving children have no claim whatsoever over the said property for as long as she is alive, has not remarried and has not exercised the power of appointment. The children’s right to the estate “as tenants in common in equal shares absolutely” has not crystallised. The life interest is for life, and the exercise of the power of appointment is at the discretion of the holder of the life interest...”
34. It was submitted that when a beneficiary moves the court under section 35(3) seeking for an apportionment of the estate, the court is guided by the principles and factors set out in Section 35(4) of the *Law of Succession Act*; That the trial court aptly found that the 1st Respondent had not apportioned any part of the estate to any of the beneficiaries and that the Appellant did not adduce any evidence to satisfy the requirements under section 35(4) of the Act or adduce evidence to establish that the 1st Respondent apportioned any part of the estate to any of the beneficiaries and that she has been discriminated in the apportionment. That the Appellant thus failed to satisfy the provisions of Section 107 of the *Evidence Act* to the effect that whoever alleges must prove.
35. As to whether the trial court determined that the 1st Respondent held the estate in trust and whether the beneficiaries are entitled to an equal share in the estate of their deceased father and none should have priority over the other and whether the trial court Considered all the facts, evidence, law and submissions of the parties, reliance was placed on Section 35 (1) and section 38 of the Act for the submission that, the law grants a widow in an intestate estate the life interest of the net estate as a surviving spouse until her death or re marriage.
36. It was submitted that in the event of the widow’s re marriage or death, section 38 of the Act grants all the surviving children the right to share equally in the estate. That the trial court rightly determined that each beneficiary is entitled to an equal share in the deceased estate and that the 1st Respondent is their trustee.
37. The Respondents submitted that it is important to distinguish between equal share of the estate and sharing of revenue or proceeds of the estate. That Equal share means an entitlement to have equal distribution of the estate at the time of distribution thus governed by Section 38 of Act and sharing of revenues means the use of the incomes which is an exclusive right of the surviving spouse under Section 35(1) of the Act. That consequently, the Appellant and all the beneficiaries right to share equally has not yet accrued.



38. It was submitted that the Appellant only called one witness and produced no relevant exhibit, while they (Respondents) called two witnesses and adduced 7 exhibits. That the Appellant relied on only one irrelevant authority namely the decision in *Jemimah Jane Wacheke -vs- Joyce & Another* (2012) eKLR dealing with revocation of grant while they relied on several authorities but mainly *Tau Katungi -vs Margrethe Thorning Katungi & another* [2014] eKLR which squarely dealt with the dispute at hand and being a decision of this Honorable court, the trial court was duty bound to follow it.
39. In conclusion, they submitted that the appeal lacks merit and that the trial's court judgement/ruling should not be disturbed. Duty of Court
40. An appeal to this court is by way of re-trial and it is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (*Selle & another -vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123).
41. Having looked at the grounds of appeal, the record of appeal and the rival submissions, I am of the view that the following issues arise for determination;
 - a. What is the nature of the 1st Respondent's interest in the deceased's estate?
 - b. Whether the Appellant is entitled to appointment of her share from the deceased's estate.
 - c. Whether the trial court erred by dismissing the application dated 04/12/2019.

Analysis and Determination

What is the nature of the 1st Respondent's interest in the deceased's estate?

42. It is not in dispute that the deceased died intestate on 04/06/2016 and that a grant of representation has already been issued and confirmed. The certificate of confirmation of grant dated 09/10/2017 lists five properties and indicates; "All to be registered in the name of Mary Nduku Sammy Kisangi to hold in trust for self and the following children..." It is also not in dispute that the *Law of Succession Act* is applicable to the estate of the deceased since he died after commencement of the Act.
43. Section 35 of the Act provides as follows;

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. A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
 3. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.



4. Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to;
 - a. the nature and amount of the deceased's property;
 - b. any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - c. the existing and future means and needs of the applicant and the surviving spouse;
 - d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - f. the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

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.

44. From the above provision and specifically section 35(1), it is clear that a surviving spouse has a life interest in the whole residue of the net intestate estate and in the case of a widow, the life interest only terminates upon death or re-marriage. The meaning of a 'life interest' was elaborated in *Tau Katungi (supra)* and I agree with it wholly. There are other cases where courts have pronounced themselves on the question of life interest for instance; in *Eddah Wangu & Anor -vs- Sacilia Magwi Kivuti (Deceased) Substituted with Ribereta Ngai [2021] eKLR*, the court stated;
 - “ 12. It is emerging from Section 35 of *Law of Succession Act* and case law, that the estate of a deceased person in which the surviving spouse has a life interest is not available for distribution unless that parent bequeaths them whatever he or she pleases to them.”

