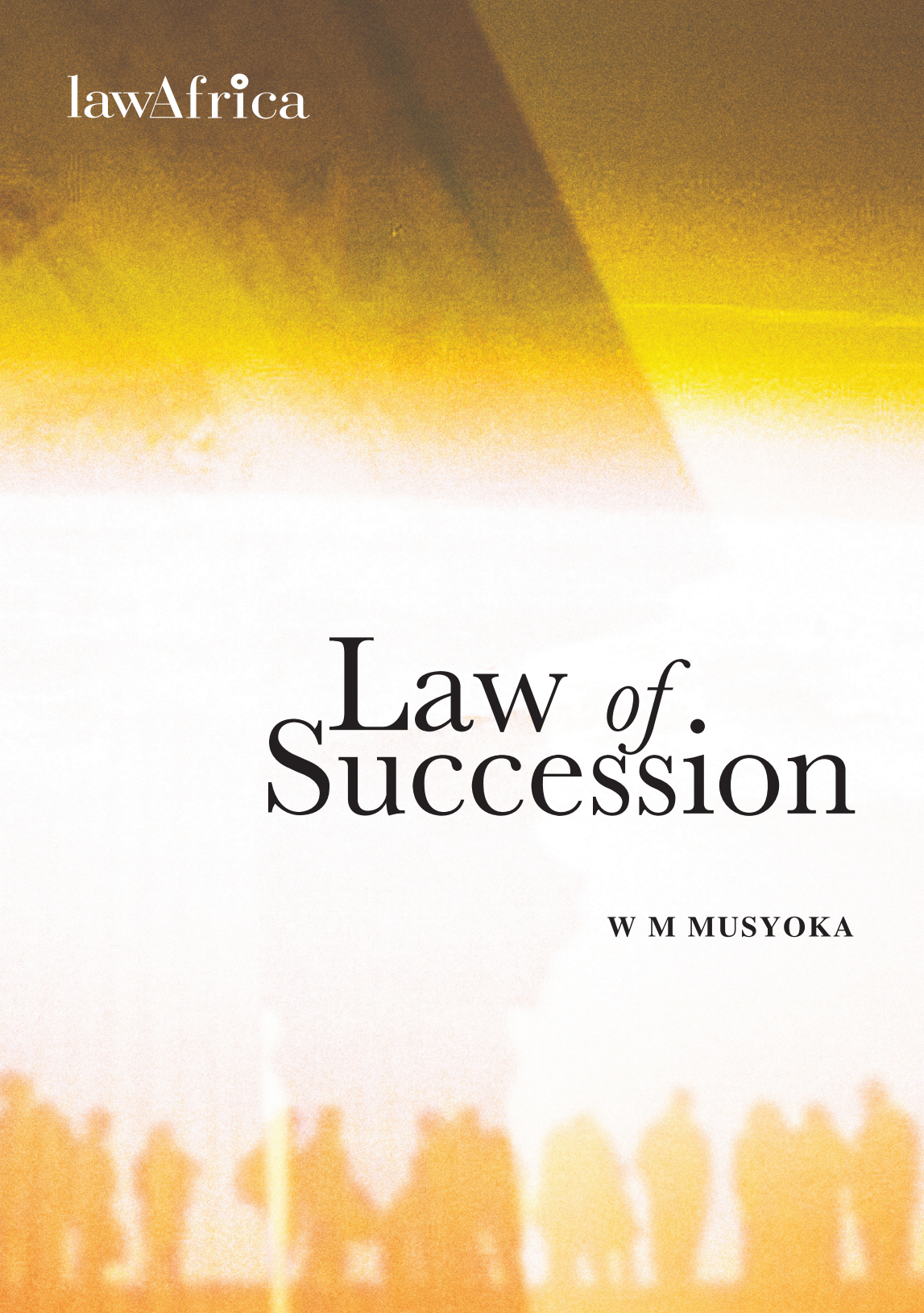


The background of the cover is an abstract composition of warm, golden-yellow and brown tones. A large, dark, triangular shape, resembling a shadow or a stylized mountain, dominates the upper half. The lower half features a bright, hazy horizon with silhouettes of a crowd of people, suggesting a sunset or sunrise scene.

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Law *of*. Succession

W M MUSYOKA

LAW OF SUCCESSION

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William Musyoka

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LIST OF ABBREVIATIONS AND LAW REPORTS

A and E.....	Adolphus and Ellis's Reports
AC Law Reports,.....	Appeal Cases, House of Lords and Privy Council
Add.....	Addam's Ecclesiastical Reports
AgJ.....	Acting Judge of the High Court
Ag JA.....	Acting Judge of the Court of Appeal
All ER.....	All England Reports
B.....	Barber's Gold Law
B and Ald.....	Barnewall and Alderson's Reports, King's Bench
Beav.....	Beavan's Reports, Roll's Court
Bli NS.....	Bligh's Reports, House of Lords, New Series
Bro CCW.....	Brown's Chancery Reports
CA.....	Civil Appeal
CA.....	Court of Appeal
CACA.....	Court of Appeal Civil Appeal
CAEA.....	Court of Appeal for East Africa
CLY.....	Current Law Year Book
Ch Law.....	Reports, Chancery Division
Ch App.....	Law Reports, Chancery Appeals
Ch D.....	Chancery Division
Cox S C.....	Cox, Equity Cases
Cr and J.....	Crompton and Jervis's Reports, Exchequer
Curt.....	Curteis' Ecclesiastical Reports
De G and Sm.....	De Gex and Smale's Reports, Chancery
Dea and Sw.....	Deane and Swabey's Ecclesiastical Reports
Drew.....	Drewry's Reports, Chancery
Drew and Sm.....	Drewry and Smale's Reports, Chancery
EA.....	East Africa Reports
EACA.....	Law Reports for Court of Appeal for East Africa
EALR.....	East African Law Reports
eKLR.....	electronic Kenya Law Reports
Fam.....	Law Reports, Family Division
HCCA.....	High Court Civil Appeal
HCCC.....	High Court Civil Case

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HC Misc Appli.....	High Court Miscellaneous Application
HC Misc CC.....	High Court Miscellaneous Civil Case
HCP and A.....	High Court Probate and Administration Cause
HCSC.....	High Court Succession Cause
HCWC.....	High Court Winding-Up Cause
HLC.....	Clark's Reports, House of Lords
Hare.....	Hare's Reports, Chancery Division
IR.....	Irish Reports
Ir.....	Irish Reports
J.....	Judge of the High Court
JA.....	Judge of the Court of Appeal
JAL.....	Journal of African Law
JJA.....	Judges of the Court of Appeal
Jur NS.....	Jurist Reports, New Series
K and J.....	Kay and Johnson's Reports, Chancery
KAR.....	Kenya Appeal Reports
KB.....	King's Bench
KLR.....	Kenya Law Reports
LJ.....	Law Journal
LJ Ch.....	Law Journal, Chancery
LJP.....	Law Journal, Probate, Divorce and Admiralty
LQR.....	Law Quarterly Review
LR Eq.....	Law Reports, Equity Cases
LR HL.....	Law Reports, House of Lords
LR P and D.....	Law Reports, Probate and Divorce
LR P and M.....	Law Reports, Probate and Matrimony
LR QB.....	Law Reports, Queen's Bench
LSGaz R.....	Law Society Gazette Reports
LT Law.....	Times Reports
LT Jo Law.....	Times Newspapers
LTOS.....	Law Times Reports, Old Series
M and W.....	Meeson and Welby's Reports
Mac and G.....	Macnaghten and Gordon's Reports, Chancery
Moo PC.....	Moore's Privy Council Cases
My and Cr.....	Mylne and Craigh's Reports, Chancery

List of Abbreviations and Law Reports

NLR.....	Nigerian Law Reports
OS.....	Originating Summons
P.....	Law Reports, Probate, Divorce and Admiralty Division
PD.....	Law Reports, Probate, Divorce and Admiralty Division
P Wms.....	Peere Williams' Reports, Chancery and King's Bench
Phil.....	Phillips' Reports, Chancery
Price.....	Price's Reports, Exchequer
QB.....	Queen's Bench Reports
R.....	the Reports
RTR.....	Road Traffic Reports
Rob Ecc.....	Robertson's Ecclesiastical Reports
Salk.....	Salkend's Reports, King's Bench
Sch and Lef.....	Schoales and Lefroy's Reports, chancery (Ireland)
Sol Jo.....	Solicitors' Journal
Sw and Tr.....	Swabey and Tristram's Reports, Probate and Divorce
TLR.....	Times Law Reports
Ves.....	Vesey Jun.'s Reports, Chancery
WN.....	Law Reports, Weekly Notes
WLR.....	Weekly Law Reports
WR.....	Weekly Reports
Y and CC.....	Younge and Collyer's Reports, Chancery Cases
ZLR.....	Zanzibar Law Reports

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PART ONE

INTRODUCTION

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

This is the branch of law that deals with inheritance¹ to property. The concept of inheritance is universal to all societies irrespective of their cultural or historical background, ideology, religion or legal system. This arises out of three basic philosophical considerations: that man needs to acquire some property for his own sustenance to satisfy the desire for self-actualisation and in order to lead a good life generally. Inheritance is one of the means through which property is acquired; the fact that man dies and leaves behind his property that should continue to be owned by those who are left behind, and the fact that man instinctively wants to have some control over his property even upon his demise.

The key factors in inheritance are the death of the property owner and the devolution of property to the heirs and beneficiaries under the law of descent and distribution.² The law of succession provides the mechanism by which property devolves from its deceased owner to the people who are left behind by him. In all societies, the law of succession seeks to ensure that the rightful claimants inherit the property of a deceased person. It also provides for the procedure by which such rightful claimants inherit or accede to the estate of the deceased person.

1.2 BACKGROUND

Even though inheritance is a universal concept among human beings, each society has come up with its own laws and guidelines, both formal and informal, to regulate the devolution of property from a deceased person to his descendants. In the case of Kenya, the country consists of diverse ethnic groups, each with a different set of rules and customs relating to succession. During the colonial period in Kenya, each tribe and race was subject to its own peculiar system of succession law.

The advent of independence saw movement towards achieving uniformity in the area of the law of succession. This movement had its genesis in Chapter V of the Constitution of Kenya that sought to put the interests of all the Kenyan people

1 Inheritance in this context means the same thing as transmission or devolution of property upon death

2 See Black's Law Dictionary (5 ed)

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at par in the eyes of the law. It is the determination to achieve this equality, which led to the passing of the current statute on the subject, the Law of Succession Act.³ The Law of Succession Act, passed in 1972⁴ and brought into effect on 1 July 1981, sought, *inter alia*, to unify all the succession laws obtaining in Kenya into a uniform legislation applicable to all the people of Kenya irrespective of their ethnic, cultural or religious backgrounds.

In most societies, the right of inheritance is predicated upon the relation between the inheritor and the deceased. In some societies, the immediate family members inherit, to the exclusion of all the other people. In others, like is the case in most African societies, the property of a deceased person devolves to his 'family'. The word 'family' is widely construed in this context to include not only the immediate family members, but also distant relations and in some cases the clan. Yet in some societies particularly in the west, the property goes to the persons identified by the deceased in his will, regardless of the relationship between them and the deceased. For example, in England, prior to 1938, the heirs of a deceased person were the persons he chose in his will. However, with the passing of the Inheritance (Family Provisions) Act of 1938, the freedom to will away one's property to strangers was fettered by statute. The legislation gave the persons who were dependent on the deceased immediately prior to his death, the right to apply to court for provision from the estate. It was felt that the burden of maintaining such persons should not be shifted to the state by the testator, who was dead in any event. The courts were empowered by this statute to order for a reasonable provision for the dependants from the estate.⁵

1.3 THE RELATIONSHIP BETWEEN SUCCESSION LAW AND OTHER AREAS OF LAW

There is a very close interface between the law of succession and other areas of law, especially: family law, law of trusts and property law.

(a) Family law

Family law and succession law are interdependent. In many respects, the law of succession is seen as part of family law, in the sense that following the demise of a family member, his property is usually shared out among the members of his

³ Chapter 160 Laws of Kenya.

⁴ As Act number 14 of 1972.

⁵ The same position has been adopted in Kenya under sections 26 of the Law of Succession Act.

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family who survive him. The heirs or beneficiaries of the estate of the deceased, in most jurisdictions, are family members. In testate succession, there is a moral obligation on the part of the testator, while disposing off his property in total freedom of testation, to provide for his family. The law usually inserts provisions in the law allowing family members to move to court to challenge a testament that does not provide for them and the court is vested with power to interfere where there is inadequate provision for a family member. For these reasons, family law is seen as having a strong bearing on succession law. Most of the succession disputes turn on family law questions, such as whether a person claiming to be a heir or dependant of the deceased or to be beneficially interested in the estate of the deceased, was a spouse or child of the deceased or related to the deceased in some legal way.

(b) Law of trusts

In administration of estates of deceased persons, the issue of trust inevitably arises. The property of the deceased vests in the personal representative who holds the real and personal property of the deceased for the benefit of others, and not his own. In the circumstances, the personal representative holds the property in trust for all the creditors and beneficiaries who are entitled to the estate of the deceased. He stands in a fiduciary position with regard to the property and in his relationship with the creditors and beneficiaries. Under the Trustee Act,⁶ the definition of trustee includes a personal representative, although the true relationship of the two officers is not exactly the same, but the personal representative may become a trustee in the full sense. In most cases, the trust is created by the instrumentality of a will, and in some cases, it arises from intestacy. The will is subject, almost on an equal basis, to both the law of succession and the law of trusts.

(c) Equity

Beneficiaries of the estate or heirs of the deceased are usually in a unique position before the distribution of the estate. The assets of the estate do not vest in them, but in the personal representatives of the deceased, and therefore although ultimately the assets devolve upon them, the beneficiaries have no legal title to the same. In law, they face difficulties in securing their interests in the estate as they lack the appropriate locus. Equity intervenes. A number of equitable principles, doctrines and remedies apply in succession law, among them being the doctrines of ademption, election and conversion, the presumption of satisfaction and the remedy of tracing.

6 Chapter 167 Laws of Kenya.

(d) Property law

Law of succession is concerned with devolution of property rights upon death from the dead person to those who survive him. Naturally, property law is of consequence. The relevant property notions include inter vivos transfers, the rule against perpetuities, corporeal hereditaments, the principle of survivorship, among others. The principles of property law are particularly important at the administration stage. Property vests in personal representatives upon the making of the grant of representation. The personal representatives have the obligation to collect the property making up the estate and preserve it. They are given wide powers regarding the management of the property, which includes the power to sell and invest the same. The distribution of assets to creditors and beneficiaries usually involves the transfer of title in the property.

1.4 TESTATE AND INTESTATE SUCCESSION

Succession law is categorised into two: testate and intestate succession law.

Testate succession refers to the disposal of a person's property after death according to a will or testament. The person making the will is called a testator, if a male, and a testatrix, if female. The executor is appointed under a will to manage the property of the dead person and to eventually distribute it to the persons entitled to it under the terms of the will. The executor derives his authority to deal with the property of the deceased from the will, but this authority is evidenced by a probate paper called the grant of probate. The term probate ideally refers to process by which a will is proved genuine and the executors are authorised to dispose of the estate of the deceased person.

Intestate succession occurs when a person dies without a will. Dying without having made a will or having made a will that is invalid, is said to lead to intestacy. The rules of intestacy (whether under statute, customary law or Islamic law), determine which relatives inherit the property of a person who dies intestate. Immediate family (spouse and children) inherit first followed by distant relatives such as parents, cousins, nephews and nieces. Where there are no relatives the property devolves to the state. The person who manages the property of the intestate is appointed by the court and is called an administrator. The administrator derives his authority from a probate paper called a grant of letters of administration.

Introduction

The role of the executors and administrators is commonly known as representation or administration of estates. This entails the management and distribution of the estate of a dead person by his personal representatives. According to the law of succession, on death, the estate vests in the personal representatives. They represent the deceased and have the power to do that which the deceased himself would have done, and similarly they bear the burden of the same duties as would have been borne by the deceased if he were alive. The personal representatives may be executors, if appointed under a will, or administrators if appointed by the court. The term administrator may also be loosely used to refer to two classes of personal representatives, that is, the executor named in the will and the administrator appointed by the court in intestacy, or in the event, the will does not name an executor. Executors become personal representatives upon being appointed as administrators by the court.

CHAPTER TWO

HISTORY OF THE LAW OF SUCCESSION IN KENYA

2.1 INTRODUCTION

The period prior to 1 July 1981, when the Law of Succession Act came into force, was characterised by a plural application of succession laws in Kenya. Each socio-cultural group had its own body of succession law. This scenario obtained because of historical reasons.

2.2 THE LAW APPLYING TO AFRICANS

For a long time before the statutory law of succession came into force, the law of succession governing indigenous Kenyan communities was customary. Each tribe had its own customary law of succession, which meant that there were numerous customary laws of inheritance applying then.

The advent of colonialism saw the introduction of other systems of succession law, some of which were progressively made applicable to Africans. The East Africa Order in Council, 1897 for example, introduced the Indian Succession Act of 1865⁷ as the general law of succession applicable to all in the territory, including Africans. The Native Court Regulations of 1897 in article 64, provided that African Christians were to be governed by the law that governed Indian Christians on matters affecting personal status. The Native Estate Administration Rules and Orders of 1899⁸ regulated the administration of estates of such Africans, and vested jurisdiction on native courts with respect to the estates. For those Africans who professed neither the Christian nor the Islamic faiths, the law of their tribe relating to personal status applied, as far as it could be ascertained and was not repugnant to natural morality.

In 1902, the East African Marriage Ordinance was passed, section 39 of which provided that the English law of succession would apply to the intestate estates of Africans who contracted a statutory marriage. The English law primarily covered personal property and any real property that the intestate might have disposed by will. Customary law on the other hand covered real property the succession

7 Act number X of 1865.

8 Order number 11 of 1899.

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to which could not be effected by testamentary disposition. In 1903, the Indian Succession Act of 1865 was disappplied to Africans by virtue of section 2 of the Application to Natives of Indian Acts Ordinance, 1903.⁹ In 1904, the Native Christian Marriage Ordinance, 1904¹⁰ repealed section 39 of the 1902 Ordinance, and thereby subjected the African customary law of succession to the estates of all native Africans irrespective of their marriage law system. The decision of the court in the case of *Benjawa Jembe v Priscilla Nyondo* (1912) 4 EALR 160 was founded on the Native Christian Marriage Ordinance, 1904. In the matter, Barth J held that succession of an African Christian's estate followed the law of the tribe to which such African Christian belonged. The judge said:

The fact that the deceased married a wife according to the rules of the Anglican Church does not affect the succession to his property. Such succession must be regulated by native law or custom.¹¹

This remained the position until 1961 when the African Wills Ordinance was passed to enable the Africans make written wills. Testate succession became subject to this statute while intestate succession continued being governed by the respective customary law of the deceased. The African Wills Ordinance originated from the recommendations made by Arthur Phillips in his *Report on Native Tribunals*.¹² In the Chapter dealing with succession, Phillips underscored the then urgent need to provide the African people with suitable legal machinery through which they could dispose of their modern property, which could not be adequately or appropriately disposed off under customary law. He argued that colonialism had brought with it new forms of market economy and property ownership modes which were unknown to the African customary law and which their law could not be adjusted to deal with, for example, shares in companies, insurance policies, premium bonds, bank accounts and so on.¹³ He recommended that a law similar to the English Inheritance (Family Provisions) Act of 1938 be passed to enable the westernized Africans deal with such property. Most of the above provisions were incorporated in the 1961 Ordinance, which remained in force until 1981 when it was repealed upon the coming into operation of the Law of Succession Act.

9 Ordinance number 2 of 1903. See also *Benjawa Jembe v Priscilla Nyondo* (1912) 4 EALR 160.

10 Ordinance number 9 of 1904.

11 See also *Miney Frances v Kuri* 24(2) KLR I.

12 Nairobi, Government Printer, 1945.

13 At 307 paragraph 927.

History of the Law of Succession in Kenya

In the 1960s there were some developments regarding Africans who died intestate, or made wills only in the customary form. Previously there was no statutory provision for control of administration of their estates, and the whole process was therefore subject to the customs and traditions of the relevant tribe. This included the settling of any disputes that arose regarding the administration of the estate, particularly with regard to distribution of the assets. The enactment of the Magistrates' Court's Act¹⁴ in 1967 vested the magistrates' courts with jurisdiction to settle any disputes arising in the law of succession. Towards the end of the 1960s, the High Court began to bring estates of African intestates within the ambit of statute, especially on matters relating to administration. In *Re Maangi* [1968] EA 337, Farrell J applied the Indian Probate and Administration Act of 1881¹⁵ to Africans in relation to administration of estates of deceased African intestates. The court held that the administration of estates is a matter of general law and was therefore not subject to the constitutional provisions¹⁶ allowing the application of discriminatory laws. Madan J in *Re Kibiego* [1972] EA 129 made a similar finding.

2.3 THE LAW APPLYING TO MUSLIMS

Article 11(b) of the East Africa Order in Council of 1897 applied the Indian Succession Act of 1865 as the general law of succession. The entire Act was applied except for section 331, which excluded Muslims, among other residents of India, from the scope of the Act. The disapplication of section 331 to Kenya meant that the Act applied to Muslim residents in Kenya. This did not last long as section 331 of the Act was applied in 1898¹⁷ effectively removing Muslims from the ambit of the Act. The Probate and Administration Act of 1881 of India was applied to Kenya, to govern probate and administration of the estates of Muslims. At the same time, the Native Court Regulations of 1897, at articles 57 and 59, applied Islamic law on matters relating to personal status. These regulations were re-enacted in Ordinance number 13 of 1907, which established the *Kadhi's* courts and vested them with full jurisdiction over Muslims in all matters relating to personal status, marriage, inheritance and divorce.¹⁸ In 1920, the Mohammedan Divorce and Succession Ordinance was passed. It applied Islamic law in personal and succession matters. Under section 4 of the Ordinance, the application of

14 Chapter 10 of the Laws of Kenya.

15 Act number V of 1881.

16 Then section 26 of the Constitution of Kenya, now section 82 of the Constitution.

17 Through Order number 22 of 1898 of the Secretary of State made on 30 September 1898.

18 Section 19 of Ordinance number 13 of 1907.

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Islamic law was limited to situations where the deceased had contracted an Islamic marriage or if the deceased was a child of such a marriage.

This remained the position until independence when the government re-affirmed the position to the Muslims as part of a constitutional bargain to counter their threat to secede from Kenya. The government assured them that under the new constitutional order, they would be allowed to keep their own personal law. The guarantee was given constitutional backing by section 66 of the Constitution, which provided for the establishment of the *Kadhi's* courts. These courts were mandated to decide matters arising out of Islamic law where such matters related to personal law. That remained the position until 1981 when the Law of Succession Act became operational. The Law of Succession Act repealed all the then existing laws on succession and became applicable to all persons domiciled in Kenya regardless of their religion or cultural background. Section 99 of the Law of Succession Act repealed, among other laws, section 4 of the Mohammedan Marriage, Divorce and Succession Act,¹⁹ which dealt with succession.

Between 1981 and 1990, there was intense agitation by the Muslims who regarded the government's act of passing the Law of Succession Act as a repudiation of the assurance given to them at independence. Their case was that the Quran or a statute embodying the Quranic principles must govern matters of personal law for Muslims. They asked to be exempted from the provisions of the Act as some of them were in direct conflict with the Quran. They were particularly unhappy with section 5 of the Law of Succession Act, which embodies the doctrine of freedom of testation, a doctrine that is not recognised in Islamic law. Under Islamic law, only a third of the deceased's estate can pass by will. Section 5 in Part II of the Law of Succession Act implies that a person is at liberty to will away his property as he wishes. That would allow a Muslim to will away the entire estate. The other contentious provision was section 29, which defines dependants to include illegitimate children, yet under Islamic law, such children have no right of inheritance. The Muslims were also of the view that the provisions of the Law of Succession Act contravened the Constitution of Kenya, particularly those provisions of the Constitution touching on the freedom of conscience or religion and the jurisdiction of the *Kadhi's* courts.²⁰

¹⁹ Chapter 156 of the Laws of Kenya.

²⁰ See Republic of Kenya, Report of the Commission on the Law of Succession, 1968, Government Printer, Nairobi, at 4 and 5. See also Patricia Kameri-Mbote (ed.), *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*, Women and Law in East Africa, Nairobi, 1995 at 22-23.