45. In *In re Estate of David Mwangi Mwarangu (Deceased) (Succession Cause 2114 of 2013) [2023] KEHC 21824 (KLR) (Family) (9 August 2023) (Ruling)*, the court stated;
 - “Since the only surviving widow of the deceased is still alive then she is entitled under the terms of section 35 of the *Law of Succession Act* to a life interest in the net estate. It would only be upon the demise or remarriage of the Administrator that the estate would be distributed equally amongst the surviving children of the deceased who include the objector herein.”

46. In this case there is no evidence of re-marriage by the 1st Respondent hence she has a life interest in the whole residue of the net intestate estate.



47. The Appellant argued that the issue of life interest was not specifically pleaded by the 1st Respondent and should not have been considered by the trial court as it amounted to travelling out of the pleadings.
48. It is trite that courts should determine cases from issues that flow from the pleadings and parties are generally confined to their pleadings unless they amend during the hearing of the case. However, it is also trite that matters of law must not be pleaded because courts are deemed to know the law. In *Pancras T Swai -vs- Kenya Breweries Limited* [2014] eKLR the Court of Appeal stated:

“23. The High Court is presumed to know the law. That is why *the Constitution* has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly...”

49. The Appellant also argued that the appointment of the 1st Respondent as a trustee did not confer upon her the benefits as contemplated under Section 35 (1) of the Act and that the intent is contained in the minutes from the meeting of the beneficiaries held on 27/01/2020. I have looked at the said minutes and have reproduced them hereunder;

“Family Members Meeting of The Late Sammy Kisangi Held on 27th January 2020 at Athi River

Members Present:

1. Lilian Muthoki Sammy
2. Rose Ndunge Sammy
3. John Kioko Sammy
4. Emmaculate Mwendu Sammy
5. Jacinta Mwikali Sammy
6. Philip Kisangi Sammy
7. Mercy Mutheu Sammy

Absent Without Apology:

- 1) Carol Mueni Mulungye

(All in the Presence of Mary Nduku Sammy Kisangi (The Administrator Of The Estate of the Late Sammy Kisangi)

Agenda: Administration To The Estate of Sammy Kisangi Mutie (deceased)

The meeting started at 2.00pm with a word of prayer by Mary Nduku Sammy

The agenda was discussed in lengthy as the big issue was the way the administrator to the estate of Sammy Kisangi (deceased) one Mary Nduku Sammy has been administering the same.



After a comprehensive and deep discussion on the agenda it was anomalously(sic) and mutually agreed between the family members and also the beneficiaries to the estate of Sammy Kisangi(deceased) that the administrator Mary Nduku Sammy has been sincerely playing her role in administering the said estates without fear or favor as required by us.

We have also resulted(sic) that if anyone among the beneficiaries has anything contrary to whatever we have resolved(sic) he or she is at liberty to call a meeting of the entire family members and express her or his views for discussions by the rest of the members.

Without any other agenda to be discussed the meeting was closed at 4.30pm by a word of prayer by

Mary Nduku Sammy. (Signed by all present)

50. There is nothing in the minutes showing that there was any discussion about the 1st Respondent's life interest and even if there was such a discussion as alluded by the Appellant, any resolution arising therefrom cannot override the express provisions of section 35(1) of the Act. In any case, the Appellant was absent and cannot possibly give an account of what transpired. Further, a resolution by family members to override statute would be illegal and courts have repeatedly held that illegal agreements are not enforceable. In *Kenya Airways Limited -vs- Satwant Singh Flora* [2013] eKLR which authority was cited with approval by the Court of Appeal in *Five Forty Aviation Limited -vs- Erwan Lanoe* [2019] eKLR, it was stated that;

“(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”

51. The upshot is that the 1st Respondent holds a life interest in the whole residue of the net intestate estate.

Whether the Appellant is entitled to appointment of her share from the deceased's estate.

52. Having keenly looked at the application dated 04/12/2019, filed in the trial court, the Appellant basically wants her share from the estate to be determined and given to her. The main enabling provision for the application is section 35 (3) supra which allows a child of a deceased to apply for appointment of his/her share, where such child considers that the power of appointment given to the holder of a life interest under section 35(2) supra has been unreasonably exercised/withheld.
53. In her two affidavits in support of the application, the Appellant deponed, inter alia, that the 1st Respondent has unlawfully and unfairly distributed the estate assets to some children and greatly prejudiced the interest of others.
54. In her evidence in chief, she described the estate assets and the rental income and proceeded to testify that after the initial distribution of the money in Family Bank account No.071402009, they never sat down as a family to share in the distribution of the rental income. That in 2018, her mother (hereinafter 'Mary') refused to assist her and stated that the property belongs to the sons of the estate. That in June



- 2018, her hotel was closed and lorry auctioned because Mary refused to assist. That she was forced to live with Mary from August 2018 to June 2019 and would be paid kshs 7,000/= because she was working as a house help. That Mary promised to give her kshs 300,000/= but the idea was shot down during a family meeting. That Mary promised to give her plot No. 135 but later refused after a meeting with the pastor and Appellant's brother. That Mary also promised her kshs 1 million but later refused.
55. Further, she testified that Mary told her that she (Mary) had bought two vehicles and one would be given to the Appellant's husband to do taxi business but when the vehicles arrived, the pastor took possession of one and Mary remained with the other one. That in November 2019, Mary gave her work to sell water but after the court issued an order in January 2020, her brother Philip chased her away because she had taken the case to court. That Mary promised to be paying her rent and in April 2020, she was evicted for lack of rent.
56. She testified that she is married with four children and her husband is not employed. That before her father died in 2015, he gave them kshs 1 million which they used to buy the repossessed vehicle. That she lives at Mlolongo phase 3 in a mabati structure where she pays kshs 2,000/= per month and has lived there since May 2020. That Mary always tells her that the Court told her not to cater for anything for the Appellant. That Mary is the cause of her problems and knows how to divide and rule. That Mary has favoritism when helping her children. That John Kioko is the elder brother and does not have any occupation or professional qualification and has no known source of income. That John's vehicle is KCS 160 H Toyota Crown.
57. Further, she testified that Philip, her younger brother, is a university student, is not employed and owns two vehicles bought for him by Mary. That the money buying the vehicles is from the estate. That her sister Lilian Muthoki Sammy is married and doesn't receive any help. That Jacinta Mwikali Sammy lives on plot No. 33, doesn't pay any rent and Mary pays for her shopping and gave her deposit money to buy vehicle KCW 611A. That Emmaculate Mwendu Sammy is married and gets help from the estate and Mercy Mutheu Sammy is married and school fees is paid from the estate.
58. She proceeded to testify that 4 years had passed since her father's death and she had not benefited from the estate whatsoever. That the total amount collected in the estate is kshs 1.3 M and Mary pays loans for the house and loans for her brothers' vehicles and her brothers' rent. She denied that Mary used to spend over kshs 100,000/= on her. That the money paid is enough for all of them to live the way they used to live before their father died.
59. On cross-examination, she said that all the properties she had mentioned belong to her father. That plot No. 9 was incomplete and only required a roof. She confirmed that Mary had not sold any property. She reiterated that her brothers' vehicles were bought with monies from the estate. She said that her children used to attend Springs of Life School and Mary used to pay their School Fees though sometimes the children would be sent away for lack of school fees. That she only worked at the water point for only December 2019 and her sister Jacinta used to collect the earning daily. That the deceased used to help his children equally.
60. She said that in one of the houses, Philip and John have occupied some business rooms and are not paying rent. She testified that she could not prove that Mary made the promises to her.
61. On her part, Mary (1st Respondent) testified that the Appellant (Carol) is her daughter and was problematic even before the death of her husband. That she has been paying Carol's rent, school fees and even providing food for Carol and her family. That the deceased even gave her kshs 1 Million to assist in buying the matatu. She produced a letter & receipts from Springs of Life School, a receipt indicative of water supply business and a cheque of kshs 900,000/= to one Boniface Mulungye Kivuva as exhibits 6,7 & 9 respectively.