The government in 1990, keen to have the Muslim support in view of the clamour at the time for return to the multi-party system of government, gave in to the pressure mounted by the Muslims. The Law of Succession Act was amended by the Statute Law (Miscellaneous Amendment) Act,²¹ which disapplied the substantive provisions of the Law of Succession Act to persons who, at the time of their death, were Muslims.²² Instead, Islamic law would govern the estates of such persons.²³ The Amendment Act also re-affirmed the position of the Kadhi's courts by stating that these courts will continue to have jurisdiction to decide on succession matters relating to Muslims in accordance with Islamic law.²⁴

2.4 THE LAW APPLYING TO HINDUS

The East Africa Order in Council 1897, through article 11(b), applied the Indian Succession Act of 1865 to Kenya excluding section 331, which disapplied the Act to Hindus, Muslims and Buddhists of India. The effect of the non-application of section 331 to Kenya meant that the Hindus domiciled in Kenya were brought under the ambit of the Indian Succession Act of 1865. In 1898 section 331 of the Indian Succession Act was applied to Kenya vide Order number 22 of 1898, which meant that the Act was no longer applicable to Hindu residents in the country. By the same order, the Hindu Wills Act of 1870 of India²⁵ and the Probate and Administration Act of 1881 of India²⁶ were applied to Kenya. The Hindu Wills Act of 1870 was a mere adaptation of the Indian Succession Act of 1865 of India. It was applied to Kenya to provide for testate succession for the Hindus living in Kenya,²⁷ subject to certain limitations. The Probate and Administration Act of 1881 contained provisions relating to probate and administration and applied to Asians, excluding Goans and Parsees.

With regard to intestate succession, no law had been specified as being applicable to the Kenyan Hindus. The Hindu customary law that governed the subject until 1946 automatically filled this vacuum. In 1946, the colonial government applied the Hindu (Marriage, Divorce and Succession) Ordinance 1946.²⁸ Its effect was to confirm, in section 9, that matters of intestate succession for the Hindu residents in Kenya were to be governed by the Hindu customary law. The 1946

21 Number 2 of 1990.

22 Section 2(3) of the Law of Succession Act.

23 Section 2(4) of the Law of Succession Act.

24 Section 48(2) of the Law of Succession Act.

25 Act number XXI of 1870 of India.

26 Act number V of 1881 of India.

27 See *Charan Singh Chadha and another v Mohinder Singh Chadha and others* [1961] EA 637 (Sir Kenneth O'Connor P, Crawshaw and Newbold JJA).

28 Ordinance number XLIII of 1946.

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legislation applied to those Hindus who had died domiciled in Kenya, but was silent on which law applied to those who died in Kenya but whose domicile was elsewhere. The scope of the legislation was therefore restricted. Another restriction in the scope of the Ordinance was that it only applied to the Hindus whose marriages had been contracted in the colony. In *Bessan Kaur v Rattan Singh* [1952] 25 KLR 24, the plaintiff, who was a widow, sued the defendant who, as the deceased's only son, had inherited his father's entire estate. She claimed for maintenance under the above legislation. It was held that she could not establish any right of succession under the Hindu (Marriage, Divorce and Succession) Ordinance since her marriage with the deceased was contracted outside the colony and section 3(1) of the Hindu (Marriage, Divorce and Succession) Ordinance restricted the scope of the statute to persons married in Kenya.

In 1961, the 1946 Ordinance was amended by being split into two statutes: the Hindu Succession Ordinance and the Hindu Marriage and Divorce Ordinance. The Hindu Succession Ordinance provided for intestate succession while the Hindu Wills Act of 1870 provided for testate succession. These two statutes remained in force until 1981 when the Law of Succession Act repealed them.

2.5 THE LAW APPLYING TO EUROPEANS

The Europeans who had settled in Kenya and acquired a Kenyan domicile needed a law to govern their succession matters. They could not obviously be governed by African customary law, Hindu or Islamic laws of succession and needed a law akin to that applicable to their brethren in other British colonies. The law applicable to British settlers in the colonies was English law with slight adaptations to suit conditions prevailing in the colonies.

Article 11(b) of the East Africa Order in Council of 1897 applied to the Protectorate several Indian Acts, among them being the Indian Succession Act of 1865. The Indian Succession Act of 1865 was passed in India to govern succession matters for Europeans, Goans and Parsees in India. It was felt that the same law could govern the settlers in Kenya. The 1865 Act reflected the position of succession laws in England at that time. It was a comprehensive code of the law of succession providing for both testate and intestate succession and administration of estates. It enacted the doctrine of testamentary freedom that allowed a testator to will away all his property to whoever he felt like without necessarily leaving anything for his dependants. The Act provided that in the case of testate succession, the estate of the testator devolved to the persons named by him in the will regardless of his relationship to them. It was therefore possible for a testator to leave his

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entire estate to a charitable organization without providing for even his immediate dependants.

The Indian Succession Act was amended in Kenya several times. The first such amendment was through Order number 12 of 1932 that repealed section 105 of the Act. This section had imposed a restriction on the doctrine of testamentary freedom by providing that any gift made in a will for a charitable purpose had to be made at least twelve months prior to the testator's death. Any purported bequest within these twelve months was deemed null and void under the Act. The provision was meant to take care of those situations where a testator sought to make peace with his maker on his deathbed by bequeathing all his estate to charitable organizations at the expense of his dependants. The period of twelve months enabled the testator to improve on his condition and make a sober decision.

The Kenyan settlers felt that this restriction on testamentary freedom was unnecessary and initiated the 1932 amendment that removed the restriction. A testator was then enabled to leave his estate to whomever he felt like without limitation on time. This amendment reflected the developments in the English law of succession between 1888 and 1889 that had not been incorporated in the 1865 Act. The other major amendment to the 1865 Act was through Order number 48 of 1956, which resulted in the present day Law Reform Act.²⁹ With respect to succession, this amendment provided that where a person died leaving a cause of action in existence at the time of his death, the cause of action survived his death and could proceed against or on behalf of his estate under the doctrine of survivorship.

The above amendments did not, however, fully harmonize the Indian Succession Act with the English law of succession in force in England at the time. A number of changes in the English law were not incorporated into the Act. One of these amendments is the amendment to the English law of succession in 1938 that removed the doctrine of testamentary freedom from the statutes. This amendment also gave dependants the right to challenge a will on grounds that they had not been adequately provided for in the will or that they had effectively been disinherited.³⁰

Another change that was not reflected in Kenya was the passing of the Intestate Estates Act of 1952. This Act provided that in the case of intestacy the persons who should inherit from the estate of the deceased were his immediate family members in the first instance and where there were none, his parents, brothers and sisters.

²⁹ Chapter 26 of the Laws of Kenya.

³⁰ This was reenacted at section 26 of the Law of Succession Act, providing for reasonable provision and its enforcement.

CHAPTER THREE

THE LAW OF SUCCESSION APPLYING IN KENYA AFTER 1981

3.1 INTRODUCTION

Until 1 July 1981,³¹ there were four systems of law of succession in Kenya applying to the four different socio-ethnic groups of people in Kenya: Africans, Muslims, Hindus and Europeans. These were (a) English law which was applied through several statutes, namely; the Indian Succession Act of 1865, the Hindu Wills Act of 1870, the Probate and Administration Act of 1881, the African Wills Act of 1961, the Administration of Estates by Corporations Act, the Commonwealth Probate Act and the Colonial Probate Act of 1892, (b) African customary law, (c) Islamic law and (d) Hindu customary law. The Law of Succession Act was passed with the intention of merging and consolidating all the four systems of law of succession and their supporting legislation into one comprehensive statute in order to give Kenya a uniform law of succession applicable to all sections of the Kenyan population, to ensure certainty, predictability and uniformity in the processes of devolution of property.

3.2 THE LAW OF SUCCESSION ACT

The Law of Succession Act came about because of a report compiled by a commission appointed by the late President Kenyatta in 1967,³² to look into the problems concerning the succession regime in Kenya. The purpose and scope of the Act is stated in its preamble. It is an Act of Parliament to define and consolidate the law relating to intestate and testamentary succession and the administration of estates of persons and for connected purposes. Section 2(1) of the Act states that

31 The Law of Succession Act came into force on 1 July 1981 through Legal Notice number 93 of 1981 dated 23 June 1981. The statement by Musinga AgJ in *Kuria and another v Kuria* [2004] KLR that the Law of Succession Act commenced in 1983 is incorrect., and so is that by Koome J in *In the Matter of the Estate of Grace Ngulhi Michobo* (deceased) Nairobi High Court succession cause number 1978 of 2000 that the Act commenced in April 1981.

32 The members of the commission were H Slade (Chairman) Chanan Singh CB Ngala-Abok BM Gecaga P Le Pelley SM Akram G Waddell TA Watts DJ Coward, WK Martin and E Cotran (Secretary). Waddell and Gecaga later resigned and were replaced with AA Kneller and Margaret Mugo respectively. The commission reported in 1968. A bill based on the report was presented in parliament, debated and passed in 1972.

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the Act constitutes the law of Kenya in respect of, and is of universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act.

Section 99 of the Act repeals all the statutes on the law of succession in force before 1 July 1981, and these are listed in the 8th Schedule to the Act. They are as follows: the Indian Succession Act of 1865, the Hindu Wills Act of 1870, the Probate and Administration Act of 1881, the Hindu Succession Act, the African Wills Act of 1961, the Administration of Estates by Corporations Act, the Commonwealth Probate Act and the Colonial Probate Act of 1892. Section 100 provides for the amendment of the other existing statutes, among them being the Mohammedan Marriage, Divorce and Succession Act, which was harmonized with the Law of Succession Act by the deletion of its section 4, which dealt with matters of succession.

The Law of Succession Act is the general law of succession in Kenya. Section 2(1) of the Act applies the Law of Succession Act universally to all in Kenya, except for those cases where different laws are applied by the Act itself or through any other written law. Although the Law of Succession Act constitutes the law of succession in Kenya and is supposed to apply uniformly to the estates of persons domiciled or dying in Kenya, it is not the only body of law governing succession in the country. Other systems of law of succession apply, but as exceptions to the Law of Succession Act.

Due to the contradictions inherent in a multi-cultural society such as is found in Kenya, there has been a great deal of conflict in the application of the Law of Succession Act to some people and some areas and as a result exceptions have had to be made in order to give way to the application of other laws in such exempted areas and to exempted persons. The ultimate aim in passing the Law of Succession Act was to provide a universal law of succession applicable to all persons resident in Kenya; this ideal has not been fully achieved. There remain certain areas or situations to which the Act does not apply.

The Law of Succession Act also embodies the African customary law of succession; the intention being to provide the Kenyan people with a statute that translates their customary beliefs and practices into law. The Act embraces certain concepts which are purely African in nature and which are meant to reflect the 'Kenyan-ness' of the statute. There is, for example, reference to 'wives' and dis-

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tant relatives in relation to the provisions pertaining to dependants.³³ This is in recognition of the concepts of polygamy and the extended family respectively, all common in traditional African communities.

The law was meant to be passed simultaneously with the Law of Matrimony Act,³⁴ a bill of which was debated in parliament in 1971 but was never passed. The bill was meant to come up with a law which would have repealed and replaced the existing marriage statutes, namely: the Marriage Act,³⁵ the African Christian Marriage and Divorce Act³⁶ and the Matrimonial Causes Act,³⁷ and replace them with one comprehensive statute governing marriage, divorce and related matters. All these family law statutes embody the English law on marriage and divorce and were introduced in Kenya during the colonial period. The fact that the marriage statutes remain in force alongside the Law of Succession Act has created the untidy situation where there are constant conflicts of interpretation and application of the two sets of laws. For example, under the marriage statutes, a woman married under a system of law allowing polygamy, like customary law, to a man who had previously or subsequently contracted a marriage under statute, is not a wife for any purpose,³⁸ but under the Law of Succession Act, she is entitled to inherit from the estate of the deceased.³⁹ The result is that a woman who is not a wife under the marriage statutes will be regarded as a wife for purposes of succession.

3.3 AFRICAN CUSTOMARY LAW

The Judicature Act⁴⁰ at section 3 lists African customary law as one of the sources of law in Kenya. Section 3(2) of the Judicature Act provides that the High Court and all subordinate courts are to be guided by African customary law in all civil cases. It applies for as long as it is applicable and not repugnant to justice and

33 See section 29 of the Law of Succession Act.

34 See a draft of the bill annexed as an appendix to Republic of Kenya Report of the Commission on the Law of Marriage and Divorce Government Printer, Nairobi 1968 at 144.

35 Chapter 150 of the Laws of Kenya.

36 Chapter 151 of the Laws of Kenya.

37 Chapter 152 of the Laws of Kenya.

38 Section 37 of the Marriage Act declares that a person who marries under statute loses capacity to contract another marriage under customary law during the subsistence of the statutory marriage. The courts have ruled that marriages contracted under customary law, subsequent to a statutory marriage, are null and void. See *Re Ruenji's Estate* [1977] EA 21, *Re Ogola's Estate* [1978] EA 18 and *In the Matter of the Estate of Reuben Nzioka Mutua* High Court probate and administration number 843 of 1986 (UR).

39 See section 3(5) of the Law of Succession Act. In *Irene Njeri Macharia v Margaret Wairimu Njomo and Another* Court of Appeal civil appeal number 139 of 1994 (unreported) and *Muigai v Muigai and another* [1995-1998] EA 206 it was held that section 37 of the Marriage Act only bars the husband from subsequently contracting other marriages, it does not bar wives who are so subsequently married from inheriting from the deceased husband's estate.

40 Chapter 8 of the Laws of Kenya.

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morality or inconsistent with any written law.⁴¹ The Court of Appeal, in *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA), held that, under section 3(2) of the Judicature Act, the court has to be satisfied that the custom if proved, is not repugnant to justice or morality. On the facts of the case a custom which was discriminatory in its effect, so as to bar women from inheritance, was found to be repugnant to ordinary notions of justice. In *Kamete Ene Ateti Marine v Mosupai ole Ateti* Nairobi High Court civil appeal number 224 of 1995, Amin J frowned upon the declaration of customary law as repugnant to justice and morality. He took the view that customs and traditions are time tested and based on wisdom and experience hence they should not be brushed aside lightly however tempting it might be to do so, unless there are sound reasons for it that have to be deliberated upon and determined judicially.

Jurisdiction over customary law matters is specifically vested in the magistrate's court by sections 5(2) and 9(a) of the Magistrates' Courts Act.⁴² Under these provisions, the magistrate's court has powers to exercise jurisdiction in proceedings of a civil nature where the proceedings concern a claim under customary law. A 'claim under customary law' is defined in section 2 of the Magistrates' Courts Act to include a claim concerning, intestate succession and administration of intestate estates, but only to the extent that such matters are not governed by any written law, such as the Law of Succession Act.

The customary law claims as set out in section 2 of the Magistrates' Courts Act relate mainly to personal law matters. The Constitution of Kenya at section 82 allows the application of different personal laws, regardless of whether such laws are discriminatory or not.⁴³ Section 82(4) of the Constitution enables the enactment of discriminatory legislation on devolution of property. In *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal number 19 of 1999, Shah JA said, while dealing with a matter touching on inheritance by daughters, that section 82 of the Constitution sanctions exclusion of daughters from inheritance by the court applying customary law concerning devolution of property upon the death of the owner of that property.

41 See *Otieno v Ougo and another* [1987] KLR 407 (Nyarangi, Platt and Gachuhi JJA) and *Otiato v Otieno* [1990] KLR 721 (Mango J).

42 Section 10 of the Laws of Kenya.

43 *Rono v Rono and another* [2005] 1 EA 363 (Omolo, O'Kubasu and Waki JJA).

3.4 AFRICAN CUSTOMARY LAW AND THE LAW OF SUCCESSION ACT

Section 2(1) of the Law of Succession Act states that the Law of Succession Act, unless provided otherwise by the Act itself or any other written law, constitutes the law in Kenya on succession matters. In *Rono v Rono and another* [2005] 1 EA 363 Waki JA stated that the application of African customary law is expressly excluded by section 2(1) of the Law of Succession Act, unless the Act itself makes provision for it.⁴⁴ Kamau J in *Francis Njoroge Muigai and others v John Njoroge Muigai* High Court civil appeal number 18 of 2001 held that the decision of a magistrate distributing the estate of a person who died in 1997 in accordance with Kikuyu customary law was inconsistent with section 2(1) of the Act and set it aside. The effect of section 2(1) of the Law of Succession Act is to oust the application of African customary law in succession matters, except in such circumstances as may be allowed by the Law of Succession Act itself.

The application of Nandi customary law, by Nambuye J *In the Matter of the Estate of Chumo Arusei* Eldoret High Court probate and administration number 26 of 1998, to the estate of a person who died in 1997 who did not fall under any exception to the provisions of the Act was wrongful and a misdirection. Nambuye J similarly misdirected herself in *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 by applying Nandi customary law to the estate of the deceased who died in 2000, yet his estate was not exempt from the provisions of the Law of Succession Act.

Akiwumi JA, in *John Gitata Mwangi v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997, stated that section 3(2) of the Judicature Act does not grant unassailable status to customary law to the extent of the same being regarded as relevant to any issue arising under the provisions of the Law of Succession Act. Although section 33 does allow the application of customary law, that provision is limited to the special circumstances stated in sections 32 and 33 of the Act. No similar provisions have been made to apply African customary law to other parts of the Act. The omission to make such provisions should be an indication that the other parts of the Act are to be interpreted without being subject to the customary law of the deceased. In his dissenting judgment, Bosire JA was of the opinion that by end of section 3(2)

44 See *In the Matter of the Estate of Mwangi Giture* (deceased) Nairobi High Court succession cause number 1033 of 1996 (Koome J) and *Kuria and another v Kuria* [2004] KLR (Musinga AgJ).

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of Judicature Act the personal laws and customary practices, as far as they are relevant, have a bearing in determining issues touching on the estate of a deceased African, unless such laws and practices are disqualified because of repugnancy.

In some cases, the court, while dealing with distribution of estates, often expresses itself as being guided by African customary law as required by section 3(2) of the Judicature Act. In *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001, for example, Kimaru J, while making orders on distribution, said he would be guided by the Kipsigis customary law. There is no indication in the decision on how, if at all, the judge was guided by Kipsigis customary law. In other cases, the court has obviously been guided by African customary law, but without expressly stating so. In *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased)* Nairobi High Court probate and administration number 2322 of 1995, Visram J cited Kikuyu customary law in deciding that the applicants were not entitled to provision in an application brought under section 26 of the Law of Succession Act. Customary law cannot be a guide nor lead the court in any matter where there are clear and mandatory statutory provisions on the matter.

The Law of Succession Act allows the application of African customary law in a number of instances.

(a) Estates of persons dying before the application of the Law of Succession Act

Section 2(2) of the Law of Succession Act provides that the estates of persons dying before the commencement of the Act are subject to the written laws and customs applying at the date of death.⁴⁵ Prior to 1981, the intestate estates of deceased Africans were exclusively subject to African customary law, except for estates of those Africans who had made wills under the African Wills Act. In *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003, Kamau AgJ held that where the deceased died prior to the commencement of the Law of Succession Act the distribution of his estate is strictly governed by the applicable customary law, however, the provisions of the Law of Succession Act as provided under section 2(2) govern the administration of the said estate. *In the Matter of*

⁴⁵ See *In the Matter of the Estate of Gathererie Muturi (deceased)* Nairobi High Court succession cause number 2170 of 1999 (Koombe J) and Mbuthi [1976] KLR 120 (Harris J).

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the Estate of Kiiru Muhia 'A' (deceased) Nairobi High Court s civil suit number 2487 of 1996 Rawal J held that the Law of Succession Act did not apply to the estate of a person who died in 1953. The administration though of such estates should be in accordance with the provisions of the Act relating to administration of estates.

The application of section 40 of the Act, by the Court of Appeal in *Cleophas Simiyu and another v Maurice Barasa Watambamala and others* Nairobi Court of Appeal civil appeal number 34 of 1984 (Hancox JA Nyarangi and Platt AgJJA), to the estate of a person dying in 1980, was obviously misdirection. The decision of Koome J *In the Matter of the Estate of Grace Nguhi Michobo (deceased)* Nairobi High Court case suit number 1978 of 2000 was obviously made in *per incuram*. The court stated that the deceased passed away on 12 April 1981 when the Act was in operation. The correct position is that the deceased died before the commencement of the Act on 1 July 1981 and the court should have shared out her estate in accordance with the law then applying to the intestate estates of deceased Africans' customary law.

(b) Testamentary dispositions in accordance with African customary law

The Law of Succession Act at section 5(1) allows the testator to dispose of his property by reference to any secular or religious law. This would allow the testator to make a will, which provides that the estate should devolve in accordance with a particular customary law. For example, he may provide for devolution according to Kamba customary law. In such a case, the court has to ascertain the requirements of the particular customary law.

(c) The application of African customary law by section 33 in the event of intestacy

Section 32 of the Law of Succession Act exempts certain classes of property from the intestacy provisions in the Act, and section 33 of the Act applies African customary law to such property. The administration of estates, which are the subject of sections 32 and 33, is not under Part VII of the Law of Succession Act, relating to administration of estates, since section 44(1) of the Law of Succession Act provides that Part VII of the Act does not apply to intestate estates the subject of section 32 of the Act. The provisions of the Magistrates' Courts Act fill the gap. The estates so

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exempted from the provisions of the Law of Succession Act are administered in accordance with African customary law. Waki JA in *Mary Rono v Jane Rono and another* Eldoret Court Appeal of civil appeal number 66 of 2002 said that sections 32 and 33 of the Law of Succession Act make provision for the application of customary law in respect of agricultural land and the crops on such land. The application of the law or custom is, however, limited to such areas as the Minister may by gazette specify. By Legal Notice number 94 of 1981, the Minister specified the various districts to which African customary law should apply.⁴⁶ Similarly, Rawal J in *In the Matter of the Estate of Mwaura Gathari (deceased)* Nairobi High Court succession cause number 1678 of 1999 found that the Law of Succession Act applies customary law to the intestate estate through section 33.⁴⁷

The courts in Kenya out of either ignorance or deliberate disregard of the provisions of the Act offer a blind effort to elevate customary law above the statute. They often overlook the Act and apply customary law although the Act is clear on the circumstances under which customary law may apply to the estate of a deceased intestate. The Court of Appeal in *Mwathi v Mwathi and another* [1995-98] 1 EA 229, (Gicheru, Kwach and Shah JJA), for example, overlooked Part V of the Act and applied Kikuyu customary law to the estate of an intestate who died in 1987. The opinion of the highest court in Kenya, which was inconsistent with Part V of the Act, was that 'the intestate succession of a deceased Kikuyu is governed by Kikuyu customary law'.⁴⁸ Mwera J in *Estate of Mutio Ikonyo (deceased)* Machakos High Court probate and administration number 203 of 1996, decided that a married daughter was not entitled to inherit from her father's estate, despite the deceased having died after the Law of Succession Act came into force. The Law of Succession Act does not discriminate between male and female children whether married or not.⁴⁹

3.5 ISLAMIC LAW

Islamic law is a source of law in Kenya. The root of the application of Islamic law in Kenya is the Constitution of Kenya. Section 82 of the Constitution allows the application of different personal laws as an exception to the general prohibition of discrimination. In *Chelang'a v Juma* [2002] 1 KLR 339, Etyang J stated that a person, particularly a non-Muslim, cannot be heard to say that the application

⁴⁶ See Chapter 9, section 9.2 here below.

⁴⁷ See also *In the Matter of the Estate of Benson Ndirangu Mathenge (deceased)* Nakuru High Court succession cause number 231 of 1998 (Ondeyo J).

⁴⁸ At 231.

⁴⁹ See also *In the Matter of the Estate of Kamau Mwangi (deceased)* Nairobi High Court succession cause number 1579 of 1994 (Osiemo J). and *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998 (Ondeyo J).

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of Islamic law governing intestate succession of a deceased Muslim's estate is discriminatory against them because section 82(2) of the Constitution allows it.

Section 66 of the Constitution provides for the existence of *Kadhi's* courts, which are established by the Kadhis' Courts Act.⁵⁰ Section 5 of the *Kadhis' Courts* Act vests jurisdiction on the Kadhi's court to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance. Islamic law is considered a limited source of law since it only applies when all the parties profess the Islamic religion.⁵¹ The provision, however, does not give exclusive jurisdiction over succession matters to the *Kadhi's* court, the High Court and the magistrates court also have jurisdiction. The former Court of Appeal for Eastern Africa in *Khatijabai v Kassam Sunderji Samji and others* (1955) 22 EACA 301 (Sir Barclay Nihill P, Sir Newham Worley VP and Sir Hugh Holmes J) held that the application of Islamic law on personal matters is subject to the general law on other matters such as land.