62. She testified that Carol used to take loans and they would pay for her. that she tried to pay the loan for the lorry and gave carol kshs 80,000/= but it was not enough. That she later gave Carol kshs 100,000/= to bail the vehicle out. That later on, Carol told her that the matatu had been repossessed and was in need of kshs 3,800,000/= but the family members refused to bail Carol out. That since 2017, Mary was staying with Carol's children as well as Carol who was pregnant. That since Carol was troubling her, she stayed for one year at her house and even gave birth to her last child while there.
63. Mary testified that she even used to pay rent for Carols hotel and gave her kshs 100,000/= to look for a house. That she even gave money to start a shoe business. That one day, Carol gave Mary's house worker diazole to poison her because she had refused to bail them out.
64. She made reference to the accounts prepared by Stephene Kyalo (MFI2) and testified that the monies listed by the Appellant hits the account every 3 months and not monthly. That she first pays the loan, then VAT, then expenses in terms of school fees and other expenses. She produced copies of business receipts, loan statements and money collected as exhibit 3.
65. She testified that she has never sold any property since the death of her husband and has even managed to build a 3-storey building. That she took a loan of ksh 4.2 M to roof and finish the individual units. That, vehicle KCS 160H in possession of John is subject of a loan, KCT 070N is owned by IBC Bank and Philip Kisangi's KCW 815R is jointly owned with NCBA Bank. She produced the log books as exhibit 4. That she also pays cleaners and other workers with money received.
66. She testified that one time Carol went to Philip's business, chased away the customers and locked the business premises. That Philip reported to the police station but later forgave her and she was given a warning letter. She produced the OB dated 23/11/2019 as exhibit 5. She said that they had sat down as a family on many occasions and agreed to finish up building first. Minutes of family meeting held on 27/01/2020 were produced as exhibit 6. She said that her prayer is for peace in the family and that whatever Carol had said in court was a lie.
67. On cross-examination, she confirmed that they agreed to have the estate registered in her name for her own benefit and the benefit of her children in equal shares. She agreed that the money in family Bank was divided equally amongst themselves. That plot No. 618 belongs to her as she bought it with her own money. That plot No. 33 has 30 rooms and each is paid kshs 4,000/=. That the room was built for the wife of John Kioko Sammy but she is not on the list of beneficiaries. That Jacinta lives in one of the houses and pays rent for her room. That 29 rooms have a rent of kshs 4,000/=.
68. That plot No. 9 is 4-storey and is situated along main Mlolongo street. That the bank has taken up all ground floor and part of first floor. The bank pays every 3 months. That there is also electrical, chips parlour and another room and they pay kshs 10,000/= per month. On first floor, there is Holy Ghost Church which pays kshs 40,000, a clinic-kshs 25,000/= per month, Nugabest-kshs 20,000/= and her son-kshs 5,000/=. On third floor, there is Empire Bar-kshs 90,000/= and office of the MCA Mlolongo used to pay kshs 15,000/=. On the fourth floor, there is Agape church-80,000/=.
69. She denied paying John's house rent and said that Philip, born in 1998, operates a duka and 2 PS stations. That Philip finished school in 2016 and went to university. She denied standing surety for his loans. That she only lives with her granddaughter. That she finished paying loan for the roofing on 30/08/2015. She said that the 1 Million advanced to Carol was for her to pay back. That they usually meet to discuss issues of the estate but Carol does not attend. That the estate was audited and what remains is very small.
70. RW2 was CPA Stephen Kyalo, an accountant professionally and he produced the estate accounts as exhibit 7. He said that the net after expenditure of kshs 519,288/= was kshs 446,180/= out of which



there were other expenses of kshs 364,612/= hence leaving a net of kshs 81,568/=. He said that the appropriation account is how the profits are utilized elsewhere other than the property.

That rental income cannot be constant at any given period.

71. On cross-examination, he said that he holds a practicing certificate but didn't have it in court. That he was instructed by the Respondent and given books of account which he returned to the client. That he only dealt with the properties submitted to him. That he doesn't know how many buildings are there and was given one property from which he prepared the report. That the loan taken by Mary was not personal as he would not have included it in the report. That Mary stays in a rented place. That the loan in the appropriations account is the same loan taken by Mary. That the rent is for one of the dependents but the name of the particular dependent was not given. That he didn't know who the food belonged to.
72. He said that it was the first report he did for Mary though they had been interacting. That he had been doing records for her since 2020. That he had an up-to-date record but not in court. That one cannot be in good standing with ICPAK without practicing. That he can provide for the other months if asked to.
73. It is on the basis of this evidence that this court should determine whether the 1st Respondent has unreasonably exercised/withheld her power of appointment.
74. It is evident that that the 1st Respondent has not disposed any estate asset. The evidence shows that the 1st Respondent has actually improved the estate by completing the roofing of plot No. 9 which had not been done by the time the deceased died. She also completed the individual units which to generate income. The Appellant acknowledged the fact that it was her mother who completed the construction of the plot. This is buttressed by the letter to family Bank dated 13/08/2016 in exhibit 3 showing that the 1st Respondent sought an arrangement with the Bank to get financing for the roof and the same would be recoverable from the monthly rent.
75. From the Appellant's affidavit dated 04/12/2019 in support of her application for appointment of share at paragraph 11, she deponed that the 1st Respondent had bought vehicles for John Kioko Sammy and Philip Kisangi Sammy.
76. At paragraph 13 she deponed that the 1st Respondent had bought land and constructed a house and bought a vehicle for Emmaculate Mwendu Sammy who resided in Tanzania with her husband.
77. At paragraph 14, she deponed that the 1st Respondent had taken custody of the children of Rose Ndunge Sammy and was catering for their education and daily maintenance.
78. In her evidence in Court, the Appellant testified that Jacinta Mwikali Sammy lives on plot No. 33, doesn't pay any rent and Mary pays for her shopping and was given deposit money to buy her vehicle KCW 611A.
79. At paragraph 15, she acknowledged that the 1st Respondent had rented a house for her in Mlolongo where she was residing with her four children. In her evidence in court, the Appellant confirmed that her mother used to pay school fees for her children at Springs of life school although they would be sent home sometimes for lack of fees. The 1st Respondent produced school fees receipts from the said school and a letter dated 10/02/2020 from the school Principal confirming that she was the one paying school fees. The 1st Respondent also testified and the Appellant confirmed that she returned to live with her mother from August 2018 to June 2019 due to financial challenges.
80. From the Appellant's own depositions and evidence, it emerges that the 1st Respondent is a parent who is concerned about the welfare of all her children. The Appellant complained that the 1st



Respondent was favoring the male children and discriminating the girls but clearly her own depositions show otherwise. Emmaculate Ndunge Sammy and Rose Ndunge Sammy are sisters to the Appellant and the Appellant has acknowledged that they have also been assisted by the 1st Respondent.

81. Further, the Appellant's evidence in court was that her mother does not help her and is the cause of her problems. In her further affidavit dated 18/02/2020, she deponed that; "at no time has my mother ever advanced me money either for domestic use or for my business." Going by the evidence on record, this deposition is clearly not true and it raises questions as to the integrity and character of the Appellant. The Appellant admitted that her mother paid school fees for her children as well as their rent. If that was not money advanced to her what was it?.
82. The Appellant also complained about the cars registered in the names of her brothers John and Philip and deponed that they had been bought using the estate money. The log books produced by the 1st Respondent show that KCS 160H, Toyota Crown, is registered in the name of Ali Cars Ltd yet the Appellant's testimony was that this particular car belongs to John.
83. The Appellant did not establish any nexus between Ali Cars Ltd and her brother John. The vehicle KCT 070M, Toyota Mark X, is registered in the names of NIC Bank and Phillip Sammy Kisangi while KCW 815R, Nissan March, is registered in the names of NCBA Bank and Phillip Sammy Kisangi. The joint registration with the Banks shows that there is a financing arrangement yet the Appellant insisted that they had been bought using estate money. The 1st Respondent denied standing surety for the loans and the Appellant did not produce any evidence to show that it was the estate repaying the loans.
84. In her further affidavit, the Appellant deponed that there is a pastor whose church is housed in plot No. 9 and she does not pay rent. That the 1st Respondent bought motor vehicle KCW 467C for the pastor using proceeds of the estate. In the same deposition, she indicates that the said vehicle is registered in the name of the 1st Respondent hence the deposition is self-defeating. In any case, the Appellant did not produce any evidence to show that the vehicle is registered in the pastor's name. In response, the 1st Respondent deponed that the church in question is 'The Holy God True Worship Church' and produced receipts showing that the church pays a monthly rent of kshs 40,000/=. In my view, this is another illustration that the Appellants dispositions are mostly falsehoods and conjecture buttressing the 1st Respondent's assertion that she is a problematic child.
85. The actions by the 1st Respondent of expending money to take care of her children's welfare is well within her powers under section 35(2) of the Act (supra) which empowers a surviving spouse to '... appoint all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children...'. Even the distribution of the Family Bank account, as admitted by the parties, was well within her powers under this section.
86. Additionally, section 35(4) of the Act requires the court to have regard to certain things in determining whether an order for appointment shall be made. One such thing is '(e)the conduct of the applicant in relation to the deceased and to the surviving spouse'. The 1st Respondent deponed and testified that the Appellant attempted to poison her shortly after she declined to secure a loan of ksh 4.3 million for the Appellant and her husband. That the 1st Respondent informed the rest of her children and the pastor about the issue and they advised her not to escalate it to the police. The 1st Respondent testified that she was reconciled to the Appellant by the pastor and made reference to a letter by the pastor. The letter was however not admitted in evidence as the pastor was not called to produce it.
87. Be that as it may, the Appellant made reference to the issue in paragraph 10 of her further affidavit and deponed that; "That I have never tried to hood wink anyone to poison her and the incident my mother is referring to in paragraph 20,21 and 23 was when I wanted to commit suicide using pills but God intervened and I went to see the pastor who my mother has been giving out part of the estate



money to, later the pastor informed my mother of the incident.” In my view, it defies logic as to why the Appellant would consult the same pastor that she holds in such low regard and who she has accused of improperly benefiting from the estate.