3.6 ISLAMIC LAW AND THE LAW OF SUCCESSION ACT

When the Law of Succession Act came into force in 1981 it was meant to replace the Islamic law of succession, since it sought to consolidate the law in Kenya relating to both intestate and testamentary succession by virtue of section 2(1) of the Law of Succession Act. The Act was also meant to apply universally, that is to all persons resident in Kenya, including Muslims.

The objective, however, was not attained, since Muslims were in 1990 exempted from the substantive provisions of the Law of Succession Act, through an amendment inserted into the Act⁵² to introduce section 2(3) and (4) of the Law of Succession Act. Section 2(3) disapplies the substantive provisions of the Act, those relating to testamentary or intestate succession, to the estate of a deceased Muslim, and instead subjects the estate exclusively to Islamic law. This is reiterated in section 48(2) of the Law of Succession Act, which states that the *Kadhis'* courts exercise jurisdiction for the determination of questions relating to inheritance in accordance with Islamic law. In light of this, the decision of Ang'awa J *In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased)* Nairobi High Court succession cause number 2678 of 2001, where she stated that with respect to the estate of a Muslim apportionment is done where questions arise according to Islamic law while the rest of the intestate estate is apportioned according to Part V of the Act, is not a true reflection of the actual legal position.

50 Chapter 11 of the Laws of Kenya.

51 T Jackson, *The Laws of Kenya*, Kenya Literature Bureau, Nairobi, 2005 at 22.

52 Through Statute (Miscellaneous Amendment) Act (Act number 2 of 1990).

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The exemption, however, only covers substantive law. Section 2(4) of the Law of Succession Act applies the procedural aspects of the Act, principally Part VII relating to the administration of estates, to the estate of a deceased Muslim so long as the said provisions are not inconsistent with Islamic law. Etyang J in *Chelang'a v Juma* [2002] 1 KLR 339, specifically held that section 2(3), (4) of the Law of Succession Act is not inconsistent with the provisions of the Constitution in so far as it exempts Muslims from the substantive provisions of the Act on distribution of estates.

Under section 5(1) of the Law of Succession Act, it would appear that a Muslim could still make a will under the aegis of the Law of Succession Act, if the will disposes off his property by reference to Islamic law. If the will disposes the estate in accordance with the principles set out in the Quran, it would be acceptable to members of the faith.

3.7 THE STATUTES REPEALED BY SECTION 99 OF THE LAW OF SUCCESSION ACT

By virtue of section 2(2) of the Law of Succession Act, some of the statutes deleted by section 99 of the Act are still of application, but only to the estates of persons dying before the commencement of the Act on 1 July 1981 where the estates fall for administration after 1 July 1981. However, the applicable statutes are those on substantive succession law that is the substance of testate and intestate succession, not the procedural law that is on administration of estates. Administration of estates of persons dying before 1 July 1981 is subject to the Law of Succession Act. The relevant statutes are the Indian Succession Act of 1865, the Hindu Wills Act of 1870, and the African Wills Act of 1961.

3.8 THE TRUSTEE ACT, THE TRUSTS OF LAND ACT,⁵³ THE PUBLIC TRUSTEE ACT⁵⁴ AND THE ARMED FORCES ACT⁵⁵

Section 101 of the Law of Succession Act refers to the continuation of the application of the Trustee Act, the Public Trustee Act, the Trusts of Land Act and sections 219 and 220 of the Armed Forces Act. These statutes were in place before the Law of Succession Act came into force and they cover various aspects of succession.

The Law of Succession Act does not have elaborate provisions on some aspects

53 Chapter 290 of the Laws of Kenya.

54 Chapter 168 of the Laws of Kenya.

55 Chapter 199 of the Laws of Kenya.

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of administration of estates of deceased persons, especially those relating to investment and other application of the capital money of an estate, indemnities of personal representatives, powers of personal representatives, where personal representatives refuse to exercise their powers of sale, the modes of exercise of powers of sale by personal representatives, among others. The omission was deliberate, as these powers exercisable by personal representatives had already been set out in legislative framework in a number of statutes, particularly the Trustee Act and the Trusts of Land Act. On these matters, the provisions of the Law of Succession Act have to be read together with those of the Trustee Act and the Trusts of Land Act.

The Public Trustee Act provides for the appointment of the Public Trustee and defines his powers and duties. Under the Act, the Public Trustee may be appointed personal representative of a deceased person under certain conditions and in respect of defined classes of estates. Section 4 of the Public Trustee Act gives the statute supremacy over the Law of Succession Act, unless it is expressly provided to the contrary in the Law of Succession Act itself. Sections 219 and 220 of the Armed Forces Act concern the estates of deceased soldiers. The provisions are principally about execution of soldiers' wills and the administration of the estates of soldiers.

3.9 LAW OF THE DOMICILE OF THE DECEASED OWNER OF MOVABLE PROPERTY

By virtue of section 4(1)(b) of the Law of Succession Act, the law of succession that applies with regard to moveable property is the law of the country where the deceased is domiciled. Waki J in *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684, held that for the purpose of the distribution of such property, the grant of representation ought to be obtained from the domicile of the deceased at the time of his death. Conversely, by dint of section 4(1)(a), succession to immovable property in Kenya of a deceased person is regulated by the law of Kenya regardless of the domicile of the deceased at the time of his death.

PART TWO

TESTATE SUCCESSION

CHAPTER FOUR

THE NATURE AND FUNCTION OF WILLS

4.1 INTRODUCTION

Testate succession occurs where a person desirous of retaining absolute or limited control over his property after death, arranges to ensure that upon his death the property passes to a person or persons of his choice. These arrangements are made through a valid and enforceable will.

4.2 NATURE AND FUNCTION OF WILLS

In a general sense, the word 'will' refers to all that a person wishes to happen upon their death. In the context of the law of succession, it refers to the document or documents in which a person expresses their wishes upon death. It means therefore a will is a record of a deceased person's wishes and intentions pertaining to the devolution of his property upon his death. It is defined under section 3(1) as the legal declaration by a person of his intentions or wishes regarding the disposition of his property after his death duly made and executed in accordance with the Act. According to Sir JP Wilde in *Lemage v Good ban* (1865) LR 1 P and D 57:

The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute.

A will is chiefly concerned with the disposal of property, but it can be used for other purposes and for incidental matters, such as: the appointment of persons to administer the estate of the testator (that of personal representatives/executors), the appointment of the trustees to administer trusts set up under will, the appointment of guardians for children of the testator who are minors at the date of the testator's death, making directions as to payment of taxes and other liabilities of the dead person, and giving directions as to the manner of disposal of the deceased's body or that the deceased's body or part of it be donated for medical or scientific purposes.

4.3 CHARACTERISTICS OF A WILL

A will being a testamentary document has no legal effect until the maker dies. It is successive in effect. While he is alive, it neither limits his rights of ownership nor confers any benefits to anyone. Before the testator's death, the document is

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a mere declaration of intention with no legal effect whatsoever. The essential characteristics or elements are: (a) the wishes expressed are intended to take effect upon death, (b) the will only takes effect upon death, (c) a will can only operate as a declaration of intention, (d) a will is ambulatory, and (e) a will is always revocable.

(a) The wishes expressed are only intended to take effect upon death

Any document made or executed in accordance with the law, may take effect as a will if the intention was that it should not operate until after the death of the maker. Where there is nothing in the instrument or document showing that it has reference to the death of the person executing it, it cannot take effect as a will. Even if a document is described as being a will, it does not follow that it is in fact a will. If the provisions of the document are to take effect sometime before the death of the person drawing up the document, then it is not a will. The test is the time the gift takes effect.

(b) A will only takes effect after death

The wishes expressed in a will are intended to take effect upon or after death. A will therefore only takes effect upon death. Beneficiaries under a will do not acquire an interest in the property before the testator's death – so that a gift to a beneficiary who dies between the time of making of the will and the death of the testator lapses or is deemed null and void.

(c) A will only operates as an expression of intention

The execution (making) of a will does not affect the way in which the testator deals with his property during their lifetime. A testator is free to dispose of the property given in the will by sale or gift during their lifetime. It is not a fetter to the testator's freedom to deal with their property as they please during their lifetime. The testator cannot be certain that a beneficiary will receive a particular asset, which is given to them by will. The personal representatives/executors are under a duty to settle all debts and liabilities of the deceased (see section 83 (a), (b), (c) and (d) of the Law of Succession Act). Section 99 of the Act vests the property of the deceased in the personal representative or executor while section 82 of the Act gives them a general power of sale. If the debts of the estate are large, the gifts,

including gifts of a specific asset, may be absorbed in the payment of debts. A will therefore is a mere declaration of intention, there is no guarantee that the wishes expressed in it would be carried to effect.

(d) A will is ambulatory

The fact that a will takes effect upon death makes it ambulatory. It is capable of dealing with property which is acquired after the date of the will. For example, if Onyango executed a will in 1997 containing a clause to the effect that all the testator's land was to pass to Owiti, this would include any land acquired by Onyango after 1997.

(e) A will is always revocable

Because a will takes effect upon death and because it is a mere declaration of intention it is always revocable. It may be revoked even where it expressly states that it is not revocable.

4.4 THE ADVANTAGES OF MAKING A WILL

Majority of people die without having made a will for various reasons: reluctance to contemplate their own death as a result of the superstitious fear that the will would hasten death, belief that a will is pointless in their case, fear that the will may generate controversy upon their demise, a general reluctance to make legal documents, and ignorance as to the possibilities open to them. There are advantages to be gained from making a will.

(a) Maintaining control over property

The making of a will enables the testator to maintain control over property upon his demise. This is especially important for a person with a spouse and children. For example, if a wife makes a will leaving the entire estate to her husband, she loses control over the ultimate destination of the property upon the death of her husband if she dies first. She simply has to hope that he will dispose of what was originally her estate to the children of the marriage rather than marrying someone else after her death and leaving the combined estate to his second wife. She could achieve control by giving her husband simply a life interest in her estate with the remainder passing on to the children upon his death. A life interest only entitles the husband to the income from the estate.

(b) Avoiding the rules of intestacy

The decision to make, change or revoke a will gives the testator an opportunity to consider his own affairs and to decide with a sober mind who should inherit what from his estate, instead of leaving this important decision to be made by other people after his death. The making of a will avoids the application of the rules of intestacy. The intestacy provisions ensure that the next of kin of the deceased benefit from his estate, but the shares of the estate which the next of kin receive are arbitrary and they are often unsuitable in the circumstances. A will is a personal document and it is preferable to use it as a last beneficial act rather than to allow the impersonal provisions of intestacy to take effect with the consequential effect that the unexpressed intentions of the deceased might not be given effect.

(c) Enabling the deceased to appoint personal representatives of their own choice

The making of a will entitles the testator to appoint personal representatives of their own choice to administer their estate. Since these are personally appointed by the testator he would be reasonably sure that his estate will be well administered after his death by persons in whom he has confidence and who probably are already acquainted with the estate during his lifetime. If a person dies intestate, the persons who administer the estate (personal representatives) are appointed by the court and the deceased will have no choice in the matter.

(d) Administrative convenience

Administrators of estates derive their authority to administer the estate from the grant of letters of administration while the executors derive their authority from the will. As they derive their authority from the will, executors can begin to administer the estate from the date of the deceased's death. The grant of probate merely confirms their authority. The grant of letters of administration takes time that means there is always a considerable lapse of time between the death of the deceased and the grant of letters. The estate of an intestate cannot be administered until after the grant of letters has been obtained. The dependants of an intestate are therefore exposed to inconvenience. Thus, through a will, a testator ensures that his estate may be dealt with immediately upon his death. A further aspect of administrative convenience in executing a will is that it is possible to give many useful and desirable powers of administration to the executors under the will. The powers of the administrator of an intestate's estate are limited by the Law of Succession Act.

(e) Full disclosure of the deceased's property

The making of a will enables the testator to make a full disclosure of all the property they own or die possessed of, which is not possible in case of intestacy where a lot of the undisclosed property or assets may be lost.

(f) Avoiding disputes over the estate

In the first place, by providing how and to whom property is to pass upon the testator's death making a will avoids squabbles between heirs and survivors over the estate.

(g) Benefiting persons outside the immediate family

The rules of intestacy only make provision for the deceased's next of kin. It is only by making a will that a testator can benefit persons outside the immediate family circle.

(h) Appointment of testamentary guardians

A will enables a parent who has minor children, if they so wish, to appoint a guardian or guardians to take parental responsibility for the children should he or she die while the children are minors. This is important where the parent is single.

(i) Directions regarding disposal of the deceased's body

A will may also be used to give directions regarding the disposal of the dead person's body. This could be in terms of the precise method by which their body is to be disposed of (that is burial where and how, cremation etc) or they may wish that their body or a part of it be donated for the purpose of medical education, scientific research or treatment of patients. Such provisions or directions have no binding legal effect, as the law recognizes no property in the dead body of a human being. This would mean that the testator cannot by will dispose of his dead body. Such provisions amount to a mere request to executors to comply with the testator's wishes. Kwach J stated in *Pauline Ndeti Kinyota Maingi v Rael Kinyota Maingi* Nairobi Court of Appeal civil appeal number 66 of 1984, there is no property in a corpse, which a testator can validly dispose of by his will, the executor's obligation is to give effect to the deceased's wishes in relation to the disposition of his corpse as far

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as practicable. The executor is not bound to give effect to those wishes if they are either impracticable or in conflict with the personal law of the deceased. Similar remarks were made by Law JA in *James Apeli and another v Prisca Buluku (Mrs)* Kisumu Court of Appeal civil appeal number 12 of 1979, where it was said that there can be no property in a dead body and a person cannot dispose of his body by will. The wishes of the deceased, though not binding must, so far as possible, be given effect, so long as they are not contrary to custom nor contrary to the general law or public policy or safety.

4.5 PROPERTY PASSING UPON DEATH OTHER THAN BY WILL

Property is capable of passing upon death other than by will. It may pass by: survivorship, under a nomination and as a *donatio mortis causa*.

(a) Survivorship

This applies in cases of joint tenancies that is where property is jointly owned. Where a co-owner of property is a beneficial joint-tenant of the property, whether real or personal, their interest will automatically pass to the surviving joint tenant(s) upon their death by virtue of the principle of survivorship, otherwise known as the principle of *jus accrescendi*. Upon the demise of one of the tenants, that tenant's interest would merge with that of the surviving tenant. For example, where the matrimonial home is held by a husband and wife as joint tenants and the husband predeceases the wife, the house will pass to the wife because of the survivorship.

The principle of survivorship operates to remove jointly owned property from the operation of the law of succession, upon the death of a spouse who jointly owns property with the other spouse. Their interests unite and the property passes to the surviving spouse. It does not form part of the deceased spouse's estate and it cannot pass by that deceased spouse's will. This contrasts with the operation of the principle of tenancy in common. The interests of common tenants are clear and distinct. The interests are not united. In the event of the death of the one tenant, there is no merger or union of interests. The beneficial share of a common tenant who is deceased can pass under their will.

The Law of Succession Act at section 43 provides that for the purposes of determining survivorship in the event of two or more persons dying

simultaneously it shall be presumed that the deaths occurred in order of seniority with the younger person surviving the older person, but in the cases of spouses, it shall be presumed that they died simultaneously. Such property in the case of non-spouses should devolve to different people upon the tenant's death, it is therefore necessary to determine who died first. In the case of spouses, the property should pass to their children or to the same dependants and it would not matter therefore who between husband and wife died first.

The Registered Land Act⁵⁶ deals with joint ownership. Section 101(1) of the Registered Land Act stipulates that in an instrument made in favour of two or more persons the registration shall show whether such persons are joint proprietors or proprietors in common. Under section 102(1) of the Registered Land Act, it is stated that where land, lease or charge is owned jointly no proprietor is entitled to any separate share on the land, and consequently: a disposition may be made only by all the joint proprietors and upon the death of a joint proprietor, his interest shall vest in the surviving proprietors jointly. At section 118 of the Registered Land Act it is provided that if one of two or more proprietors of land dies, the name of the proprietor is deleted from the register. The Indian Transfer of Property Act⁵⁷ does not make reference to joint tenancies but sections 44, 45 and 46 deals with comparable situations.

(b) Nomination

A nomination is a direction by a person, called the nominator, to another who is holding investment on the nominator's behalf, to pay the funds on the nominator's death to a third party, called the nominee, nominated by the nominator during the nominator's lifetime. The direction is made by the nominator during the nominator's lifetime, but like a will, the gift only takes effect upon the death of the nominator. A nomination operates under the rules of a particular scheme and although it does dispose of property upon death, it does not comply with the formalities of and is not subject to the Law of Succession Act. Nominations are classified into statutory nominations and nominations under a discretionary pension scheme.

The property, which is the subject of a nomination, does not form part of the nominator's estate, and it cannot therefore pass under a will. It does not vest in the personal representatives of the deceased, as it does not form part of the

56 Chapter 300 of the Laws of Kenya.

57 Group 8 Statute of the Laws of Kenya.

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nominator's estate. Consequently, the payer (the person having the investment) does not require a grant (of probate or letters of administration) before paying the funds to the nominee. The direction is to pay only on death and therefore the payer will want to see the nominator's death certificate before making payment. As with the beneficiary under a will, the nominee does not have an interest in the nominated funds during the lifetime of the nominator, who may deal freely with the property at any time during their lifetime. A nomination may be revoked by a later nomination; the subsequent marriage of the nominator; and the death of the nominee prior to the death of the nominator. A nomination cannot be revoked by a subsequent will or codicil.

In Kenya, nominations are made mainly with respect to savings and investments in co-operative societies and provident or pension schemes. The nominations under the Co-operative Societies Act of 1997⁵⁸ are statutory. Section 39(1) of the Co-operative Societies Act of 1997 provides that upon the death of a member, a co-operative society may transfer the share or interest of the deceased member to: a person nominated in accordance with the Act or the rules made under it; or if, no person has been nominated, to such person as may appear to be the personal representative of the deceased member. The shares can only be transferred to the personal representative of the deceased member where there is no valid nomination in place.

The nomination under the discretionary pension schemes is not binding on the trustees of the scheme since the trustees are usually given discretion under the rules of the scheme to exercise their discretion in favour of the nominated person or disregard the nomination altogether and make payment to the dependants of the deceased. The nominations under the discretionary pension schemes differ from statutory nominations in that they are not binding on the trustees of the pension fund but are merely indication of the deceased's wishes. The trustees are not bound to pay the nominated funds to the nominee. The funds under the discretionary pension scheme do not form part of the deceased's estate.

Under rule 19 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000,⁵⁹ the scheme rules provide that upon the death of a member, the benefits payable from the scheme should be paid to the nominated beneficiary, and if the deceased had not named a beneficiary, then the trustees should exercise their discretion in the distribution of the benefits to the dependants

⁵⁸ Act number 12 of 1997.

⁵⁹ Made under section 55 of the Retirement Benefits Act (Act number 3 of 1997), and gazetted as Legal Notice number 118 of 2000 in Kenya Subsidiary Legislation, 2000 at 313.

of the deceased. There is a proviso that the trustees may refuse to pay the nominated beneficiary for stated reasons. Rule 23 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000⁶⁰ is in similar terms.⁶¹

(c) Donatio mortis causa or gift in contemplation of death

A *donatio mortis causa* is a gift made by a person during their lifetime that is conditional upon their death. It is neither an inter vivos gift nor a testamentary gift. Buckley LJ in *Re: Beaumont* [1902] 1 Ch 889 at 892 said of *donatio mortis causa*:

It may be said to be of amphibious nature being a gift, which is neither entirely *inter vivos* nor testamentary.

A *donatio mortis causa* is similar to a lifetime gift in that the subject matter of the gift is delivered to the donee during the donor's lifetime, but the gift takes place upon the death of the donor. A *donatio mortis causa* cannot be revoked by a subsequent will. It cannot be given away as a gift under a will to someone else. It is not free property; it cannot therefore be the subject of a will. This means that if a donor delivers property during their lifetime, with the intention of making the gift conditional upon death, and then thereafter makes a gift of the same property by will to another person, the beneficiary named in the will receives nothing. As *donatio mortis causa* is not a testamentary gift the subject matter cannot form part of the deceased's estate upon death, but if the estate proves insufficient to pay the deceased's debt(s) the subject matter of a *donatio mortis causa* may be used.⁶²

Lord Russell in the case of *Cain v Moon* [1896] 2 QB 283 set down the conditions which need to be satisfied for a valid *donatio mortis causa* or gift in contemplation of death namely: the gift by the donor in the contemplation of death; the gift must be conditional on the donor's death; the subject – matter of the gift must be declared to the donee; and the property must be capable of forming the subject-matter of a *donatio mortis causa*. The burden of proving that all four conditions have been met lies with the donee. *Donatio mortis causa* or gifts in contemplation of death are dealt with by section 31 of the Law of Succession Act, which incorporates the conditions set out in *Re: Beaumont* [1902] 1 Ch 889 at 892.

⁶⁰ Legal Notice number 119 of 2000 in Kenya Subsidiary Legislation, 2000 at 332.

⁶¹ Compare with rule 24 of the same Regulations.

⁶² See *Re Korvine's Trust* (1921) 1 Chapter 343.

*Law of Succession**(i) It must be a gift in contemplation of death*

Section 31(a) provides that a gift in contemplation of death would be valid if the person making the gift is at the time contemplating the possibility of his death because of a present illness or present or imminent danger. In *Staniland v Willott* (1850) 3 Mac and G 664, it was held that the gift must be made in contemplation of the approach of death from existing disease or other impending peril, but not necessarily expectation of immediate death. The death of a donor need not be imminent, but the donor must believe that they are dying or they are likely to die in a particular way for example they may believe that they are dying from a terminal disease or at risk of dying from a dangerous expedition.

It is generally irrelevant that the donor dies from some cause other than the one within their contemplation so long as the condition from which the deceased thought he was dying continued up to the date of the donor's death. Section 31(e) provides that the gift would be valid if the person making the gift dies from any cause without having survived the illness or danger. *Wilkes v Allington* [1931] 2 Ch 104. This condition was deemed not even though the deceased thought he was going to die of cancer but in fact died of double pneumonia. The gift would fail if the donor survives the contemplated illness or danger but dies of a different cause.

The condition that the gift be made in contemplation of death cannot be satisfied where the donor contemplates their own death by suicide. Section 31(c) provides that no gift made in contemplation of death shall be valid if the death is caused by suicide. *Agnew v Belfast Banking Co* (1896) 2 IR 204 held it was against public policy to uphold a gift which was intended to take effect by means of suicide. In *Re Dudman* [1925] 1 Ch 553, the donor committed suicide, as he could not cope with his terminal illness. The court followed *Agnew v Belfast Banking Company* and in addition, held that the donation failed on the ground of public policy. The legal position stated in these two cases is no longer valid in England following the enactment of the Suicide Act of 1961 that decriminalized suicide. The Pre-1961 position in England is still the law in Kenya by virtue of section 31(i) of Law of Succession Act.

The contemplation of death may be expressed or implied from the circumstances. In *Lillington* [1952] 2 All ER 184 the donor expressed opinion that she was "done for" and the court inferred that the gift was made in contemplation of her death.

(ii) It must be conditional upon donor's death

If the donor does not die, the gift will not take effect and the donor will be entitled to recover possession of the property from the donee, as the gift must be conditional upon the death of the donor. A gift can expressly be stated by the donor to be conditional upon death. It may also be implied from the circumstances. The courts are likely to imply that the gift is conditional upon death if it is made in the last few days of the donor's final illness. However, where a gift in these circumstances is made in writing as opposed to orally, it is presumed by the court that the gift is not a *donatio mortis causa*, but either an attempted lifetime gift or a failed testamentary gift.⁶³

A gift in contemplation of death should be distinguished from an oral will in that an oral will is usually not made in contemplation of death. The failure of the contemplated death to occur leads to the termination of the gift in contemplation of death, the same does not apply to an oral will. In *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001, Kimaru J appeared to use oral will and gift in contemplation of death interchangeably, yet the two are separate and distinct.

For the gift to be said to have been made conditional upon death, the death of the donor should not be a certainty, as there is a possibility that the gift can be revoked by the recovery of the donor.⁶⁴ The Kenyan law on this condition is section 31(d) and (ii). Section 31(d) provides that a gift in contemplation of death would be valid if the donor makes the gift in such circumstances as to show that he intended it to revert to him should he survive the contemplated illness or danger. A *donatio mortis causa* is revocable and section 31(ii) states that the donor may at any time before his death lawfully request the donee to return the gift.

(iii) It must be delivered to the donee

The donor must have handed over to the donee or his agent the subject matter of the gift or the means of controlling it. The donor must have parted possession with or parted with dominion over the subject matter of the gift. Section 31(c) of the Act states that a gift in contemplation of death would be valid if there is delivery to the intended beneficiary of the possession of the property or of the documents or other evidence of title of the property.

In *Wildish v Fowler* [1892] 8 TLR 457 a land lady was handed property by

63 See *Edward v Jones* (1836) 1 MY and CN 226

64 See *Lord Advocate v McCourt* (1893) 20 R. 488.

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her sick tenant with instructions “take care of this”. It was held that there had been no *donatio mortis causa* of the property as the donor had not parted with dominion over the property. The property was delivered merely for the purpose of safe custody. In *Cain v Moon* [1896] 2 QB 283 the donor originally delivered a deposit note to her mother for safe custody. She later became very ill and at a time when it was likely that she was going to die she told her mother that the deposit note along with other property was to be the mother’s, should she die. It was held that there was effective delivery of the property. In *Woodward v Woodward* [1992] RTR 35 (Court of Appeal), a father handed over keys to his car to his son at a time when he was seriously ill, but the father kept a duplicate set. It was held that the father had effectively parted with dominion over the car because in the circumstances he was so ill only the son had access to the car.

(iv) *It must be capable of making the subject matter of a donatio mortis causa*

The property, the subject of the gift, should be capable of being the subject matter of such a gift. It should be capable of being donated. Section 31(b) of the Act provides that a gift in contemplation of death would be valid if a person gives movable property that he could otherwise dispose of by will. Property that cannot be disposed off by will cannot be donated. A testator can only dispose of free property by will, therefore only free property can be the subject of donation. Cheques and promissory notes drawn by the donor cannot be a *donatio mortis causa*. It was held in *Re Beaumont* [1902] 1 Ch 889 that a cheque cannot form the subject of a *donatio mortis causa* as it is not enforceable without consideration. It was held similarly in *Leaper* [1916] 1 Ch 579 with respect to a promissory note.

It was suggested *obiter dicta* by the House of Lords in *Duffield v Elwes* 1827 Bile NS 497 that the land either freehold or leasehold could not form the subject matter of a *donatio mortis causa*. The Law of Succession Act appears to imply that this *dicta* is the law in Kenya as section 31 only covers moveable property. Section 31(b) provides that a gift in contemplation of death would be valid if a person gives movable property (not immovable) which he could otherwise dispose of by will. The most recent English decisions however suggest that unregistered freehold property could form the subject matter of a *donatio mortis causa*.⁶⁵

(v) *Donee must survive the donor*

The gift is not to be effective where the donee predeceases the donor. Section 31(f) provides that the gift would be valid if the donee survives the person who made the gift to him. If the intended donee predeceases the donor, his estate

65 See *Sen v Headley* [1991] 2 All ER 636 (Court of Appeal).

would have no cause of action against the estate of the donor.

4.6 CONDITIONAL AND JOINT WILLS

The Law of Succession Act does not cover these. They are rare. In the event of a local court being confronted with such wills, the English Law on the matter would be persuasive.

(a) Conditional Wills

This refers to a will intended to operate only upon the happening of some event specified in the will. If the event fails to occur, the will would be ineffective, for example a testator providing that his will is to operate only if the wife predeceases him or a testator providing that his will operate only if he dies on a dangerous trip which he is about to undertake.

It is sometimes difficult to decide whether the danger to be faced is merely the motive for making the will or whether death in the envisaged circumstances is the pre-condition for the operation of the will. If it is a motive the will would be effective, but if it is a pre-condition it would be ineffective.

In *Re Spratt's Goods* (1897) P 28 an army officer serving in the New Zealand during the Maori War made a privileged will. The same took the form of a letter to his son leaving everything to him should anything happen to the officer. He did not die in the war but he lived on for 32 years without making a new will or revoking the privileged will. It was held that the privileged will was admissible to probate and the son was entitled to take all of his father's estate. In *the Goods of Dobson* (1866) LR 1 P and M 88, the testator's will commenced with the words "in case of any fatal accident happening to me being about to travel by railway, I leave" It was held not to be a conditional will. His belief that he might die in the course of the journey was merely the motive in making the will, it was not a pre-condition that he died on the journey before the will operated.

Whether a will is conditional or not is purely a matter of construction. In *Lindsay v Lindsay* [1872] 27 LT 322, a will commenced "if I should die at sea or abroad" It was held, as matter of construction, to be conditional. When the testator died in England, that is while not at sea or abroad, it was held to have no effect as the pre-condition of dying at sea or abroad was not satisfied.

(b) Joint wills

A joint will is created where two or more persons express their wishes upon death in one document. The joint will takes effect as the separate wills of the parties who made it. For example, a husband and wife could make a joint will. If wife dies first it would be admitted to probate as the wife's will in the first instance, then when the husband dies, it would be admitted to probate as the will of the husband.

CHAPTER FIVE

THE CREATION OF A VALID WILL

5.1 INTRODUCTION

A will is only valid if a person of sufficient age and of sound mind makes it in the proper form.

Before a will can take effect, it must first be proved as a valid testamentary disposition. The process of proving the formal validity of a will is referred to as propounding the will. Here, it is necessary to consider the form of the will and determine whether the formal requirements have been complied with; whether the testator had capacity to make the will and whether the will was made voluntarily without any duress, undue influence or by mistake. It may also be necessary to consider whether the testator in fact revoked the document alleged to be a will before his death.

5.2 CAPACITY

At common law, a will is invalid unless made by a person who at the time of making it has the capacity to do so. As a rule, infants and persons of unsound mind are incapable of making a valid will. The common law position regarding testamentary capacity is reflected in section 5 of the Law of Succession Act. Section 5(1) essentially embodies the principle of testamentary freedom; by providing that any person is capable of disposing of all or any of his free property by will so long as he is of sound mind and not a minor. The testator may make any disposition by reference to any secular or religious law that he chooses.⁶⁶

(a) Age

A will made during infancy is invalid unless the testator upon reaching the age of majority re-executes it or makes a new will or codicil confirming it. When a minor dies, his estate should pass in accordance with the rules of intestacy. Under section 2 of the Age of Majority Act,⁶⁷ a person is of full age and ceases to be under any disability by reason of age upon attaining the age of eighteen years.

⁶⁶ See *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997 (Bosire JA) and *In the Matter of the Estate of Abdehusein Ebrahimji Nurbhai alias Abdehusein Ebrahimji Nurbhai Adamji (deceased)* Mombasa High Court succession cause number 91 of 2001 (Khaminwa J).

⁶⁷ Chapter 33 Laws of Kenya.

*Law of Succession***(b) Mental or testamentary capacity**

Persons of unsound mind are incapacitated from making a valid will, although this does not mean that such persons are destined to die intestate. If such a person makes a will before his mind becomes afflicted or makes, it during a lucid interval such a will is valid. In *Vijay Chand rakant Shah v The Public Trustee* Nairobi Court of Appeal civil appeal number 63 of 1984 (Kneller JA, Platt and Gachuhi AgJJA), the deceased was very sick from syphilis and diabetes at the time he executed his will, but it was held by the Court of Appeal, on the evidence, that he executed the same during a lucid moment and therefore the will was valid.

The test of mental capacity to make a will is not directly linked to mental disorder, but to the testator's capacity to understand the nature of will making. Cockburn CJ set the test in *Banks v Good fellow* (1870) LR 5 QB 549 in the following terms:

“he must have a sound and disposing mind and memory In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.”⁶⁸

In *Broughton v Knight* (1873) 3 P and D 64, the court held that the testator must have ‘a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him so that he can decide whether or not to give each of them any part of his property by will. The test stated in *Banks v Good fellow* (1870) LR 5 QB 549 was cited and applied with approval by the Tanzanian Court of Appeal in *Vaghella v Vaghella* [1999] 2 EA 351 (Mfalila, Samatta and Lugakingira JJA), where it was stated that the validity of a will derives from the testamentary capacity of the testator and from the circumstances attending its making.

This test requires three things of the testator: One, he must have a sound mind enabling him to understand the nature of the act of making a will and its effects. He would lack a sound mind if he does not understand what he is precisely doing either because he is of low mentality or is under the influence of a drink or drugs. Two, he must have a sound memory enabling him to have a recollection of the

⁶⁸ See also *Cleare v Cleare* (1869) LR 1 Probate and Administration 655 Lord Penzance at 557, *Harwood v Baker* (1840) 3 Moo. P C 282 at 291, *Broughton v Knight* (1873) LR 3 P and D 64, *Re Park* (1954) P 89 and *Battan Singh v Armirchand* [1948] AC 161.

The Creation of a Valid Will

property of which he is disposing. Three, he must have a sound understanding. He should appreciate the moral claims upon him; otherwise, the omission to adequately cater for any dependant could attract an application under section 26 of the Law of Succession Act. He should be able to remember the persons he is morally bound to provide for having regard to their relationship with him. In *Harwood v Baker* (1840) 3 Moo PC 282 a testator executed his will on his death bed and left all his estate to his second wife to the exclusion of other family members. He was at the time suffering from a disease that affected his brain. It was held that based on the evidence, he did not have sufficient recollection of his other family members and therefore capacity to make the will.

At common law, the burden of proving testamentary capacity is on the executor. In the event of the validity of a will is questioned or contested on grounds of alleged mental incapacity, the executor must prove that at the time the will was made, the testator was having a lucid moment and that his mind was sufficiently clear about what he was doing: that is that he knew the property he had, the names of his dependants, and so on.⁶⁹ The Law of Succession Act takes a different position from the common law. The burden of proof is shifted under section 5(3) (4) to the person alleging that the testator was not of testamentary capacity or was of unsound mind at the time of making the will.

Section 5(3) of the Law of Succession Act creates the presumption that a person making a will is of sound mind unless the contrary is proved. In *the Matter of the Estate of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996 (Koome J), the testator was dementing and physically incapacitated due to joint pains and hypertension at the time of making the will. The witnesses who attested the will testified that the deceased looked normal. The court was satisfied that he was of sound mind as the objectors had failed to prove unsoundness of mind at the time of the execution of the will. That is unless it is proved that at the time of executing the will he is of unsound mind occasioned by mental or physical illness, drunkenness or other cause to make him not know what he is doing, the testator is presumed to be of sound mind. In *Mbugua v Mbugua* Nairobi Court of Appeal civil appeal number 23 of 1982, Chesoni AgJA emphasised that a testator must be of sound mind and he must not at the time of giving his instructions be drunk, insane, or otherwise incapable of making a valid will.

In *John Kinuthia Githinji v Githua Kiarie and others*, Nairobi Court of Appeal civil appeal number 99 of 1988 (Gachuhi, Gicheru and Muli JJA), the deceased,

⁶⁹ See *Smee and others v Smee and Corporation of Brighton* (1879) 5 P and D 84.

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who was admitted in hospital seriously ill with cancer of the duodenum, sent for her advocate whom she gave instructions to draw a will the details of which comprised of how she wished her property to be disposed off. The advocate drew the will in accordance with the instructions and thereafter explained its contents to the testatrix in the hearing of a nurse on duty. At the time of execution, she was said to be mentally alert and appeared to understand the advocate's explanations of what was contained in the will. Consciously and knowing what she was doing, the testatrix executed the will by signing it. It was held that in the absence of evidence that the illness had affected her mind so as not to know what she was doing when she signed the will, the subject will was valid.

(c) Insane delusions

The fact that the testator is labouring under insane delusions is not necessarily fatal to the validity of a will so long as the delusions leave the testator's power of understanding unimpaired. The approach of the courts to construing insane delusions as a vitiating factor differs depending on the impact of the delusion. According to the court in the case of *Dew v Clark* (1826) 3 Add 79 a person suffers from an insane delusion if he holds a belief of a particular matter which no rational person could hold and the belief cannot be eradicated from his mind by reasoning with him for example, where one holds the erroneous belief that he is being bewitched. In *Broughton v, Knight* (1873) 3 P and D 64, Sir J Hannen instructed members of the jury to ask themselves this question and answer it "Can I understand how any man in possession of this senses could have believed such and such a thing? If the answer you give is, 'I cannot understand it' then it is the necessity of the case that you should say that the man is not sane". The court also stated that a distinction should be drawn between insane delusions and grave misjudgement.

An insane delusion will only affect the testator's capacity to make a will if it in some way affects the way he disposes of his property.⁷⁰ According to the Tanzanian Court of Appeal in *Vaghella v Vaghella* (1999) 2 EA 351 (Mfalila, Samatta and Lugakingira JJA), for delusions to be material in the testamentary context, there must be a connection between the will and the delusions, the poisoning of affections and the perversion of the sense of right. In *Dew v Clark* [1826] 3 Add 79 the testator made a will which was rational superficially, but which excluded his daughter from benefit. The daughter showed by way of extrinsic evidence that the testator

⁷⁰ See *Smee and others v Smee and Corporation of Brighton* (1879) 5 P and D 84.

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had an insane aversion of her. He had refused to see her for the first three years of her life and he had made her sleep with an insane woman.⁷¹ In *Re Nightingale* (1974) 119 Sol Jo 189, lack of mental capacity was shown when a son was excluded from his father's will because the father wrongly and insanely believed that the son was trying to kill him by reason of the fact that the son had on two occasions pushed him back on the pillow as the father was struggling for breath in a hospital after an operation on his lungs. In *Banks v Good fellow* (1870) LR 5 QB 549, the testator believed that evil spirits and a person who was already dead were pursuing him. The court found that although the testator suffered from an insane delusion the same did not affect his testamentary capacity as the delusion did not affect the way in which he disposed of his property by will. The will was held to be valid.

Sometimes the delusion may only affect the validity of part of a will. In such a case, probate will be granted to such parts of the will as are not affected by the delusion. In *In Re Bohrmann's Estate* [1938] 1 All ER 24, a testator made three codicils to his will all giving substantial gifts to various charities. He later began to suffer from an insane delusion that the London County Council was persecuting him. The insane belief arose out of the council's attempt to acquire part of his land to build a hospital on it. As a result of the delusion, the testator executed a fourth codicil of which one clause provided that all references to English charities should be read as referring to corresponding American charities. Probate was granted of the will and the four codicils excluding only the clause in the fourth codicil on the American charities, which was declared invalid for lack of testamentary capacity on part of the testator.

5.3 KNOWLEDGE AND APPROVAL

In addition to having testamentary capacity, a testator must know and approve the contents of their will. A testator knows the contents of the will if he is aware and understands the terms of the will. He need not understand the precise legal effect of the terms. A testator approves the terms of the will if he executes it in those terms on his own volition and not because of coercion or undue influence of another. The knowledge and approval of the testator may also be absent because of mistake or fraud. This requirement is of particular significance when the will is drawn up for the testator by a third party for example a friend, a relative or a professional person such as an advocate.

71 See also *Singh and others v Amirchand and others* [1948] AC 161 (PC).

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Gicheru JA stated in *John Kinuthia Githinji v Githua Kiarie and others* Nairobi Court of Appeal civil appeal number 99 of 1988 that it is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents: for where a will, rational on the face of it, is shown to have been executed and attested in the manner prescribed by law it is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding; but if there are circumstances in evidence, which counterbalance that presumption, the decree of the court must be against its validity.

The law on knowledge and approval is section 7 of the Law of Succession Act, which provides that a will caused by fraud, coercion, importunity or mistake is void. These are vitiating factors.

(a) Time of knowledge and approval

The point at which the testator must know and approve the contents of their will is at the time of execution. There is an exception to this general rule set out in the cases of *Parker v Felgate* (1883) 89 P and D 171, and *In the Estate of Wallace* (1952) 2 TLR 925, that a will may be valid despite lack of knowledge and approval at the time of execution so long as: one, the testator knew and approved the contents of the will at the time at which he gave instructions to the advocate to draft their will; two, the will was prepared in accordance with his instructions; and, at the time the will was executed the testator understood that he was executing a will for which he had earlier given instructions.

In *the Estate of Wallace* (1952) 2 TLR 925, the testator who was seriously ill had written and signed a document entitled “last wish”. At the time of execution, he knew and approved the contents of the document. A solicitor then prepared his will in accordance with the document. At the time when the testator executed the will, a day before he died, he did not know and approve the contents of the will that were not read over to him. It was held that the will was valid.

(b) Burden of proof

The Law of Succession Act is silent on the issue of burden of proof to establish knowledge and approval, the common law position is that the onus lies on the pro-pounder of the will.⁷² A presumption of knowledge and approval arises once it is established that the testator had testamentary capacity and that the proper

⁷² See *Halsbury's Laws of England* Volume 30 paragraph 1015.

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formalities for the execution of the will have been complied with. The evidential burden shifts to the person attacking the will to provide evidence to rebut the presumption. The presumption of knowledge and approval will not arise where: the testator is blind, dumb or illiterate or the will is signed on behalf of the testator and where there are suspicious circumstances.

The Kenyan law on knowledge and approval is section 11(a) of the Law of Succession Act and Rule 54(3) of the Probate and Administration Rules. Section 11(a) of the Act provides that for a will to be valid and properly executed it must be signed by the testator or by someone else in the presence of and by the direction of the testator. Rule 54(3) of the Probate and Administration rules provides that where the testator is blind or illiterate or where a will is signed by another person by the direction of the testator or where it appears to be written in a language with which the testator is not familiar evidence is required before the will is admitted to probate. Rule 54(3) makes it mandatory for the court to satisfy itself that the testator had knowledge, by requiring an affidavit showing that the contents of the will had been read over and explained to and appeared to be understood by the testator immediately before the execution of the will.

In *Karanja and another v Karanja* [2002] 2 KLR 22, Githinji J stated that the burden of proving that a will was caused by fraud or coercion or importunity was on the person alleging the same.⁷³ In *the Matter of the Estate of Jefferson Gathecha (deceased)* Nyeri High Court succession cause number 75 of 1995 (Juma J), the deceased died testate. His will was challenged on the grounds that he was too ill to have written and executed it. In upholding, the will the court held that the burden of proving that the deceased lacked capacity to make the will or that the same was a forgery lay with the person making the allegations, and in this particular case, they had failed to prove those allegations to the required standard.

To ease the matter, it would be prudent at the time of drafting the will to include as part of the attestation, clause words to the effect that the will was read over to the testator and that they thoroughly understood and approved the contents.⁷⁴

⁷³ See also *In the Matter of the Estate of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996 (Koome J).

⁷⁴ This is akin to the requirements of section 69 of the Indian Transfer of Property Act whereby the contents of a charge or mortgage instrument must be read over and explained to the chargor or mortgagor.

(c) Suspicious circumstances

Where a person who writes or prepares the will takes a substantial benefit under the will, this will be regarded as a suspicious circumstance. In *Vijay Chand rakant Shah v the Public Trustee* Nairobi Court of Appeal civil appeal number 63 of 1984, Platt JA stated that where the pro-pounder of the will is the principal beneficiary under it, it is the duty of the court to scrutinise the evidence of the pro-pounder vigilantly and jealously following the *contra preferendum* rule. Similarly, where a person suggested the terms of the will to the testator, that is other than writing the will himself, and takes that testator along to the advocate of that person's choice the circumstances will be regarded as suspicious.⁷⁵ In *Tyrell v Painton* (1894) P 151, it was held that it would be a suspicious circumstance if the will is written or prepared by a close relative of a substantial beneficiary. In *Wintle v Nye* [1959] 1 All ER 552, the testatrix was an elderly woman who had no experience of dealing with money. She placed heavy reliance on the family solicitor. She left most of her sizeable estate to him. It was held that the circumstances were suspicious. Lord Reid at 561 quoted Sir, J P Wilde in *Atter v Atkinson* (1869) LR 1 P and D 665 where it was said;

The proportion however is undoubted that if you have to deal with a will in which a person who made it himself takes a large benefit, you ought to be satisfied, from evidence calculated to exclude all doubt that the testator not only signed it, but that he knew and approved of its contents.

In *Barry v Bultin* (1838) 2 Moo PC 480 a testator made a will at the home of his solicitor, in the solicitor's hand writing and left a ¼ of the estate to the solicitor and the rest to friends. The testator's son challenged the will on the grounds of (among others) suspicious circumstances. It was held that the circumstances were on the face of it suspicious, but the suspicion was dispelled by two factors: the fact that the will was executed before two independent witnesses and the fact that the testator's son was excluded from the will because of his criminal conduct.

In *Mwathi v Mwathi and another* [1995-1998] 1 EA 229 (Gicheru, Kwach and Shah JJA), the deceased died at sixty-five. He never married and left behind no wife or children. A brother and two sisters survived him. He owned real property Two days before his death; he made a will under the terms of which he bequeathed the property to the brother. According to the brother, the deceased

75 See *Fulton v Andrew* (1875) LR 7 HL.

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dictated his wishes and the brother reduced them into writing. The will was then thumb-printed by the deceased and witnessed by, among others, the brother and his wife. Following the death of the deceased, the brother applied for grant of probate of the will of the deceased and letters of administration were issued to him. The sisters sought a revocation of the grant on the grounds of suspicious circumstances. It emerged that shortly before the execution of the alleged will, the brother had removed the deceased from their mother's house to his (the brother's) house for baptism and then shifted him back. It also emerged that when he (the brother) wanted the deceased to dictate and execute the alleged will he moved the deceased again from their mother's house to his own house. At the same time, the brother exhibited considerable animosity towards the sisters whom he prevented from entering his house. At the time, the deceased allegedly dictated the will he was quite ill and could not walk without support. It was held by the High Court that the circumstances excited suspicion and that the will was therefore invalid. The grant was revoked. An appeal to the Court of Appeal on this aspect of the High Court decision was rejected, with the Court of Appeal stating that the brother was not only the author of the will but also the sole beneficiary under it he had a duty to do everything above board.⁷⁶

The issue of suspicious circumstances also came up for consideration in *Wanjau Wanyoike and four other v Ernest Wanyoike Njuki Waweru and another* Nairobi High of Court civil case number 147 of 1980 (Cotran J). The deceased died at age ninety, three days before his death he had made a codicil to his will, which had been made two years earlier. The codicil substantially altered the terms of the original will, resulting in a substantial benefit to the first respondent, a grand child of the deceased. Evidence showed that the time of the alleged execution of the codicil the deceased was bedridden, sick and paralysed and he appeared to be in no mental or physical condition to comprehend or even give instructions for the making of a will. The court considered the age of the deceased, the fact that he died three days after the making of the codicil and the fact that it was the first respondent who did everything in relation to the codicil and benefited most under it, in deciding that the circumstances excited suspicion. The first respondent claimed the deceased dictated the terms of the codicil and that he noted them down and gave them to the advocate who drafted the will. The court concluded that the deceased did not know nor approve the contents of the codicil, and the same was therefore void.

76 See also *In the Matter of the Estate of Naomi Wanjiku Muwangi (deceased)* Nairobi High Court succession cause number 1781 of 2001 (Koome J).

(d) Mistake

The knowledge and approval of the testator may be absent because of a mistake on the part of the testator or of a person employed by him to draft the will. The mistake may relate to part or whole of the will. A mistake relating to the whole will renders it invalid, while a partial mistake may be corrected or otherwise that portion of the will revoked. In *the Goods of Hunt* (1875), LRP and D 250 the mistake related to the whole will. A woman living with the sister prepared two wills in similar terms for their respective execution. By mistake, she executed the will of the sister rather than the will she had prepared for her own. Probate of the will was not granted on the grounds that the woman would not have executed the will had she known it had the content of the will she had drawn up to her sister.

In *Re Morris* (1970) 2 WLR 805 the testatrix made a will, but after sometime decided to alter some of its provisions. She instructed a solicitor to prepare a codicil to effect the changes. The solicitor made a mistake while drafting and inserted an erroneous figure. The testatrix executed the codicil upon merely passing a glance through it but without reading the contents. The executors brought an action asking to be allowed to use the right figure instead of the erroneous one. The court allowed them to do so. In *Re Phelan* (1972), Fame 33 the testator bought some pre-printed forms from a stationer. He thought that each gift had to be put on a separate form. He made four separate gifts on four forms. Each form had a stand ard revocation clause at the top. He then executed the forms each after the other on the same day. It was argued that only the gift on the last form to be executed was admissible to probate as the revocation clause on each form revoked the precious form executed, which meant that the testator died intestate in respect of the other gifts. It was held that the testator did not know or approve the contents of the wills as far as they related to the revocation clauses in each of the three wills. The court admitted all four wills to probate without the revocation clauses.