88. Further, the 1st Respondent deponed that in November 2019, the Appellant attempted to obtain some documents from her house but was denied access by her sister, Mercy Mutheu. That the Appellant reacted by camping at the 1st Respondent’s gate where she was screaming and alleging that she had been chased away with children. That the neighbors intervened whereupon the Appellant abandoned the children and ran away. In paragraph 16 of her further affidavit, the Appellant deponed that the 1st Respondent had caused her arrest at Mlolongo police station claiming that she had created disturbance. She exhibited a notice from the Kenya Police dated 21/11/2019 requiring her to appear at the police station on 10/12/2019. Considering the standard of proof in civil cases, it is more probable that the Appellant caused disturbance at her mother’s home.
89. Evidently therefore, the Appellant has misconducted herself towards her mother on more than one occasion. The evidence is also clear that the Appellant and her husband had been advanced kshs 1,000,000/= by the deceased during his lifetime. The Appellant admitted this fact in paragraph 4 of her further affidavit and deponed that the amount was not a loan to be refunded.
90. The upshot is that the Appellant has fallen way short of establishing that her mother has unreasonably exercised/withheld her power of appointment. In my view, the Appellant is not entitled to appointment of her share from the deceased’s estate.

Whether the trial court erred by dismissing the application dated 04/12/2019.

91. Having dealt with prayer (a) of the Appellant’s application in the trial court, I now turn to prayer(b) which sought to restrain the 1st Respondent from selling, disposing, transferring or in any way dealing with the estate. Section 37 of the Act provides that;
92. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

93. The above provision shows that the safeguard against the Appellant’s fears is already codified in the law. It is a limitation on the 1st Respondent’s powers and she is expected to abide by it. In *Re Estate of Doris Wanjiku Johro Mwigaruri Alias Doris Wanjiku (2015) eKLR* the court (Mativo J) stated;

“Life interest confers a limited right to the surviving spouse over the estate. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interests dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court.

This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property of the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.”



94. As for prayer (c) which sought that the Respondents be compelled to submit to the honorable court accounts on the estate income, the interpretation was given by Musyoka J in the Tau Katungi case (supra) that;

“24. As matters stand the widow holds life interest over LR No. 7583/17 Mwititu Estate, Karen and she is entitled to whatever income that is generated from the said property. She enjoys interest over the whole property, and the three surviving children have no claim whatsoever over the said property for as long as she is alive, has not remarried and has not exercised the power of appointment. The children’s right to the estate “as tenants in common in equal shares absolutely” has not crystallised. The life interest is for life, and the exercise of the power of appointment is at the discretion of the holder of the life interest...”

95. The import of the interpretation by Musyoka J-an authority in matters succession- is that the prayer by the Appellant is premature and untenable. The 1st Respondent is entitled to whatever income is generated by the estate without a call for accountability by the children. The children have to await termination of the life interest before the estate can be distributed.

96. Consequently, the following depositions in the Appellant’s further affidavit are not legally sound in the circumstances of this case;

“18. That I have been advised by my Advocates on record which advise I believe to be true that once a certificate of confirmation has been issued by the court, the work of the administrator is to distribute the estate among the beneficiaries for them to decide what to do with their inheritance.

97. That the children of deceased should share equally the income from all the properties in accordance with the certificate of confirmation.”

98. The administrator here is not just any administrator but the widow of the deceased upon whom the law bequeaths certain rights, duties and privileges over the estate of her husband, and the distribution of the estate of the deceased to the children in equal shares as per the law in provided for under s. 38 of the Law of Succession Act, which clearly states

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

99. 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.

100. This was not the case and the learned trial court correctly applied s. 35. Where intestate has left one surviving spouse and child or children and was guided by Tau Katungi (supra) which is relevant in this case.

101. In the circumstances I find that the appeal is without merit, and the same is dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MARCH 2015

MUMBUA T MATHEKA

JUDGE