If the testator does know and approve the contents but is mistaken as to the legal effects of the words, the will will be considered valid and admissible for probate. In *Collins v Elstone* (1893), P 1 the testatrix was given incorrect information as to the extent to which a revocation clause in her will operated but she executed the will. It was held that the will was valid and admissible to probate, as she knew about it and had approved the contents, the words notwithstanding.

*The Creation of a Valid Will***(e) Coercion or undue influence**

The knowledge or approval may be absent owing to coercion or undue influence being exercised on the testator. Undue influence occurs when a testator is coerced into making a will or some part of it that he does not want to make. Undue influence is proved if it can be shown that the testator was induced or coerced into making dispositions that he did not really intend to make.⁷⁷ It is common where the testator is of weak or impaired mental capacity or in failing health. The circumstances in the case of *Mwathi v Mwathi and another* [1995-1998] 1 EA 229 (Gicheru, Kwach and Shah JJA), demonstrate the exercise of undue influence or coercion on a deceased person. At the High Court Bosire J (as he then was) said:

The petitioner was obliged but did not demonstrate that the deceased freely and consciously dictated and executed the alleged will. He did not call evidence to exclude the possibility of having unduly influenced the deceased to will his property to him.

A distinction should be drawn between undue influence and persuasion.⁷⁸ Lord Penzance in *Hall v Hall* (1869) LR 1 P and D 481 brought out the distinction as follows:

Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgement of the testator will constitute undue influence though no force is either used or threatened.⁷⁹

Persuasion is lawful, that is where a person is pressurized through persuasion to dispose of property in a particular way. In *Wingrove v Wingrove* (1885) 11 P and D 81 it was remarked that if a young man was caught in the toils of a harlot who was able to exert much influence over him and induced him to make a will in her favour to the exclusion of his wife and children, this would not amount to undue influence. In *Wingrove v Wingrove* (1885) 11 P and D 81, Sir James Hannen said:

To make a good will a man must be a free agent. But not all influences are unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or the like, these are all legitimate and may fairly be pressed on a testator. On the other hand, pressure of whatever character whether acting on the fears or hopes if so exerted as to overpower the volition

⁷⁷ See *Wambui and another v Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA and Masime AgJA)
⁷⁸ See *In the Matter of the Estate of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996 (Koome J).

⁷⁹ At 482.

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without convincing the judgement is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has no courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these if carried to a degree in which the free play of the testator's judgement, discretion or wishes is overborne will constitute undue influence though no force is either used or threatened. In a word, a testator may be led but not driven and his will must be the offspring of his own volition and not the record of someone else.

In *Wambui and another v Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA and Masime AgJA), the deceased who was illiterate gave instructions regarding the disposal of his assets upon death, which instructions were reduced into writing by one of the people present. He distributed his land to his wife and children including the appellant, a married daughter. The document was thumb printed by the deceased in the presence of two witnesses who did not however sign it. When the appellant was told by her father of the gift, she said she would not believe it unless another document was made to show her father's good faith. The deceased caused another document to be prepared which he thumb printed after it was signed by the attesting witnesses; the appellant sought a grant of probate on both documents. The other beneficiaries alleged that the same was not valid, as coercion had been exercised on the deceased to make a will in the appellant's favour. It was held that there was no coercion. The evidence suggested persuasion only, yet persuasion is not unlawful. The Court of Appeal said that in the second document the deceased only confirmed the earlier document as he distributed his estate in the second document as per the terms of the first.⁸⁰

Coercion amounting to undue influence can take various forms – actual physical force or the incessant talking to a sick, frail or elderly testator. The burden of proof lies with the person alleging coercion or undue influence. In *the Matter of Philly, Nyarangi Otundo (deceased)* Nairobi High Court succession cause number 2078 of 1997 (Aluoch J), a will was challenged on the grounds that it was a forgery and the executors named in the will were strangers to the family of the deceased. The will had been executed by the deceased while on her sick bed. The court found that the deceased had made the will freely, and that the applicants had not proved their case. In *the Matter of the Estate of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996 (Koome J), undue influence was alleged in the matter because it was the eldest son of the deceased who suggested that he should write a will and got the family priest to convince the deceased to make the will. The objectors also pointed out that the deceased was living in the house of the said eldest son and therefore the eldest son must have

80 See also *Karanja and another v Karanja* [2002] 2 KLR 22 (Githinji J).

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driven the deceased into making the will in the manner he made it. The court was not convinced that the eldest son had exercised undue influence on the deceased as the deceased had previously donated a power of attorney to the son to act on his behalf during his lifetime. The deceased was convinced by a respected citizen, a family priest to write the will. The advocate who drafted the will visited the deceased three times to discuss the will, and that it was normal for an elderly person to live with their eldest son.

Undue influence is common in confidential relationships, particularly those of a religious nature. In *Parfitt v Lawless* (1872) LR 2 P and D 462, the testatrix left her residuary estate to a Roman Catholic priest who was her confessor and who lived with her and her husband. It was alleged that the confidential relationship between them gave rise to a presumption of undue influence. It was held however that there was no positive evidence of undue influence. In *Re Harden* [1959 CYLB] 3448, The Times 30 June 1959, a testatrix left property to a spiritualist medium after he allegedly transmitted messages 'from the other side' to her as to what she should do with her property upon death. The messages were dictated to her and resulted in her executing two wills that made the medium a substantial beneficiary of her estate. It was held that the medium had taken control of the testator's mind to the extent that she had written what he wanted rather than the record of her mind. The will was invalidated on the ground of undue influence.

(f) Fraud

Knowledge and approval will also be absent if the testator makes a gift by will or excludes a person from benefit as a result of false statements which have been made about an intended beneficiary's character or conduct. In *the Estate of Posner* (1953) P 557 a gift made to a beneficiary who fraudulently misrepresented herself to be the testator's wife was invalidated. In *Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi* Nairobi Court of Appeal civil appeal number 66 of 1984 (Nyarangi, Platt and Kwach JJA), the deceased appointed a woman he described as his wife the executrix and trustee of his will. He had married the woman under statute while still married under customary law to the first wife. He also stated falsely that he was divorced from his first wife and purported to disinherit her completely. The Court of Appeal held that the purported statutory marriage was null and void by virtue of the Marriage Act and the African Christian Marriage and Divorce Act, because the deceased was already married under customary law, he could only lawfully contract another marriage according to customary law

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under whose procedure a marriage is potentially polygamous. It was further held that the appointment of the said woman as an executrix was both fraudulent and illegal in the circumstances, as the testator relied on deliberate falsehood. The appointment of the executrix and trustee was therefore void for fraud and illegality rendering the executorship impossible.⁸¹

(g) Forgery

A will will also be void if it is forged. In such a case, there is lack of knowledge and approval by the testator of the contents of the will. The forged will is not the will of the testator. The burden of proving forgery lies with the person alleging it. In *Elizabeth Kamene Ndolo v George Matata Ndolo* (1995) LLR 390 (CAK) (Gicheru, Omolo and Tunoi JJA), the Court of Appeal stated that the charge of forgery or fraud is a serious one, the standard of proof required of the alleged is higher than that required in ordinary civil cases, that is proof upon a balance of probabilities, but certainly not beyond a reasonable doubt as in criminal cases. In that matter the Court of Appeal held that the eyewitness evidence of attesting witnesses was preferable to that of the hand writing experts, which really is only opinion evidence.

In the Matter of the Estate of James Ngengi Muigai Nairobi High Court succession cause number 523 of 1996 (Koome J), the allegedly forged will was submitted to the Criminal Investigations Department at the request of the objectors following a criminal complaint. The document was subjected to an examination and the alleged forged signature of the deceased was compared with the deceased's known signatures. The expert document examiner concluded that the signature on the document was that of the deceased. The court held that the will was not a forgery.

5.4 MARRIED WOMEN

Section 5(2) of the Law of Succession Act addresses the case of married women and adopts the position under the Married Women's Property Act of 1882 by providing that any female, whether married or unmarried, is capable of making a valid will.

At common law, married women suffered a disability similar to that of infants and idiots, chiefly because upon marriage, the husband automatically acquired

⁸¹ See also *Karanja and another v Karanja* [2002] 2 KLR 22 (Githinji J).

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rights over her property. A woman as *feme sole* could not own property in her own right. This position changed with the enactment of the Married Women's Property Act of 1882, which enabled women to own property in their own right and thus conferring upon them the right to dispose of such property by will.

5.5 FORM

Under Kenyan law, no specific form of a will is required. Section 8 provides that a will may either be oral or in written and may thus take any form provided it satisfies the laid down requirements of formal validity. Section 9 provides the formal requirements for an oral will, while section 11 deals with written wills.

(a) Oral will

In the case of an oral will, according to section 9, it must be made in the presence of two or more competent witnesses and it cannot be valid unless the testator dies within three months after it is made.⁸² The rationale behind the provision in section 9(b), the time stipulation, is that being oral there is a danger that some details may be forgotten or misreported where a longer period is allowed. The other reason is that such wills are usually made in a state of panic, fear, or anxiety for example when the testator is very ill or in a state of imminent danger. People in such state have a tendency to be irrational in their decisions and to express intentions that they might never have had if they had a free thought. The three-month period is intended to allow them time to reconsider the terms of the will and, if possible, reduce the same to writing.

A proviso to section 9(1) provides an exception to these requirements. The exception covers persons in active service in the armed forces or merchant marine. An oral will made by such persons is valid if the persons die in active service notwithstanding that the will was made more than three months before their death. Such wills, which do not comply with the formal requirements, are called 'privileged wills'.

Kenyan courts have held that where a deceased person gives instructions regarding the disposal of his assets and the instructions are reduced into writing

82 See *In the Matter of the Estate of Amos Koprono Sirma* Nakuru High Court civil suit. number 231 of 1994 (Rimita J), *In the Matter of the Estate of Nduva Mailu (deceased)* Machakos High Court probate and administration number 110 of 1994 (Mwera J) and *Wambui and another v Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA and Masime AgJA).

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by the persons recording them, such written instructions amount to an oral will, provided the instructions are given in the presence of two or more persons. In *Re Rufus Ngethe Munyua (Deceased) Public Trustee v Wambui* [1977] KLR 137 (Harris J), the deceased gave instructions on the disposal of his properties to his wives and children. The persons receiving the instructions wrote this on a piece of paper. The deceased died a few days later. It was held that the writing disposing the property was an oral will. In *Wambui and another v Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA and Masime AgJA), the deceased who was illiterate called two people to his home and requested them to write down his wishes. The wishes were taken down in Kikuyu. The person who took the instructions had the document typed the following day. He read it back to the deceased who then thumb printed it; the witnesses did not countersign it. The Court of Appeal, relying on *Re Rufus Ngethe Munyua* (supra) and sections 8 and 9 the Law of Succession Act on oral wills, held that the document was capable of being constructed as an oral will.

Section 10 provides that where a conflict arises between the contents of a written will and an oral will the contents of the written will should prevail.

(b) Written will

Section 11 provides that no written will shall be valid unless: it is signed by the testator or he affixes his mark to the will or it has been signed by some other person in the presence of and by the direction of the testator; it appears that the testator intended by his signature or mark or signature of the person signing for him to give effect to the will; the signature is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time; and each witness must attest and sign the will in the presence of the testator but not necessarily in the presence of the other witnesses.⁸³ No form of attestation of the other witnesses' signature is necessary.

(i) Writing

Since the Law of Succession Act does not prescribe a particular form of the written will, it is presumed that the will maybe hand written, typed, printed or in lithographed form. The writing may be that of the testator or of any other person. It may be in any language. This is clearly implied by rules 52(2) and 54(3) of Probate and Administration rules. Rule 52(2) provides for the translation into English of a will written in a language other than English, while rule 54(3)

⁸³ See *Wambui and another v Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA and Masime AgJA).

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addresses the case of a will written in a language with which the testator was not wholly familiar with; an affidavit is required to show that the testator was aware of its contents and appeared to understand them.

Case law shows that it may even be in a code, so long as the code can be deciphered. In the case of *Kell v Charmer* (1856) 23 Beaver 195, a will written in a jeweller's code was admitted to probate. It may be written on any material provided the material produces a visible form. In *Hodson v Barnes* (1926) 43 TLR 71, a will written on an eggshell and in *Murray* [1963] CLY 3621 (Canadian), a will written on a cigarette packet, were admitted to probate.

(ii) *Signature*

The term "signature" is not defined in the Act, but the courts have widely interpreted it to cover any mark of the testator which is intended as a signature for example thumb print, initials, assumed name, mark by a rubber stamp with the testator's name, have all been held to amount to valid signatures.⁸⁴ It need not even consist of a name at all. In *Re Cook's Estate* [1960] 1 All ER 639, the words "you're loving mother" placed at the end of the document were held to be a valid signature. Part of a signature may in some cases be sufficient to validate a signature. In *Re Chalcraft's Goods* 1948 page 222, a testatrix, on a point of death, started to sign her normal signature "E. Chalcraft" but after writing "E. Chal", she became too weak to continue. It was held that the signature was valid. It was the best she could manage in her weak condition.

Where the will is signed by another person, this should be done in the testator's presence and under his direction. The concept of "presence" has a physical and mental dimension. Since the signature has to be made under the testator's direction, the testator's physical and mental condition must be such that he could either object to or assent to the signature made on his behalf. A will will normally be signed on behalf of a testator in circumstances where he is too weak through illness to sign for himself. The person who signs on behalf of the testator may sign his or her own name or in the testator's name.⁸⁵ The person may be one of the witnesses to the will.⁸⁶ It would be more prudent for the person signing on behalf of the testator to sign his own name and to state that he is signing on behalf of the testator, in the testator's presence and under his direction. This would obviate any

⁸⁴ See *In the Estate of Finn* [1936] 52 TLR 153.

⁸⁵ See *In the Goods of Clark* (1958) 1 Sw and Tr 22.

⁸⁶ See *Smith v Harris* (1845) 1 Rob Ecc 262.

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uncertainty as to whether the person is signing for the testator or as an attesting witness.

Section 11(b) states that the signature or mark should be so placed as to make it appear that he intended by the signature or mark, to give effect to the will. Under this provision, the signature can theoretically be placed anywhere on the document, so long as it is apparent from the position that it is intended to give effect to the will.⁸⁷ The point was addressed in the Kenyan case of *Wambui and another v Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA and Masime AgJA), where the court found that the fact that the deceased thumb printed last, the witnesses having signed first did not invalidate the will as the testator does not necessarily have to sign the will; it could be signed on his behalf and still be valid.

The Administration of Justice Act of 1982 of England carries a similar provision at section 17 and recent UK decisions on the point could be a guideline. In *Weatherall v Pearce* (1994), The Times 7 November, a testator made a will on a printed form purchased from the stationers. She signed her name in the middle of the attestation clause, but not at the end of the will. The issue was whether this constituted a signature for the purpose of section 17 of the UK Act. It was held that since she had intended her name as signed to be her signature, the will was properly signed. In *Wood v Smith* [1991] 3 WLR 514, a testator wrote in his own hand writing at the top of his will and before writing the rest of the will “My will by Percy Winter borne”. He did not sign his name at the foot of the document. Evidence was adduced that the testator regarded his name at the top to be his signature. It was held that by writing his name and the dispositive provisions in one single operation, the deceased had provided clear evidence that he intended to give effect to the provisions. The will was held to have been duly executed.

Sometimes a testator may place his signature on a separate piece of paper or on an envelope containing the otherwise unsigned will. In such situations, whether the will is validly signed or not will depend on the intention of the testator. If the intention is to ratify the will, it should be valid. If the intention is to identify the will, the same would be invalid. The intention of the testator is a question of fact to be gauged from the evidence adduced. In *the Estate of Bean* (1944) at 83, a testator forgot to sign his will but wrote his name and address on the envelope. It was held that the will was not valid. He had written his name

87 See *Karanja and another v Karanja* [2002] 2 KLR 22 (Githinji J).

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on the envelope to identify rather than ratify the will. Probate of the will was refused. *In Re Mann's Goods* (1942) at 146 a testatrix forgot to sign her will, but put it in an envelope and wrote on the envelope, "Last will and testament of JC Mann", signed the envelope and had it witnessed. The envelope was then placed in a larger envelope. It was held that the testatrix intended the signature to give effect to the will, which was therefore admissible to probate.

(iii) Witnesses

Section 11(c) of the Law of Succession Act provides that the testator's signature must be made in the presence of two witnesses who need not be present at the same time. *In the Matter of the Estate of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996 Koome J stated that the law allows the will to be witnessed by two or more witnesses at different times, but each should sign in the presence of the testator. The provision is unhelpfully drafted. It requires that the will be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark to the will, and at the same time say that it shall not be necessary that more than one witness be present at the same time. It is not conceivable how the witnesses can each see the testator sign the will if both are not present at the same time, unless the will is signed twice by the testator. A will signed by one witness, as was the case *In the Matter of the Estate of Susan Kanini Kilonzo (deceased)* Nairobi High Court succession cause number (2669 of 2002), would be in contravention of section 11(c) and therefore null and void. To be present at signing means the witnesses must be capable of seeing the testator sign. The witnessing is of the signature that is the fact of signing. The witnesses need not look at the signature or even know that the document is a will.⁸⁸

If the witness is present but unaware of what the testator is doing, the attestation will be invalid. In *Brown v Skirrow* (1902) P 3, a testatrix took her will to a grocer's to be executed. She asked two shop assistants to act as witnesses. As she was signing the document, one of the assistants was busy serving a customer. The will was held invalid. In *Re Colling* (1972) 1 WLR 1440, it was stated *obiter* that if a witness left the room before the testator completed his signature, the attestation will also be invalid.

Section 11(c) of the Law of Succession Act refers to the acknowledgement of a signature. Instead of being present when the testator is executing the document,

⁸⁸ See In the case of *Benjamin* (1934) 150 LT 417.

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the witnesses may be called after he has signed the document, in which event the testator should acknowledge his signature or mark or the signature of the person signing on his behalf and at his direction, to the witnesses. The witnesses need not be present at the acknowledgement at the same time. Acknowledgement may be by words or by conduct. It is however preferable that the acknowledgement be express. Older English decisions show that the witnesses need not even see the signature being acknowledged. In *Daintree v Butcher* (1888) 13 P and D 102 a testatrix simply said she had a document that she needed two witnesses to sign and the court found that the acknowledgment was sufficient.

The importance of the requirement regarding witnesses is that evidence can be obtained after the testator's death as to what actually happened. It is advisable to select persons who are younger than the testator as these persons are more likely to survive him. It is also advisable to choose persons who can easily be traced in preference to a total stranger or someone of no fixed address or some one who is likely to be far away at the time of the testator's death. Section 11(c) is not specific on who may be a witness but only says that the witnesses be present at the time the testator signs or acknowledges his signature. Section 11(c) however requires that the witnesses must be capable of seeing the signature and understanding about what they are doing. This provision therefore makes the blind and the illiterate unsafe witnesses. Minors, drunks and insane persons should not be chosen. A witness competent to attest a will is defined in section 3(1) as a person of sound mind and full age.⁸⁹

By virtue of section 14 of the Law of Succession Act, the fact that a person has been named in the will as an executor does not disqualify him from signing the will as a witness.

(iv) Attestation

Section 11(c) provides that each witness must sign the will in the presence of the testator. They need not necessarily sign in the presence of each other. Attesting the will requires that the witnesses put their signatures in the will with the intention of validating the testator's signature.⁹⁰ Under section 11(c) no particular form of attestation is necessary. The witnesses' signatures need not be in a particular place

⁸⁹ See *John Kinuthia Githinji v Githua Kiarie and others* Nairobi Court of Appeal court appeal number 99 of 1988 (Gicheru JA).

⁹⁰ See *In the Matter of the Estate of Susan Kanini Kilonzo (deceased)* Nairobi High Court succession cause number 2669 of 2002 (Koome J).

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in the will, but it should be so placed or positioned as to show the intention to ratify the testator's signature. In *Re Beadle* [1974] 1 All ER 493 witnesses signed the envelope containing a will but the will itself was unattested. It was held that the will was invalidly attested.

The term signature is widely interpreted to mean any mark intended by the witness to be their signature. In *the Goods of Sperling* (1863) 3 Sw and Tr 272 a witness attested by writing "servant to Mr. Sperling". It was held that the same was a signature as it was intended to identify the witness as the person attesting. The witness must sign the will for themselves rather than have a third party sign on their behalf.

Under section 13, a will should not be considered as insufficiently attested merely by the fact that it is attested by a beneficiary or spouse of such beneficiary, provided that where that is done the signatures of such beneficiaries are further attested by at least two additional competent and independent witnesses. Section 13(2) makes a bequest to an attesting witness void where the signature of such witness is not attested. In *the Matter of the Estate of George Mbugua Ngare (deceased)* Nairobi High Court probate and administration number 855 of 1995 (Rawal J), the court held that the will in dispute was properly attested as per section 13, although a beneficiary had signed it as an attesting witness, since his signature was further attested by two other attesting witnesses who were independent and competent.⁹¹

(v) *Presumption of due execution*

According to Githinji J in *Karanja and another v Karanja* [2002] 2 KLR 22 where a will is regular on the face of it with an attesting clause and the signature of the testator, there is a rebuttable presumption of due execution (*omnia esse riteatta*). The wills and codicils appeared *ex facie* to be properly executed, in such manner as to show that they were intended to give effect to the document as wills and codicils. In the instant case, the court was satisfied that the presumption applied to the wills and codicils the subject of the suit, but the presumption was not rebutted

⁹¹ Compare with *In the Estate of Bravda* (1968) 1 WLR 479 where a testator made a will leaving his estate to his two daughters. He signed the will in the presence of the two daughters and two other witnesses. He explained the reason of making the will as being that he wished to see his daughters provided for. After the two witnesses had signed the will after the testator, the testator out of sheer enthusiasm asked the daughters to also sign, "to make it stronger". They signed. It was held that since the daughters put their signatures under the words "witnessed by" they had signed as witnesses. It was held that the will was invalid.

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by the objectors through concrete evidence. The court was convinced that the deceased made the wills and codicils and duly executed them in accordance with the provisions of section 11 of the Law of Succession Act; and there were no circumstances, which disturbed the conscience of the court about the same.

5.6 THE DOCTRINE OF INCORPORATION BY REFERENCE

Section 12 of the Act provides for incorporation of papers by reference. The section embodies the doctrine of incorporation by reference that allows documents that satisfy certain conditions to be regarded as part of a will even though the documents themselves are not executed. Such documents if incorporated into a will are admissible to probate as part of the will. For the incorporation to be effective the document must be in existence at the date on which the will is executed, referred to in the will as being in existence and clearly identified.

This criteria is discussed in a number of English cases, including but not limited to *Re Keen* [1937] Ch 236, *In The Goods Of Lady Truro* [1866] LR 1 P and D 201, *University of North Wales v Taylor* (1908) at 140, *Re Batemans' Will Trusts* (1970) 1 All ER 817, *In the Goods of Smart* (1902) P 238, *Allen v Maddock* (1858) 11 Moo 427 and *In the Goods of Heath cote* (1881) 6 P and D 30.

5.7 VALIDITY OF WILLS OUTSIDE THE SCOPE OF THE LAW OF SUCCESSION ACT

The Law of Succession Act also provides for the validity of wills made outside the scope of the Law of Succession Act. Section 15 deals with wills made before the commencement of the Act while section 16 deals with wills made outside of the jurisdiction.

Section 15 provides that written wills executed prior to the commencement of the Act, regardless of whether the testator died before or after the commencement of the Act are to be treated as properly executed if they were executed according to the requirements of the law then in force at the time of execution. Under section 16, the will of a foreigner or alien is treated as properly executed if its execution conformed, either at the time of execution or of the testator's death, to the law in force of the state of execution or of the state where the property is situated or of the state where the testator was domiciled or of the state of which the testator was a national at the time of execution or death.

5.8 PRIVILEGED WILLS

A privileged will is one that is deemed valid notwithstanding the failure to comply with the strict legal formalities required of a will. Privileged wills are made in circumstances that by their very nature do not allow the opportunity of making

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a normal will. The Law of Succession Act provides for the making of oral or nuncupative privileged wills. The statute makes no provision for written privileged wills. Written privileged wills are provided for in the Armed Forces Act at section 219.

Section 9 of the Law of Succession Act provides that an oral will made by a member of armed forces and merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he dies more than three (3) months after the date of the making of the will. The term “active service” is defined in section 3 of the Act to mean service with respect to the armed forces on a field of military operations or under orders to proceed to a field of operations; while in respect of the merchant marine it refers to being at sea or under orders to proceed to sea. The equivalent English statute, Wills Act of 1837, at section 11 uses the term “actual military service”. The term was given judicial interpretation in *Re Wingham* (1949) at 187 where it was said to be referring to a situation of a soldier serving in the armed forces in connection with military operations, which are or have been taking place or are believed to be imminent. In this case, a pilot who died in a training exercise in Canada during the Second World War was held to be on actual military service.⁹²

The term member of the armed forces is not defined in the Law of Succession Act. There is no reported Kenyan case yet on a soldier's privileged oral will. However, the English case of *Re Stable* (1919) at 7 is relevant. The deceased, a lieutenant, said to a woman to whom he was engaged, “if I stop a bullet everything of mine will be yours”. This was said in the presence of a person who was called as a witness. Probate of the deceased's words was granted.⁹³

92 See also *Re Jones* [1981] 1 All ER 1.

93 English cases on written privileged wills are good illustrations of privileged wills. In *the Estate of Ada Stanley* (1916) P 192 a nurse employed under a contract by the war office on hospital ships wrote a letter giving the addressee full liberty to deal with her affairs and giving directions as to the manner in which her property was to be disposed of after her death. The letter was written during an interval shortly after the writer received instructions to go to war. It was held that the letter though unattested as required of wills was a soldier's will within the meaning of the Will's Act of 1887 and that the person to whom it was addressed was an executor according to the document. In *the Goods of Hale* (1950), 2 Irish Reports 362, the court held that a typist working with the marines on a ship was entitled to make a privileged will. In *Gattward v Knee* (1920) P 99 the deceased, a battalion soldier, after receiving instructions to go to war, wrote an undated letter, which was received by the plaintiff in England. The writer died in the war. The letter contained expressions such as: ‘if you have a letter to say that I am killed, then the lot is for you’ and ‘you will receive the lot if I am killed in action, for I shall make out my will in your favour’. No other document in the nature of a will was ever received or discovered and the father of the deceased took out a grant of letters of administration since the deceased was single. The plaintiff propounded the letter as a will and applied for the revocation of the grant of letters of administration made to the deceased's father on the grounds that the deceased had not died intestate. It was held that letter constituted a testamentary document capable of taking effect, as a soldier's will within the meaning of the Will's Act. The letter was a privileged will and therefore admissible to probate.

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The Presidential Commission on the Law of Succession did not see the need for a written privileged will as the Law of Succession Act had already provided for an oral will as an alternative to a written will. In recommendation number 13 in its Report, the Commission saw no reason why soldiers and sailors should be in a special category as they can avail themselves of the simpler methods open to other persons. The soldiers are also catered for adequately in the Armed Forces Act at section 219 under which a soldier can make a written will if witnessed by one witness only, an officer of the regiment.

CHAPTER SIX

REVOCATION, ALTERATION AND REVIVAL OF WILLS

6.1 INTRODUCTION

Wills once made are liable to change by their maker; either through alteration, revocation or revival in cases where there has been a revocation.

6.2 REVOCATION

All wills are revocable. This is an expression of the freedom of testation. The freedom to make a will extends to cover the freedom to revoke it. A will can be revoked voluntarily or involuntarily. There are three (3) methods of voluntary revocation, namely: express revocation, implied revocation and revocation by destruction. These three methods require mental capacity to the same degree as for the creation of a will and the intention to revoke. Under Kenyan law, there is only one involuntary method of revocation, namely-revocation by marriage. This arises by operation of the law and it therefore does not require that the testator had mental capacity or intention to revoke. Section 17 of the Law of Succession Act provides that the maker of a will may revoke it at any time when he is competent to dispose of his free property by will.

6.3 EXPRESS REVOCATION

Section 18(1) provides for the revocation of a will or codicil by another will or codicil declaring an intention to revoke it. Read together with section 17, this provision enables testators to revoke their wills so long as they have the capacity to do so.

Professionally drawn wills invariably contain an express revocation clause taking this form: "I revoke all former wills and testamentary dispositions heretofore made by me". It is not sufficient to say, "This is the last will and testament made by me". This would not be an express revocation clause. It was held in *Re Hawks ley's Settlement* [1934] Ch 384 that the description of the will as the testator's 'last will' was not sufficient for an express revocation clause. Revocation may be of whole or part of the will or codicil. A codicil is often used when only parts of the will are to be revoked. As stated earlier, express revocation requires an intention to revoke on the part of the testator.

6.4 IMPLIED REVOCATION

The wording of section 18(2) of the Law of Succession Act is wide enough to cover the possibility of implied revocation. A will or codicil is impliedly revoked by a later will or codicil to the extent that the latter is inconsistent with the earlier will or codicil.⁹⁴ It is a matter of construction of the will or codicil to decide whether and to what extent a latter will impliedly revokes an earlier will. Extrinsic evidence is admissible for establishing implied revocation.⁹⁵

6.5 REVOCATION BY DESTRUCTION

Section 18(1) provides for revocation by burning, tearing or otherwise, destroying the will with the intention of revoking it by the testator or by some one else at his direction. Revocation by destruction involves two distinct elements: the actual destruction of the will and an intention to revoke the will. Both elements must be present.

(a) Actual destruction

The actual destruction must be by the physical act of burning, tearing or otherwise destroying the will. ‘Otherwise destroying’ has been construed using the *ejusdem generis* rule to require that the acts of destruction are of the same kind as burning and tearing. In *Cheese v Lovejoy* (1877) 2 P and D 251, A testator cancelled his will by striking out its clauses and his signature with a pen and then writing at the back of the will ‘All these are revoked’. He threw the will in a pile of waste paper in the corner of the room where his house cleaner retrieved it and kept it in a kitchen drawer until the testator’s death eight years later. It was held that he did not amount to “otherwise destroying”. Although he intended to revoke the will, it had not been destroyed and it was admitted to probate. In *Re Morton’s Goods* (1887) 12 P and D 14 the testator’s signature was completely scratched out. It held that the same amounted to otherwise destroying. In *Re Adams* (1990) 134 Sol Jol 518 parts of a will were heavily scored through with a ballpoint pen. The relevant parts were held to have been actually destroyed.⁹⁶ In *Hobbs v Knight* (1836) 1 Curt 768 it was held that “tearing” include cutting.

Whether the actual destruction of part of a will results in the revocation of a

⁹⁴ *Birks v Birks* (1865) Sw and Tr 23.

⁹⁵ *Methuen v Methuen* (1816) Phil 416.

⁹⁶ See also *Stephen v Taprell* (1840) 2 Curt 458.

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whole or part of the will depends on the part actually destroyed. If the destroyed part impinges on the whole will then the whole will be revoked, for example the destruction of the part of the will containing the signature. If the parts are less important, only those parts will be revoked. In *Re Everest* (1975) Fam 44 the testator cut off the part of his will that contained the trusts of the residue. It was held that the parts cut off were revoked but that the rest of the will remained intact. It is important to establish the extent of the act of destruction so as to show whether the intention to revoke existed. In *In the Goods of Lewis* (1858) 1 Sw and Tr 31, the court held that the mere cutting off of a signature and the attestation clause may be a sufficient act. If, however, some other part is torn off, that will only be sufficient to revoke the will if that part torn off is so important that the will could not fairly be allowed to stand without it. In *In The Goods of Woodward* [1871] LR 2 P and D 206, the testator made a will consisting of seven sheets of paper. He tore off eight lines of one page, and probate was granted of the remainder.

To establish actual destruction, it must be proved that the acts of destruction were completed by the testator. In *Doe D Perkes v Perkes* (1820), 3 B and Ald 489, the testator tore his will into four (4) pieces in a rage with one of the beneficiaries named in the will. He thereafter became calmer and put the pieces together. It was held that there was no actual destruction as the testator had not completed all that he had intended to do by way of destruction.

(b) Destruction must be by the testator or by someone in his presence and by his direction

The acts of destruction must be by the testator or by some other person in the testator's presence and under his direction. In *Re Dadd's Goods* (1857) Dea and Sw 290 a testator on her deathbed expressed a wish to revoke a codicil. Her executor and a neighbour went out of her presence into the kitchen and burnt the codicil. It was held that there was no actual destruction.⁹⁷

If destruction is done by some other person, it must be done in the presence of the testator and by his direction. In *Gill v Gill* (1909) at 157, the testator's wife tore up his will in a fit of temper and it was held that there was no actual destruction as the will was not destroyed under the testator's direction. A destruction of a will by someone else must be done in the presence of the testator. Where instructions are given to an advocate by a client asking the advocate to destroy the client's will in

97 See *Mills v Millward* (1890) 15 P and D 20 and *Re Booth* (1926) at 118.

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his possession and then the advocate destroys the same in the absence of the client, the act of destruction in such a case does not amount to the actual destruction of the will and there would be no revocation of the subject will since the destruction was done in the client's absence and at any rate without his direction.

If, however, the letter or document containing the instructions to destroy is signed by the testator and attested by two witnesses the destruction would effectively revoke the will. In *Re Durance* [1872] LR 2 P and D 406, a testator wrote to his brother who had custody of his will asking him to destroy the will that the brother did. The letter was signed and witnessed by two persons. It was held that there was actual destruction and that the will had been revoked.

(c) Animus revocandi

With respect to intention to revoke, the testator must have the same capacity to revoke as is necessary to execute a valid will. In *Re Aynsley* [1973] 1 Ch 172 a testatrix who was old and confused tore her will into forty pieces. The judge put the pieces together in a one-hour operation. It was held that the testatrix lacked mental capacity to revoke and the will was therefore still valid.

The destruction must not be accidental. If a fire at home destroyed a will, the same would not amount to revocation by destruction,⁹⁸ as there would be no intention on the part of the testator to revoke the will by destruction. The happening or occurrence of the accident negates intention to destroy the will. If a testator is under some mistaken belief, for example that the will is invalid, a destruction of the will in the circumstances would not lead to revocation, as there would be no intention to revoke.⁹⁹

(d) Proof of contents of a destroyed will

Where a will is destroyed during the lifetime of the testator without his authority it may be proved by evidence on the circumstances surrounding its destruction and its contents. This means the substance of the will may be ascertained by oral evidence.¹⁰⁰

⁹⁸ See *Brunt v Brunt* [1873] LR 3 P and D 37.

⁹⁹ See *Cheese v Lovejoy* (1877) 2 P and D 253 and *Re Booth* (1926) at 118.

¹⁰⁰ See *Foster v Foster* (1823) 1 Add 462.

6.6 PRESUMPTION CONCERNING REVOCATION BY DESTRUCTION

In some cases, a will may be lost or found torn or mutilated after the testator's death. In such cases, the will is presumed to have been destroyed by the testator with the intention of revoking it in cases where the will was last known to be in his possession. The presumption can be rebutted by evidence to the contrary.

In *Re Jones* [1976] 1 All ER 593 the appellants challenged a will made by the testatrix who was their aunt in which she had left a bequest to the respondents who were her favourite nieces. At the time the will was made, the respondents used to visit and help the testatrix. In appreciation, the aunt left her house and land to them under the will. On learning of the contents of the will, the respondents stopped visiting her and giving her any support. The testatrix apparently in retaliation, decided to revoke her will to disinherit them of the bequest. She informed her lawyer and someone else about the intention, but she died before her instructions could be carried out. After her death, a copy of the will was found in her house mutilated at the part in which she had bequeathed the house and land to the respondents. She had also cut out her signature from the will. It was held that the actions of the testatrix indicated an absolute intention to revoke the will and the same was effectively carried out as characterised by the act of destruction. The effect was that the deceased died intestate.

6.7 DOCTRINE OF CONDITIONAL REVOCATION

Once an intention to revoke is established, it is necessary to decide whether the intention is absolute or conditional.¹⁰¹ It is a question of fact in the case of actual destruction but a matter of construction in the case of express revocation. The doctrine is also known as 'dependent relative revocation'.¹⁰² If the intention is conditional, the revocation does not have effect until the condition is fulfilled. This effectively means that where a testator revokes his will with the intention of making a new one and for some reason fails to make a new one, the original one remains valid. The doctrine only applies where the court is satisfied that the testator did not intend to revoke the will absolutely, but merely revoked it as a first step towards making a new will. If the intention is absolute, the revocation takes effect immediately.

101 Ex parte *Lord Ilchester* (1803) 7 Ves 348.

102 See *FH Newark* in 71 LQR 374 on the doctrine's evolution.

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In *Dixon v Treasury Solicitor* (1905) at 42 (Court of Appeal) a testator instructed a solicitor to draw up a will for him. Before this had been done he cut off the signature from his old will as he mistakenly believed that the new will could not be made until the old will was revoked. The action of cutting off the signature amounted to revocation by destruction. The testator died before he could sign the new will. It was held that because of his mistaken belief the revocation of the old will was conditional on the new will being effective. The old will was admitted to probate. In *Re Carey* (1925), LSGaz R 189 a testator revoked his will by destruction because he thought he no longer had property that could pass by his will. He had forgotten that he might inherit some property from his sister's estate, which he in fact did. It was held that the revocation was conditional on the testator having nothing to leave. As he in fact had property to leave, the condition was not fulfilled and the will remained valid. In *Re Southerden's Estate* (1925), at 177 a testator revoked his will by destruction under the mistaken belief that under the rules of intestacy his widow would acquire the whole of his estate. The will was made just before the couple embarked on a voyage to America. When they safely made it back to England, they regarded the will as unnecessary and destroyed it. It was known in fact that the deceased had always intended his wife to be the sole beneficiary of his estate. It was held that the revocation was conditional on the widow taking the whole estate upon intestacy, as she was not entitled to the whole estate the condition had not been fulfilled and the will remained valid.

6.8 REVOCATION BY MARRIAGE

Generally, the marriage of the testator automatically revokes any will or codicil made prior to the marriage. Section 19 of the Law of Succession Act provides that the marriage of the testator will automatically revoke a will subject to one exception, where the will is expressed to be made in contemplation of marriage with a specified person.

The reason for this rule is that marriage and the birth of issue to the testator, constitutes an important change of the circumstances of the testator and it is equitable in the event for the person's estate to devolve on an intestacy rather than under a will made before marriage and the birth of the children.¹⁰³ Although, in the absence of the rule, the person married subsequent to the execution of the will and any children born thereafter, may avail themselves to the protection afforded by section 26 of the Law of Succession Act, this approach would invite

¹⁰³ Report of the Commission at 27.

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unnecessary litigation. The common sense approach is that where a person fails to alter their will as a result of marriage, the interests of the heirs would be served by the devolution of the property in intestacy.

6.9 REVOCATION BY DIVORCE

Kenyan law does not recognize revocation by divorce, indeed the definition of ‘dependant’ in section 29 includes former wife or wives of the deceased. In *Re Bird Deceased* [1970] EA 289, Platt J stated that divorce does not ipso facto revoke a will. The court found that the divorced woman was the person named in the will as the person entitled to the property of the testator.

6.10 REVOCATION OF WRITTEN WILL BY ORAL WILL

Under section, 18(2) a written will cannot be revoked by an oral will.

6.11 ALTERATION OF WILLS AND CODICILS

Where the words of a will are obliterated or altered in some way or interlineations are made, the effect of these changes depend on whether the alterations were made before the execution of the will or after.

An alteration made before the execution of the will is valid so long as it is final rather than deliberate. According to the court in *Re Bellamy's Goods* [1866] 14 WR 501, if it is in pencil it is presumed to be merely deliberative, and without evidence, to the contrary it would not therefore be valid. It was stated in *Cooper v Bockett* (1846) 4 Moo PCC 320, that with respect to alterations made before the execution of the will, there is a presumption that they have been made after execution unless the alteration is to fill in a blank space in the will. Either extrinsic evidence or evidence from the will itself is admissible to rebut the presumption. In view of the presumption, it is advisable in practice to execute an alteration even if it has been made before the execution of the will. In *Kell v Charmer* (1856) 23 Beaver 195, it was held that where the alteration is made to fill a blank space in the will, the presumption is that the alteration was made before execution of the will.

Where a codicil to a will is subsequently executed, even though a codicil has the effect of republishing the will, this will not itself validate an alteration by making it as though done before the execution of the will. An alteration will only be

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made valid by a codicil if the codicil refers in some way to the alteration.

Alterations made after executions of the will are invalid unless they have been executed. Under section 20(1) of the Law of Succession Act, if the alterations are made after the execution of the will they would be invalid unless they have been duly executed in accordance with the formalities required for the execution of the will. The formalities are complied with if the testator and the witnesses place their initials in the margin next to the alteration or if the signature of the witnesses and the testator is put at the end of a memorandum which is contained in the will, and which refers to the alteration.¹⁰⁴

In *Re Horsford's Goods* [1874] LR 3 P and D 221 and *Re Itter* (1950) P 130, it was said that where an unattested alteration has been made after the execution of the will the precise effect depends on whether the original wording is apparent or not apparent. The original wording will be apparent for this purpose if the original words can be deciphered by an expert through natural means. This means that the original words can be ascertained from the face of the will without physically interfering with the will. According to the decision in the case of *Re Hamer's Estate* (1943) 113 LJP 31, where an unattested alteration has been made and the words are apparent, the will is admitted to probate with the original wording ignoring the alteration. Where an unattested alteration has been made and the original words are not apparent the general rule is that probate of the will is granted with a blank space.

6.12 REVIVAL OF WILLS

Under section 21 of the Law of Succession Act, a testator may revive a will, codicil or any one of them that has been revoked, provided that it has not been destroyed. Revival usually involves the re-execution of the will with proper formalities or a duly executed codicil. There should be in either case an intention to revive the revoked document.¹⁰⁵ Such intention is deciphered from the circumstances of the case; for example, the testator's oral affirmation to that effect or his re-calling of the will from where it had been kept. A codicil is used to revive part of a revoked will, while a will which has been totally revoked can be revived only by re-execution. It was stated in *Re Hardyman* [1925] Ch 287, that the effect of a revival of a will or codicil is to make the same speak from the date

¹⁰⁴ See *Re Shearn's Goods* (1880) 50 LJP 15.

¹⁰⁵ See *Marsh v Marsh* (1860) 1 Sw and Tr 528, *Re Steele's Goods* (1868) LR 1 P and D 575, *Re Hodgkinson's Goods* (1893) at 339.

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on which it was revived. As it speaks from the date of the revival, references to persons in the will or codicil are to persons at the date of revival. According to the court in *Re Revees* [1928] Ch 351, the fact that the revival of the will speaks from the date of revival also affects reference to property.

CHAPTER SEVEN

GIFTS BY WILL AND THEIR FAILURE

7.1 INTRODUCTION

A will disposes off property in the form of gifts to the beneficiaries. There are various forms or classes of gifts, and doctrines governing them.

7.2 TYPES OF GIFTS

A gift by will may be of immovable property (realty) or movable property (personality). In the past, a gift of immovable property was called a devise, while that of movable property was termed a legacy. The modern approach is to use the term legacy to refer to both classes of gifts.

There are four main types of gifts, namely: specific gifts, general gifts, demonstrative gifts, pecuniary gifts, and residuary gifts.

(a) Specific gifts

A specific gift is a gift of property forming part of the testator's estate that is distinguished in the will from other property of the same kind.¹⁰⁶ In *Bothamley v Sherson* [1875] LR 20 Eq 304, a specific gift was described as being a severed or distinguished part of the estate, for example a gift of a Lamu bed. In *Re Rose* [1949] Ch 499, it was said that the court leans against specific legacies and is inclined to construe a legacy as general. The explanation for this is that specific gifts tend to fail for ademption.

(b) General gifts

A general gift is a gift that is not in any way distinguished from property of the same kind. It covers a gift of the entire testator's property or the entire testator's property of a particular type. As a general gift is one which is to be provided out of the testator's estate, it does not matter that the property of that description does not form part of the deceased's estate at the time of his death.¹⁰⁷ General gifts tend to be pecuniary legacies, although they do not have to be.¹⁰⁸

106 See *Re Eve* (1956) Ch. 479 and *Robertson v Broadbent* (1883) 8 appeal case. 812.

107 See *Bothamley v Sherson* [1975] LR 20 Eq 304.

108 See *Re Compton* [1914] 2 Ch 119.

*Law of Succession***(c) Demonstrative gifts**

A demonstrative gift is a gift that is expressed as payable out of a particular fund or property. As a demonstrative gift is general in nature, rather than specific, the gift does not fail for ademption even if the particular fund or property does not form part of the testator's estate at the time of the testator's death. The money to settle the gift has to be raised by the executors or the property acquired.¹⁰⁹

If the gift directed is to be satisfied only out of a particular fund, it will not be a demonstrative gift at all, but instead a specific gift. The demonstrative gift should operate as a general gift in that it cannot be satisfied out of the specified fund or property.

(d) Pecuniary legacies

This is a gift of money, whether general or demonstrative. Usually, a pecuniary legacy is a general gift, but it could be specific or demonstrative, where money is instructed to be paid out of a particular fund.¹¹⁰

(e) Residuary gifts

A residuary gift is a gift of a testator's residuary estate. The residuary estate is all that is left in the testator's estate after all valid specific gifts have been paid. The residuary gift is usually made subject to the payment of pecuniary legacies, all debts and other liabilities of the deceased, and payment of funeral and administration expenses.¹¹¹

7.3 DOCTRINE OF ELECTION

The equitable doctrine of election is provided for in section 24 of the Law of Succession Act, and beneficiaries are put to election, with relation to gifts, in the circumstances, manner and to the extent provided by the 3rd Schedule to the Act. Under paragraph 1(1) of the 3rd Schedule, the doctrine applies to circumstances where the testator makes a gift of property that does not belong to him or makes dual gifts under one instrument, giving his own property and someone else's property.

109 See *Re Webster* (1937) 156 LT 128 and *Kirby v Potter* (1799) 4 Ves 751.

110 See *Re Wedmore* [1907] 2 Ch 277 and *Hancox v Abbey* (1805) 11 Ves 179.

111 See *Re Elcom* [1894] 1 Ch 303.

Gifts by Will and their Failure

The principles governing election were laid down by Jessel MR in *Rogers v Jones* [1877] 3 Ch.D 688. If the testator by the same will gives property to one beneficiary, and purports to give that beneficiary's own property to another beneficiary, the first beneficiary will be put to election. He has to choose between taking the gift under the will or against it. If he takes under the will, he will be entitled to the testator's property, and the other beneficiary will be entitled to take the first beneficiary's property bequeathed to him in the testator's will. If the first beneficiary elects to take against the will, he will be entitled to keep his own property and the gift willed to him by the testator. In this event, the other beneficiary loses out, the first beneficiary has to compensate him for his disappointment out of the gift from the testator.¹¹² The compensation is to an extent not exceeding the benefits the first beneficiary receives under the will.¹¹³ According to the court in *Re Gordon's Wills' Trusts* [1978] Ch 145, the doctrine of election may be excluded by contrary intention on the testator.

7.4 PRESUMPTION OF SATISFACTION

The principle of satisfaction deals with a gift by will intend to satisfy or extinguish a debt or other claim. Satisfaction was defined in *Lord Chichester v Coventry* [1867] LR 2 HL 71 by Lord Romilly as the donation of a thing with the intention that it be taken as extinguishment or satisfaction of some prior claim of the donee either wholly or in part.¹¹⁴ It presupposes an existing legal obligation.

The Kenyan law on satisfaction is paragraphs 64, 65 and 66 of the 1st Schedule to the Law of Succession Act. Under paragraph 64, where a debtor makes a gift by will to his creditor and the gift is equal or greater than the debt, there arises a presumption that the gift is intended to satisfy the debt and not to be taken in addition to payment of the debt. Paragraph 65 covers the situation where the testator is under an obligation under a contract to provide for his child or other person to whom he is in *loco parentis*, and then fails to so provide. If he makes a gift to the child or that other person by will, a presumption arises that the gift is intended to satisfy the portion. The presumption of satisfaction does not apply to gifts in contemplation of death.¹¹⁵

112 At 689.

113 See also *Re Carpenter* (1884) 54 LT 773.

114 At 95.

115 See paragraph 66 of the 1st Schedule.

7.5 DOCTRINE OF ADEMPMENT¹¹⁶

The doctrine of ademption is provided for in section 23 of the Law of Succession Act, and it operates in the circumstances, manner and extent provided by the 2nd Schedule to the Act.

Under paragraph 8(1) of the 2nd Schedule, where a specific gift is made, the gift will fail for ademption if the subject matter of the gift does not form part of the testator's estate at the date of his death. Ademption is likely to occur because the property has been sold, given away or destroyed during the testator's lifetime. According to the court in *Durrant v Friend* (1852) 5 De G and Sm 343, where it is unclear which happens first, the death of the testator or the destruction of the property, the property is deemed to have perished before the testator so that the gift is adeemed. Under paragraph 8(2) there must be a substantial change in the subject matter to cause ademption: mere nominal change is not sufficient.

Sometimes, where property has changed in nature, it is difficult to decide whether ademption has occurred. In *Re Slater* [1907] 1 Ch 665 Court of Appeal, Cozens-Hardy MR said that ademption would not occur if the asset in question had changed in nature or form only, but remained substantially the same thing. Change in the nature of the asset has been a particular problem in relation to company shares. It was held in *Re Slate, Re Leeming* [1912] 1 Ch 828, that if the company in which the testator held shares has been taken over since the execution of the will, it must be decided whether there has been a change in form or a change in substance. In the case of change of substance, ademption will occur.

A contract to sell the subject matter of a specific gift will cause a gift to fail for ademption even though the contract is not completed until after the testator's death. According to *Re Calow* [1928] Ch 710, this will not be the case where the testator has made a contract to sell the subject matter of the gift before the will was executed. In this case, the beneficiary will be entitled to the proceeds of sale. Under the rule in *Lawes v Bennett* (1785) 1 Cox 167, where a testator during his lifetime grants to a third party an option to purchase property which is the subject matter of a specific gift, the gift will adeem whether or not the option is exercised. It was stated in *Drant v Vause* (1842) 1 Y and civil case 580, that if the

¹¹⁶ This should be distinguished from equitable presumption of ademption, which comparable is to satisfaction. Equitable ademption is a rule against double portions. It operates to prevent a child from benefiting twice from their father's estate. It works on the same principles as the bringing to hotchpot of property in intestacy.

Gifts by Will and their Failure

option was granted to the third party before the will was executed, the gift will adeem and the beneficiary will be entitled to the proceeds of the sale if the option is exercised.

Although the authorities are not entirely clear on the point, it seems that a gift will fail for ademption if between the execution of the will and the date of its republication the testator acquires another asset of the same description.¹¹⁷ It is always possible for the testator to express a contrary intention to the operation of the doctrine of ademption.

7.6 DOCTRINE OF LAPSE

The doctrine of lapse is provided under section 23 of the Law of Succession Act, and its application is as set out in the 2nd Schedule to the Act.

Generally, stated in paragraph 1(1) of the 2nd Schedule, if a beneficiary under a will predeceases the testator, their gift will lapse. Under paragraph 7 of the 2nd Schedule, if the gift is not a residuary gift, the property will fall into residue. If the gift is a residuary gift, the property will pass according to the rules of intestacy unless there is substitutional gift of the residue. A gift will not lapse if it can be shown that the beneficiary survived the testator for even a very short period. Where the circumstances of death make it uncertain whether the beneficiary survived the testator, the beneficiary may be deemed to have either survived or predeceased the testator under the doctrine of *commorientes*.

Under paragraph 1(2) of the 2nd Schedule, the doctrine of lapse cannot be excluded by stating in the will that a gift is not made subject to it. According to *Re Ladd* [1932] 2 Ch 219 it is possible to make an express gift to the estate of a deceased beneficiary.

It was stated in *Morley v Bird* (1798) 3Ves 696, that if a gift is made to beneficiaries as joint tenants, the gift will not lapse unless all the joint tenants predeceased the testator, as the surviving joint tenant(s) take(s) the share of a deceased joint tenant by survivorship.¹¹⁸ According to the court in *Page v Page* (1728) 2 PWms 489, the converse is that if a gift is made to beneficiaries as tenants in common, the share of a beneficiary who predeceases will lapse.¹¹⁹ This is because tenants in common

117 See *Cowper v Mantel* (number 1) (1856) 22 Beaver 223.

118 Paragraph 3(a) of the 2nd Schedule.

119 Paragraph 3(b) of the 2nd Schedule.

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have a distinct share in the property and the rule of survivorship does not apply. For a tenancy in common, there must be words to the effect that each beneficiary is to have a distinct share or that the property is to be shared equally or divided between them.

Where a class gift is made, the gift will not lapse unless all the members of the class predecease the testator. A class gift is one where the beneficiaries fit a certain description, and the amount that each beneficiary receives depends on the number of people in the class.

There are a number of exceptions to the doctrine of lapse. The exceptions are set out in the 2nd Schedule to the Law of Succession Act. One exception is with respect to gifts made in the discharge of a moral obligation.¹²⁰ The extent of the exception is not fully clear, but it was explained in *Stevens v King* [1904] 2 Ch 30 that the doctrine of lapse does not apply to a gift made to discharge a moral obligation, as the court will imply that the gift is intended by the testator to pass to the beneficiary to whom the testator owes a moral obligation. Possibly, the exception only extends to debts owed by the testator to a beneficiary.

Paragraph 2(1)(b) of the 2nd Schedule makes an exception for gifts to children or other issue of the testator. It provides that gifts to such persons will not lapse so long as the will contains a gift to a child or children or other issue of the deceased, and the intended beneficiary dies before the testator, upon leaving issue and the issue of that member is living at the death of the child. Under the circumstances, the gift takes effect as a gift to the issue living or *en ventre sa mere* at the time of the testator's death or as if the class includes the issue of the deceased member who are living at the date of the testator's death. The issue takes the share of their deceased parent would have taken; if issue are more than one then they should take in equal shares.

Paragraph 2(2) of the 2nd Schedule deals with class gifts, and provides that the gift would not lapse so long as there is a surviving member or surviving members of the class, who should take as a whole.

7.7 COMMORIENTES OR SURVIVORSHIP

If the death of a beneficiary under a will and that of the testator occur close together, it will be necessary for the executors to try to establish who died first. It may be that the testator and beneficiary have died in a common accident. If evidence exists that the beneficiary predeceased the testator, however close the deaths,

¹²⁰ See paragraph 2(1)(a) of the 2nd Schedule.

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the doctrine of lapse applies and the gift to the beneficiary will fail.¹²¹ Under section 43 of the Law of Succession Act, where there is no evidence as to the order of deaths, as where persons die in a common accident, for the purpose of succession, the deaths are presumed to have occurred in order of seniority. The elder person is presumed to have died first. This provision, however, does not apply to spouses, who are presumed to have died simultaneously.

7.8 MISTAKE, FRAUD AND UNDUE INFLUENCE

The validity of a will is predicated on, among other factors, the testator's knowledge and approval of its contents, and the testator is said to not know or approve the contents because of a mistake, fraud and undue influence. The presence of a mistake, fraud and undue influence may lead to the lapse of one or more gifts made in the will.¹²² The presence of these factors vitiates the testator's intention to make the will and the knowledge and approval of its contents, and thus rendering the will invalid.

7.9 UNCERTAINTY

It was said in *Palmer v Simmonds* (1854) 2 Drew 221 and *Re Golay* (1965) 1 WLR 969, that a gift will fail for uncertainty unless the subject matter of the gift and the beneficiaries can be identified with sufficient certainty. A gift may fail for uncertainty where the beneficiary is described in terms that are uncertain.¹²³ For example, a gift to friends may fail for uncertainty. In *the Matter of George Percy Smithson, Deceased* (1942) 22 EACA 14 (Lucie-Smith J) a gift of the residue of the estate to 'African Leper Missionaries and Leper Hospitals at present and to be established in Africa only' was found to be a good charitable bequest which was void for uncertainty and impossibility of performance.

The appropriate test of certainty of objects for a class gift, according to the court in *McPhail v Douulton* [1971] AC 424 and *Chichester Diocesan Board of Finance v Simpson* [1944] AC 341, is one of whether it can be said of any given individual, that they either are or are not member of the class.

121 See *Re Phene's Trusts* (1870) 5 Ch Application 139.

122 See section 7 of the Law of Succession Act.

123 See paragraph 25 of the 1st Schedule to the Law of Succession Act.

7.10 BENEFICIARY OR SPOUSE OF BENEFICIARY WITNESSING THE WILL

The validity of a will is not affected where a beneficiary or a spouse of a beneficiary acts as an attesting witness, but section 13 of the Law of Succession Act provides that a gift will fail if the beneficiary or their spouse has witnessed the will. Unless section 13(2) of the Law of Succession Act is complied with by having their signatures further attested by independent witnesses.¹²⁴ This provision is not limited to dependent beneficiaries, it includes any person who is entitled to costs or charges out of the estate or incurred in the course of preparing the will. If a professional executor who is appointed under the will witnesses the will, he will lose his entitlement to his fees or charges.

7.11 FORFEITURE

Under section 96 of the Law of Succession Act, a beneficiary who is convicted of the murder of the testator is prevented on the basis of public policy, from benefiting under the testator's will. This is founded on the maxim that a person should not benefit from his own wrong.

7.12 DISCLAIMER

The disclaimer by a beneficiary of a gift, whether made by will or given in intestacy, leads to failure of the gift. It is a refusal by a beneficiary to take a gift made to them.¹²⁵ As a rule, a legatee or heir cannot be compelled to accept a gift. He is entitled to disclaim or renounce the gift, if he so desires.¹²⁶

7.13 PERPETUITY

The law gives powers to property owners to dispose of their interests, but at the same time seeks to prevent them from settling property in a way that makes its devolution complicated or uncertain. The rules relating to perpetuity affect gifts by will in several ways, and apply by virtue of section 25 of the Law of Succession Act and the Perpetuities and Accumulations Act.¹²⁷ Section 25 of the Law of

¹²⁴ See *In the Matter of the Estate of George Mbugua Ngare (deceased)* Nairobi High Court probate and administration number 855 of 1995 (Rawal J).

¹²⁵ See Chapter 21 section 21.2 here below.

¹²⁶ See *Re Stratton's Disclaimer* (1958) Chapter 42.

¹²⁷ Chapter 161 Laws of Kenya.

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Succession Act provides that testamentary gifts or dispositions are void if they offend the rules against perpetuities, remoteness or accumulations set out in the 4th Schedule to the Act. These rules grew out of the conflict between the desire of owners of property to tie it up indefinitely for some reason, and public policy, championed by the courts and the legislature, which seeks to free such wealth so that it can circulate freely for the benefit of the whole nation. The rules are really a compromise, which allows property to be tied up for comparatively short periods of time.

In the first place, they apply to contingent gifts and require that it must be possible within a certain period of time, usually called the perpetuity period, to say who is entitled to the gift. If the gift does not vest within the perpetuity period, it is void. The rationale for the rules against perpetuity is to ensure that property, which makes up the country's wealth, is not used for the benefit of anyone for very long periods.

Secondly, property once vested in trustees must not be rendered inalienable. If a charitable gift is inalienable, it is void. A gift is said to be inalienable if some provision or the terms of the gift prevent the property from being disposed of within a certain period of time. This aspect of the rule of perpetuity is particularly relevant where property is left by will for a purpose or cause, which is not charitable. The reason behind the principle is that it is against public interest for property to be tied up indefinitely for a purpose that is not of general benefit to the community. Charitable gifts are excluded from the rule because they are by definition of public benefit. Without the rule, land or funds could be tied up for very unproductive purposes.

7.14 PRIVATE PURPOSE TRUSTS

A purpose trust arises where a testator wishes to benefit a cause or a purpose as opposed to benefiting a person or persons. In *Brown v Burdett* [1882] 21 Ch 667 a testator left a fund of money to keep a house maintained with all but four of its rooms blocked up. Generally, unless the purpose is charitable, the gift will be void because of the beneficiary principle and the perpetuity rule. The beneficiary principle was explained in *Morice v Bishop of Durham* (1804) 9 Ves where it was stated that the objection to a gift for a private purpose is that there is no one capable of enforcing the payment of the gift.

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There are, however, exceptions to the rule that private purpose trusts are void. An important exception is trusts known as ‘trusts of imperfect obligation’. These have been described, by Roxburgh J in *Re Endacott* [1960] Ch 232, as concessions to human weakness or sentiment. If a gift falls within one of the categories of trusts of imperfect obligation, it will be valid, but the executors will not be bound to give effect to the gift- though they may if they wish, provided that the gift is limited to the perpetuity period. Trusts of imperfect obligation fall into three categories, namely; trusts for maintenance of a particular monument or grave, saying of masses, for the dead and maintenance of one or more specific animals.

CHAPTER EIGHT

CONSTRUCTION OF WILLS

8.1 INTRODUCTION

It sometimes becomes necessary for the court not only to determine whether or not the document alleged to be a will is a valid will, but also what the meaning and effect of the words and phrases used by the testator in the will are. First, it must emerge from the words, phrases and expressions used that the document was made in contemplation of death that is, that it is testamentary. The role of the court is therefore, to decide what meaning should be attributed to any disputed clauses in a will.

Issues relating to construction of wills arise out of poor drafting. The main objective of the construction of a will is to ascertain the testator's intentions as expressed in the will. In *Perrin v Morgan* [1943] AC 399 Lord Simon LC said that 'the question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are the “expressed intentions” of the testator.’¹²⁸

Where a will uses words and phrases which are capable of two or more meanings and does not show in which sense the testator intended to use them, the court is faced with two alternatives either to declare the will void for uncertainty or decide on which of the available interpretations is to be given to the disputed clause. The latter course is known as ‘the benevolent approach’ to the construction of wills. This approach has given rise to the so-called rules of construction of wills.

Under section, 22 of the Law of Succession Act wills are construed according to the rules made under the 1st Schedule to the Act. There are 78 rules of construction under the 1st Schedule. These rules are based on some basic general principles of construction of wills.

8.2 THE COURT CONSTRUES WILLS, IT DOES NOT REMAKE THEM.

The duty of the court is to interpret the words as used by the testator in the will regardless of whether they produce an unfair result, provided that was the intention of the testator. Even where a testator has not made a provision for his lawful dependants it is not for the court in interpreting the will to seek to make provision

¹²⁸ See *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207.

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for these survivors. The court interprets the will as it stands and pronounces that the survivors are not provided for. Thereafter the survivors may, if they so wish, file the necessary application under section 26 asking the court to make a reasonable provision for them out of the estate. Thus, the court's business is to construe the testator's will, not to make a new will for him.

Note, however, that a mechanical application of this principle can sometimes produce absurd results and obvious injustice. In *Scale v Rawlings* [1892] AC 342 a testator devised three of his houses to A (his niece) for life and provided that should A die leaving no children, those houses were to go to his nephews. "A" died leaving some children surviving her. It was argued on behalf of A's children that the testator intended, although his will did not expressly say so, that if A died leaving children, the houses should go to them. Interestingly, both the Court of Appeal and House of Lords decided that the will clearly gave A no more than a life interest in the houses and gave nothing to her children. Consequently, when A died leaving children, the houses devolved upon the testator's residuary devisees i.e. the nephews. Both courts held that if the testator had desired A's children to benefit he would have said so.

Despite the obvious injustice that can result from such mechanical application of the principle the rationale behind it is to guard against the tendency to impute a meaning to a will that was never intended by the testator and thereby defeat his intentions. It also acts as a caveat against sloppy drafters, who must be warned against using words and phrases carelessly without considering whether they express the testator's true intentions.

8.3 WORDS ARE CONSTRUED IN THEIR ORDINARY NATURAL SENSE

(a) The golden rule

The first rule of construction was stated by Ether MR in *Re Harrison* [1885] 30 ChD 390, what is called the golden rule. It was stated that where a testator executed a will in solemn form, it is assumed that he did not intend to make it a solemn farce and that he did not intend to die intestate when he has gone through the form of making a will. A will should be read to lead to a testacy rather than intestacy¹²⁹. Ever shed MR in *Re Bailey* [1951] Ch 407 warned that the fact that intestacy would follow does not justify the court in giving an unnatural meaning to words or rewriting the will so as to produce a result that might appear more satisfactory.

¹²⁹ See paragraph 17 of 1st Schedule to the Law of Succession Act.

(b) The primary meaning

Words in a will are attributed to their primary meaning, regardless of whether the construction will produce a capricious meaning or lead to absurd or unreasonable result.¹³⁰ In *Gorringe v Mahlstedt* [1907] AC 225, it was said that there is a presumption in construing a will that the 'ordinary and usual meaning of the words' should be applied. In *Re Raphael Public Trustee v Raphael* [1972] EA 522 (Simpson J) the court was asked to construe two wills containing the phrase 'or of us dying together'. Both testators were found dead in a locked room with bullet wounds, the pathologist was unable to determine who died first. It was held that the testators did not mean dying at precisely the same instant. The court concluded that the testators died together within the meaning of the phrase in their will.

In *Anarali Museraza (a minor by his next friend) Mohamedtaki A P Champsy v Mohamedali Nazerali Jiwa and others* [1966] EA 117 (Wicks J) the court was called upon to construe the clause 'in addition to this will' in a codicil to an earlier will. It was contended that the testator was attempting to make further dispositions 'in addition' to the one-third willable property under Islamic law and as this exceeds that one-third, the codicil was therefore void. The court held that looking at the codicil as a whole by the words 'in addition to this will the testator intended that the codicil was to be read with the earlier will and by the words 'the following addition to it' the testator intended to add to the provisions of the prior will.

(c) Departing from the general principle

However, if on reading the will as a whole or on investigating the habits and circumstances of the testator, it is evident that he used a particular word or phrase in some special sense of his own, the court may interpret it in this special or secondary sense provided that the word or phrase is capable of carrying such a meaning and evidence is tendered to prove the special meaning. There are two ways in which the general principle may be departed from, through the application of the 'dictionary principle' and the use of a secondary meaning where the ordinary meaning does not make sense.

(i) The dictionary principle

The dictionary principle applies in circumstances where the testator has set up his own dictionary in the will by defining words he uses in a particular way. The principle would apply if the testator has a definition clause saying how particular

130 See paragraph 9 of the 1st Schedule to the Law of Succession Act and *Rashida Begum v Administrator General and another* (1951) 18 EACA 102 (Sir Barclay Nihill P, Sir Newnham Worley VP and Pearson AgCJ).

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words are used in the will. In *Re Helliwell, Pickles v Helliwell* [1916] 2 Ch 580, the testator left property to his ‘nephews’ and in another part of the will provided that the illegitimate son of his illegitimate sister was to participate ‘equally with my other nephews.’ The court stated that the testator had used the word ‘nephew’ in a sense wider than normal.

(ii) *The surrounding circumstances principle*

Where the ordinary meaning does not make sense, a secondary meaning which makes sense can be applied. *Re Smalley, Smalley v. Scotton* [1929] 2 Ch 112 illustrates the power of the court to interpret a word in a secondary sense when the surrounding circumstances of the testator show that he used it with that particular meaning. In this case a testator bequeathed all his property to ‘my wife EAS’. The woman named believed herself to be his wife and was generally reputed as such but in fact, he had committed bigamy in marrying her, for he was already married to another woman. On evidence of these surrounding circumstances, the Court of Appeal construed the word “wife” to mean “reputed” as opposed to “lawful” wife, for the circumstances showed that he had used the words in this secondary sense. In *Thorn v Dickens* (1906) WN 54, evidence of surrounding circumstances showed that the testator referred to his wife as “mother” so that a bequest to ‘mother’ in his will was taken to be a bequest to her.

(iii) *Words with more than one meaning*

Where a word has more than one meaning, the general rule that words are given their ordinary meaning, cannot be applied.¹³¹ In this case the court adopts the meaning it regards as the most probable, which in effect leaves the court with wide discretion. In *Re Everett, Prince v Hunt* [1944] Ch 311, the testatrix made for provision in her will for disposal of her ‘stocks and shares’. Her investments consisted partly of stocks and shares in limited liability companies, but she had also invested in redeemable debentures and government securities. It was held that the gift passed only stocks and shares in limited liability companies. In *Re Purnchard’s Will Trusts, Public Trustee v Pelly* [1984] Ch 312 it was held that the testator must be presumed to have wished to dispose of the whole of his estate and therefore the expression ‘stocks and shares’ included all his investments.

131 *Re Everett* (1944) 176, *Re Barnes’ Will Trust* (1972) 1 WLR 587, *Re Mellor* [1929] 1 Ch 446.

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(iv) Special and technical words

Where special or technical words are used in a will, they are presumed to be employed in their technical sense, unless the context clearly indicates the contrary.¹³² Such technical words may also be construed in a secondary sense if the will provides sufficient evidence that this is the sense in which the testator used them. In *In Re Smith, Bull v Smith* [1933] Ch 847, the testatrix left her property ‘to my own right heirs’ other than R J Smith and issue. When she died the son of R J Smith was her heir at common law, but if R J Smith or his issue had never existed then her nephew would have been her heir. It was held that one could not have a ‘right heir’ excluding a ‘right heir’ so that the whole gift was void.

8.4 THE WILL MUST BE READ AS A WHOLE

The meaning of clauses is to be collected from the entire will.¹³³ Since the paramount purpose of construction is to give effect to the testator’s intention as expressed in the will, the meaning of any clause in a will is to be ascertained from the entire document and not in isolation.¹³⁴ The provisions of the will must be construed in relation to each other. It is a rule of inclusivity.

However, where two clauses or provisions are irreconcilable or mutually inconsistent to the extent that they cannot possibly stand together the last one prevails.¹³⁵ The rationale for this rule lies in the notion that the later clause is the last expression of the testator. The rule has been described, by Lord Greene MR in *Re Potter’s Will Trust* [1944] Ch 70, as a ‘rule of despair’. Case law shows that the courts try not to apply the rule at all.¹³⁶ The judicial attitude is to avoid this rule, which is akin to the doctrine of severance. Apparently a rule has developed to the effect that where, looking at the will as a whole, it looks like that the testator intended the first clause to apply, the presumption that the latter clause prevails should not be applied.¹³⁷

¹³² See paragraph 8 of the 1st Schedule to the Law of Succession Act and *Re Cook* [1948] Ch 212.

¹³³ See paragraph 2 of the 1st Schedule to the Law of Succession Act and *Rashida Begum v Administrator General and another* (1951) 18 EACA 102 (Sir Barclay Nihill P, Sir Newnham Worley VP and Pearson AgCJ).

¹³⁴ See *Abdulla Rehmentulla Walje v Alibhai Haji and another* (1943) 10 EACA 6 (Sir Norman Whitley CJ, Mark-Wilson AgCJ and Hayden J).

¹³⁵ See paragraph 2 of the 1st Schedule to the Law of Succession Act and *Re Hammond* [1938] 3 Ch 70.

¹³⁶ *Re Alexand er’s Will Trusts* (1948) 2 All ER 111.

¹³⁷ See *Re Bywater* [1881] 18 Ch 17.

8.5 THE WILL MUST SPEAK FOR ITSELF.

Construction of wills is about ascertaining the testator's intention, as expressed in the will. As general rule, courts must ascertain the testator's intention from the words of the will itself.¹³⁸ In *Perrin v Morgan* [1943] AC 399, Lord Atkin remarked that 'the sole object is to ascertain from the will the testator's intentions'. In *Re Raphael, Public Trustee v Raphael* [1972] EA 522 (Simpson J), the court was asked to construe the phrase 'or of us dying together' contained in the wills of two testators who were found together in a locked room and who had died from bullet wounds. The court found that the deceased died together within the meaning of that phrase in their wills. In the opinion of the court, the phrase 'dying together' did not mean dying precisely at the same instant of time, what the deceased had in mind was death in the same air crash, road accident, ship collision or similar calamity.

It is not about what the testator intended to do when they made their will. Where there is an ambiguity or a deficiency on the face of the will, no extrinsic evidence as to the intentions of the testator may be admitted for example, if the description of a person or property in the will is so vague that there is no person or property to whom it can apply, the bequest will be void for uncertainty.¹³⁹

In *Re Feather* [1945] Ch 343, a testator bequeathed \$2000 to his servant "if still in my employment". The servant was conscripted into the army and was still serving when the testator died. Evidence was adduced that shortly before he died, the testator had affirmed to one of his executors that he wished this legacy to stand and regarded the servant as still in his employment. It was held that such evidence was not admissible to prove that the testator intended the servant to have the legacy whether still in his employment or not.

There are, however, circumstances where extrinsic evidence of the testator's intention is admissible in construing wills. These circumstances are where the armchair rule applies: the words are ambiguous on the face of the will, there is latent ambiguity or any part of the will is meaningless.

In addition to ascertaining the intention of the testator from the will, the court also has to see whether the will can be carried into effect consistently with

138 *Colclough v Cocker* (1917) 7 EALR 120 (Hamilton CJ, Murison CJ and Pickering JJ), *Rustomji Kersasji Khursedji Sidhwa v Dinshwa Ruttonji Mehta and others* (1934) 1 EACA 38 (Abrahams CJ, Lucie-Smith AgCJ and Horne J).

139 See paragraph 25 of the 1st Schedule to the Law of Succession Act.

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the rules of law. In *Wakf Commissioner of the Colony and Protectorate of Kenya v Alimohamed Ali Nahdi Executor of the Will of Aisha binti Shafi, deceased* (1951) 18 EACA 86 (Sir Newnham Worley VP, Lockhart-Smith JA and De Lestang J) the testatrix, a Muslim woman, gave a house by her will to a mosque apart from the land on which it stood. It was held that although Islamic law permits the house and the land, it stands on to be legally in different ownership, the same was inconsistent with the Land Titles Ordinance. The disposition of the house alone was found to be invalid and intestacy resulted. It was further found that the express provisions of the Land Titles Ordinance had ousted the Islamic position on the matter.¹⁴⁰

(a) The armchair rule

In construing the will, the court can put itself in the testator's position at the time he or she made their will, in order to understand the words of the will itself.¹⁴¹ The objective of the exercise is so that the court can make itself aware of the facts that were known to the testator at the time of the execution of the will. The armchair rule is used most commonly to identify the beneficiary or the subject matter of the gift. It is applied by the courts by construing the will without reference to the surrounding circumstances and applying the apparent effect of the will to the surrounding circumstances to ascertain that the will is being construed in accordance with the circumstances, which prevailed at the time when the will was made.

This rule can only be used to confirm the apparent effect of a will or to shed light on vague terms. It cannot be used to alter the effect of the words used in the will if those words are clear and unambiguous. The armchair rule could be used to explain an unclear term.¹⁴²

(b) Ambiguous words

Where words are ambiguous on the face of the will, either direct or circumstantial evidence is admissible to explain the words used. Words are said to be ambiguous on the face of the will where the words used have more than one normal meanings,

¹⁴⁰ See also *Khatijabai v Kassam Sunderji Samji and others* (1955) 22 EACA 301 (Sir Barclay Nihill P, Sir Newnham Worley VP and Sir Hugh Holmes J).

¹⁴¹ See *Boyes v Cook* [1880] 14 ChD 53.

¹⁴² See *Ricketts v Turquand* (1848) 1 HL Case 472). *Kell v Charmer* (1856) 23 Beaver. 195, *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty for the Prevention of Cruelty to Children*.

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as in the terms ‘money’ and ‘my effects’, or where the words used are equally applicable to two or more persons or items of property.

(c) Latent ambiguity

A latent ambiguity occurs where a will is ambiguous not on its face, but only in the light of the surrounding circumstances, for example where a testator gives property to ‘my nephew Onyango’, and the testator had several nephews by that name. This would be a case of many beneficiaries. Another example is where the testator leaves his ‘Volkswagen beetle to my daughter’, and the testator had more than one Volkswagen beetle. This is case of many bequests. This type of ambiguity is also called equivocation. Equivocation not only occurs where the description fits two persons or things exactly, but also where the description is not in all respects totally accurate.¹⁴³ If equivocation cannot be solved with the aid of extrinsic evidence, the gift will fail for uncertainty.

(d) Meaningless provisions

A meaningless provision is one where the court cannot without extrinsic evidence give any meaning to the word or phrase.¹⁴⁴ A provision of a will cannot be said to be meaningless, simply because the provision seems pointless, in the sense that it has no effect. So if a testator was to provide ‘I give nothing to my son’, the clause would not be meaningless and extrinsic evidence would not be admissible to suggest that the testator meant anything other than to make no provision in her will for his son. Extrinsic evidence is not admissible on the basis that a provision is meaningless, in order to complete a blank space in a will, for instance, if a legacy provided ‘I give my son Kamau’. The rationale for the rule is that the purpose of admitting extrinsic evidence is to assist in the interpretation of the will, and arguably, one cannot interpret a blank space. Interpretation should be of a phrase as a whole.

The only exception to this principle is that evidence may be led as to the circumstances in which the testator was situated at the time he made a will, so as to help the court to ascertain the meaning he intended to impute to his chosen wording, for example, it is admissible to adduce evidence as to the state of his property at the time he made the will or at his death in order to ascertain to what property the will refers. If he refers to this house number in Bahati Estate, but

¹⁴³ See *Bennett v Marshall* (1856) 2 K and J 740.

¹⁴⁴ See *Kell v Charnier* (1856) 23 Beaver 195.

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there is clear evidence that the only house he had in Nairobi is number 071 in Bahati Estate, this evidence is admissible.¹⁴⁵

8.6 ASCERTAINING THE SUBJECT MATTER OF GIFTS

Paragraph 3 of the 1st Schedule provides that, as regards property, a will speaks from the date of death unless a contrary intention appears by the will. The only exception to this rule is in cases of revival where a will speaks from the date of revival. A gift of 'all my shares' would be taken to refer to all the shares owned by a testator at the date of his death, rather than being confined to the shares which he owned at the date on which he executed his will. Paragraph 3, however, states that with reference to specific gifts or legacies, the presumption is that the will speaks as at the date of its actual execution.

In *In the Matter of the Estate of Ivo Murray Murton, Deceased* [1938] 18(1) KLR 65 (Sir Joseph Sheridan CJ) where the testator directed the trustees to hold property upon trust for his son until the son attained majority age, it was held that the son took a vested or contingent interest in the property at the testator's death and on attaining majority age, was entitled to a conveyance and transfer of the property to his name.

A contrary intention refers to where the property is described in a very specific way.¹⁴⁶ In deciding whether there is a contrary intention to paragraph 3, difficulties occur where the testator uses terms such as 'now' and 'at present'. Whether such words amount to a contrary intention to the operation of paragraph 3 depends on whether the reference to the present time is construed as an essential part of the description of the subject matter of the specific gift. If it is, this will operate as a contrary intention to paragraph 3.¹⁴⁷ The fact that the testator, after the execution of the will, acquires a different interest in the property that forms the subject matter of a gift does not necessarily prevent the court from finding that paragraph 3 operates to make the will speak from the date of death.¹⁴⁸

The effects of the republication of a will need to be considered in the light of paragraph 3. If paragraph 3 operates to make the will speak as to the property from the date of the testator's death, obviously the republication of the will has no effect. If paragraph 3 does not apply because a contrary intention is in operation,

¹⁴⁵ See *Re Smalley* [1929] 2 Ch 112.

¹⁴⁶ See *Re Gibson* [1866] LR 2 Eq 669, *Re Sikes* [1927] 1 Ch 364.

¹⁴⁷ See *Re Fowler* (1915) 139 LT Jo 183, *Re Willis* [1911] 2 Ch 263, *Hepburn v Skiving* (1858) 32 LTOS 26.

¹⁴⁸ See *Saxton v Saxton* [1879] 13 ChD 359

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the will is generally taken to speak from the date of the codicil.¹⁴⁹

In *In the Matter of the Estate of Ivo Murray Murton, Deceased* [1938] 18(1) KLR 65 (Sir Joseph Sheridan CJ)) it was stated that where property is given to several persons concurrently the question whether these persons take as joint tenants or tenants in common depends on the context of the whole will; they prima facie take as joint tenants.

8.7 ASCERTAINING THE BENEFICIARIES

Paragraph 3 only applies to property. References to people are, as a general rule, construed to refer to people at the date the will was made, unless there is a contrary intention. A gift to ‘my *shamba* boy’ would refer to the testator’s *shamba* boy at the date of the will. For example, a will might have bequeathed a gift to the ‘youngest child of my niece Kanini’, and the youngest child of Kanini alive at the date of the will was Wayua, but Wayua had died by the date of the testator’s death. The consequences of the general rule that a will is construed as referring to people at the date of the will, is that the gift to Kanini’s youngest child will lapse, even if Kanini has other children alive at the time of the testator’s death.¹⁵⁰

It is, however, possible to have a contrary intention to the general rule that, as regards reference to people, a will speaks from the date of the will.¹⁵¹ The situation where no person fulfils the description at the date of the will needs to be distinguished from that where a person fulfils the description at the date of the will but by the date of the testator’s death, that description has become inoperative to them.¹⁵²

A number of difficulties in construction of a will occur in relation to gifts where the relationship is specified. This is particularly so where a gift is made to children or remoter issue. Regarding relationships referred to in the making of gifts generally, there is a presumption that the only persons to take are blood relatives, and not relatives by affinity or marriage. A gift to ‘all my nieces’, does not include any females born to a brother or sister of his wife. In *Rashida Begum v Administrator General and another* (1951) 18 EACA 102 (Sir Barclay Nihill P, Sir Newnham Worley VP and Pearson AgCJ) the clause ‘other relations’ was construed to exclude the testator’s adopted daughter. It was stated that the ordinary meaning of the word ‘relation’ does not include an adopted child. The presumption can be rebutted by evidence of a contrary intention. The position regarding relatives of half-blood

¹⁴⁹ See *Re Reeves* [1928] Ch 351.

¹⁵⁰ See *Re Whorwood* [1887] 34 ChD 446.

¹⁵¹ See *Re Daniels* [1918] 87 LJ Ch 661 and *Radford v Willis* [1871] Ch Application number 7.

¹⁵² See *Radford v Willis* [1871] Ch Application number 7.

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is unclear. It was, however, suggested in *Re Reed* (1888) 57 LJ 790, that there is a presumption that relatives of half- blood are included.

Difficulties often occur over the use of the word 'children' or the term 'issue'. Children includes children *en ventre sa mere*,¹⁵³ and there is a presumption that the term 'children' refers to immediate children. The presumption may be rebutted by evidence that grandchildren and remoter issue were intended.¹⁵⁴ 'Issue' technically means children, grand children and remoter descendants, but in some matters, the courts have construed the term to refer only to the children of the testator.¹⁵⁵

8.8 THE CLASS CLOSING RULES

A class gift is a gift to be divided amongst individuals who fulfil a general description, where the amount that each individual gets depends on the number of beneficiaries falling within the class. A gift of KShs 4 00 000.00 to Mureithi's children is a class gift. How much each child of Mureithi receives depends on the number of children that Mureithi has.

Class gifts could (if it were not for class closing rules) make it difficult for the personal representatives of an estate to make an early distribution of the property to be given to the class. Class closing rules are rules of convenience, designed to allow personal representatives to distribute the estate at the earliest opportunity. The rule frowns on keeping property out of circulation or use for a long period of time. The rationale behind the class-closing rule is similar to the rationale for the perpetuity principle. It is however, often argued that the rules frequently act against the intentions of a testator, as they have the effect of excluding from the class beneficiaries whom the deceased intended to benefit.

The class closing rules originate from the case of *Andrews v Partington* (1791) 3 Bro CC 401. The rules only apply to gifts made by will and operate so that the class closes at the date on which the first member of the class becomes entitled. Precisely how the rules operate depends on the nature of the gift.

There are four types of class gifts.

153 See *Villar v Gibbey* [1907] AC 139.

154 See *Loring v Thomas* (1861) 1 Drew and Sm 497.

155 See *Re Noad* [1951] Ch 553.

*Law of Succession***(a) Immediate class gift**

This usually takes the form of a gift say ‘to the children of Akinyi’. If Akinyi has a child who is living at the testator’s death, the class closes at the testator’s death and includes all the children of Akinyi alive at that date.¹⁵⁶ In *Rustomji Kersasji Khursedji Sidhwa v Dinshaw Ruttonji Mehta and others* (1934) 1 EACA 38 (Abrahams CJ, Lucie-Smith AgCJ and Horne J) a direction in the will that a share be paid to ‘to Rustomji’s children during their lifetime’ was construed as meaning both those children who were living at the testator’s death and those born subsequent to that event.

In *In the Matter of the Estate of WJ Bellasis, deceased* (1919–21) 8 EALR 142 (Barth CJ), a gift to husband and wife ‘and their family’ was construed as giving an immediate life interest in the gift to the husband and wife with a remainder to any children of the marriage born before or after the death of the testator.

(b) Deferred class gift

This would take the form of a gift say ‘to Kwamboka for life with remainder to the children of Nyakenyanya’. If Nyakenyanya has no children at the testator’s death, the class remains open until Nyakenyanya dies and includes all children subsequently born to Nyakenyanya. If Nyakenyanya has a child before the death of Kwamboka, the class closes at Kwamboka’s death and includes all the children of Nyakenyanya who are alive at that date. It, however, will close at the testator’s death if Kwamboka predeceases the testator. If Nyakenyanya has no children at Kwamboka’s death or the testator’s death, the class remains open until Nyakenyanya dies.¹⁵⁷

(c) Contingent class gift

This would be a gift say ‘to the children of Kimathi who attain 21 years’. If Kimathi has a child who reaches 21 years before the testator’s death, the class closes at the testator’s death and includes all children of Kimathi alive at that date who subsequently reach 21 years. If Kimathi has no child who has reached 21 years by the date of the testator’s death, then the class only closes when the first child of Kimathi reaches 21 years and includes all children alive at that date.

¹⁵⁶ See *In the Matter of the Estate of WJ Bellasis, deceased* (1919–21) 8 EALR 142 (Barth J).

¹⁵⁷ *Ibid.* See also *Latif Suleman Mohamed v K J Pand ya and others* [1963] EA 416 (Sir Ronald Sinclair P, Sir Trevor Gould AVP and Newbold JA).

(d) Contingent and deferred class gift

This would be both a contingent and a deferred gift. It could take the form of a gift; say 'to Mulusa for life with remainder to the children of Luvaga who attain 21 years'. If Luvaga has a child who has reached 21 years by the date of Mulusa's death, or the testator's death if this is later, the class closes at this date. The class will then include all children alive at the date the first child reaches 21 years who subsequently reach 21 years. If no child of Luvaga has reached 21 years by the date of Mulusa's death or that of the testator if later, then the class remains open until the first child reaches 21 years and all children who are alive at that date and who subsequently attain the age of 21 years.

PART THREE
INTESTACY

CHAPTER NINE

INTESTATE SUCCESSION

9.1 INTRODUCTION

Intestacy occurs where a person dies without having made a will, the person's attempt to die testate fails upon the invalidation of his will or the person revokes his will and subsequently dies without reviving his earlier revoked will or without having made another will.¹⁵⁸ The rules of intestacy determine the question who is entitled to the property of the estate of an intestate. Intestacy may be total or partial. It is total where the intestate has left no valid will whatsoever. It is partial where: a person fails to include all his property in his otherwise valid will or part of the will is declared invalid or a part of the will is revoked or a person acquires property subsequent to the making of the will (and the will is not ambulatory). The property not covered by the will is governed by the intestacy provisions or is subject to intestate succession.

Provisions relating to intestacy are contained in Part V that is sections 32 to 42 of the Law of Succession Act.¹⁵⁹ The intestacy rules only benefit people who also have a direct blood link with the intestate, that is, apart from spouses. It does not confer benefit on such categories as unmarried partners and parents-in-law. To benefit such persons the deceased has to make a will. In the absence of blood relatives, the estate passes to the state *bona vacantia* (for lack of a heir) under the doctrine of escheat. Any one claiming to be a relative or a person beneficially entitled who considers that the rules of intestacy do not make reasonable provision for them may make a claim under the family provisions in section 26 of the Law of Succession Act, and the rules of intestacy may be varied by the court to make adequate provision for that person. The rules of intestacy only apply to property that is capable of being disposed of by a will. They do not apply to joint property which passes by survivorship or to nominations, life policies written in trust or the subject of a *donatio mortis causa*.

The Law of Succession Act makes provision for both monogamous and polygamous situations and the nature of devolution of property upon intestacy

¹⁵⁸ See section 34 of the Law of Succession Act.

¹⁵⁹ See Ang'awa J's analysis of Part V in *In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased)* Nairobi High Court succession cause number 2678 of 2001.

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depends on whether the deceased was polygamous or monogamous. Sections 35 and 36 deal with the monogamous situations, section 40 covers the polygamous situation, while sections 37 to 39 are general provisions applying to both.

Part V of the Act only applies to the estate of a person who dies after the Act came into force (section 2(1) of the Law of Succession Act). Under section 2(2), the law applying to the estate of a person who died before the Act became operational is the law that was in force at the time.¹⁶⁰ The application of Part V of the Act by Koome J in *In the Matter of the Estate of Gathererie Muturi (deceased)* Nairobi High Court succession cause number 2170 of 1999, to the estate of a person who died in 1967 was wrongful. So was the decision in *In the Matter of the Estate of Grace Nguhi Michobo (deceased)* Nairobi High Court succession cause number 1978 of 2000 (Koome J), where the deceased passed away in April 1981, that is before the Act came into force on 1 July 1981, yet Part V of the Act was applied to the estate. So was the decision of the Court of Appeal in *Cleopas Simiyu and another v Maurice Barasa Watambala and others* Nairobi Court of Appeal civil appeal number 34 of 1984 (Hancox JA, Nyarangi and Platt AgJJA), where section 40 of Part III of the Act was applied to the estate of a person who died in 1970.

The intestacy provisions do not apply at all where the deceased died testate, even if the will is on the face of it unfair to the survivors. The approach adopted by Ondo J in *In the Matter of the Estate of Benson Ndirangu Mathenge (deceased)* Nakuru High Court succession cause number 231 of 1998, cannot be correct. The deceased had died testate but the court held that there was an element of unfairness in the will, disregarded it and dealt with the estate as if the deceased had died intestate. With respect, if a survivor feels that the contents of a will are unfair to him he should resort to section 26 of the Act, otherwise the court has no power to disregard a testamentary instrument unless the same is invalidated in the first instance.

9.2 EXEMPTION OF CERTAIN PROPERTY FROM THE INTESTACY PROVISIONS

Section 32 of the Act empowers the Minister to disapply by a notice in the official gazette, agricultural land and crops on such land or livestock in some areas from Part V of the Act. The Minister (Attorney General) in 1981 exempted property¹⁶¹ in the predominantly pastoral areas of Marsabit, Narok, Tana River, Samburu, West Pokot, Turkana, Isiolo, Mandera, Wajir, Garissa, Lamu and Kajiado from the

¹⁶⁰ See *In the Matter of the Estate of Kiiru Muhia 'A' (deceased)* Nairobi High Court succession cause number 2487 of 1996 (Rawal J).

¹⁶¹ By Legal Notice number 94 of 1981.

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intestacy provisions pursuant to section 32 of the Law of Succession Act. Section 33 of the Act applies African customary law to the property excluded under section 32. The administration of the estates exempted from Part V of the Law of Succession Act falls under African customary law. Section 44(1) of the Law of Succession Act disapplies Part VII of the Act, which deals with administration of estates, to the types of property mentioned in section 32.¹⁶² The Law of Succession Act contemplates a capitalist market economy of individual ownership of property under which it is possible to determine the appropriate share of each individual. In the pre-dominantly pastoralist areas individual ownership of property is not recognized and succession to property is better left to the customary law of the people concerned. The majority of the inhabitants of those areas are unlikely to accept or understand the provisions of the Act, which in any event may be incompatible with their way of life.¹⁶³

Sections 32 and 33 do not provide a blanket exemption covering all African intestates. However, the Court of Appeal has interpreted sections 32 and 33 to mean that all intestate estates of Africans are exempt from the intestacy provisions of the Law of Succession Act. In *Mwathi v Mwathi and another* [1995-1998] 1 EA 229 (Gicheru, Kwach and Shah JJA), the deceased died in 1987 and was unmarried. A brother (the appellant) and two sisters (the respondents) survived him. He hailed from Kiambu District. His will was declared invalid by the High Court, which ordered the estate to be shared equally between the appellant and the respondents in terms of Part V of the Act. The appellant aggrieved by the order appealed to the Court of Appeal, which upheld the High Court decision with respect to the invalidity of the will and confirmed that the appellant had died intestate. It, however, differed with the High Court by holding that the applicable law was customary law and not the intestacy provisions in Part V of the Act. A portion of the Court of Appeal judgment asserts.

The intestate succession of a deceased Kikuyu is governed by the Kikuyu Customary Law. The asset involved is a piece of land and the matter must therefore be determined by Kikuyu Customary Law relating to land inheritance.

There is no basis at all in law for the Court of Appeal's decision in *Mwathi v Mwathi and another*. The deceased died after the Act came into force and customary law was not applicable since it was excluded from operation by section 2(1) of the Law of Succession Act, unless allowed by the minister through sections 32 and 33 of the Law of Succession Act. Besides, the property in question was situate

¹⁶² See Chapter 3 sections 3.3 and 3.4(c) here above.

¹⁶³ See the Commission's report at 17.

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in Kiambu district, which is not one of the districts specified in Legal Notice 94 of 1981. It is regrettable that such an erroneous decision came from the highest court in the land. It is binding on the High Court and the subordinate courts: it has not been overruled to date.

In another matter, *John Kinuthia Githinji v Githua Kiarie and others* (civil appeal number 99 of 1988), Gachuhi JA, while discussing the Law of Succession Act, similarly went on a wrong tangent and remarked *obiter dicta*:

The other aspect of the claims is under the provision of the law where a person dies without making either a written or oral will. This will be in the case of intestacy. The distribution on intestacy shall be governed by the law or custom applicable to the deceased's community or tribe as the case may be.

The High Court has been consistent in maintaining the correct interpretation of sections 32 and 33 of the Act. The interpretation given by Bosire J (as he then was) in *Mwathi v Mwathi* was correct. Githinji J also correctly interpreted the provisions in *the Matter of Estate of Kihara Githambaa (Deceased)* High Court probate and administration number 364 of 1989.¹⁶⁴ Two wives and seventeen children survived the deceased. The first wife had four sons and four daughters while the second wife had two sons and seven daughters. Of the seven daughters of the second wife, four were married, three were unmarried. Of the three unmarried one had three children, one child and the other did not have children. Two of the first wife's sons claimed that the deceased had made an oral will recorded in a book that the deceased kept. The effect of the alleged oral will was to give the prime land to the six sons of the deceased equally and to direct how the land was to be subdivided. The distribution of the deceased's other pieces of land would be to the six sons equally. The effect was to deny the surviving widow and her unmarried daughters a share of the deceased's pieces of land named in the alleged oral will. The court found that there was a written will that was invalid for lack of attestation and execution. It was ordered that the estate be distributed in accordance with the law of intestacy. The sons sought to rely on section 33 of the Act arguing that the estate ought to be distributed in accordance with the Kikuyu Customary Law. Githinji J said of section 33:

Section 33 refers to the distribution of properties specified in section 32 of the Law of Succession Act situated in the areas as the minister may by notice in the Gazette specify. There is no evidence that the minister by the Gazette Notice has specified that

164 See also *In the Matter of the Estate of Mwaura Gathari (deceased)* Nairobi High Court succession cause number 1678 of 1999 (Rawal J), *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996 (Kamau J) and *In the Matter of the Estate of Benson Ndirangu Mathenge (deceased)* Nakuru High Court succession cause number 231 of 1998 (Ondeyo J)

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the lands located in the area the estate is situated should be distributed as provided under section 33 of the Law of Succession Act. In any case, the deceased died after the Law of Succession Act came into operation and the law applicable by virtue of section 2(1) of the Law of Succession Act is the Law of Succession Act (Part V).

The court then proceeded to apply Part V of the Act to the estate, providing for the sons and unmarried daughters of the deceased.¹⁶⁵

The correct position is that in case of intestacy the provisions of Part V of the Law of Succession Act apply as long as the deceased died after the commencement of the Act and no exemption has been granted under section 32 of the Act. In *In the Matter of the Estate of Benson Kagunda Ngururi (deceased)* Nakuru High Court succession cause number 341 of 1993 (Ondeyo J), the property was situated in Elburgon in Nakuru district. The issue, which fell for determination, was whether customary law applied to the estate of the deceased intestate. The court found that the deceased had died after the Act came into force, which meant that the Act was the applicable law in the circumstances. It was further held that property in Nakuru district was not exempt from the intestacy provisions, as Nakuru was not included among the districts in Legal Notice number 94 of 1981. In *In the Matter of the Estate of Elijah Mbondo Nthekeha (deceased)* Nairobi High Court succession cause number 193 of 1997, Koome J stated that the only areas excluded from the application of the intestacy provisions are those specified in a gazette notice in accordance with section 32 of the Act. In the instant case, the court found that the area the subject of the dispute was not excluded from the application of Part V of the Act.

The Court of Appeal's decision in *Rono v Rono and another* [2005] 1 EA 363 (Omolo, O'Kubasu and Waki JJA), is the first by that court where sections 32 and 33 of the Act were correctly applied and interpreted. The land in dispute was situated in Uasin Gishu District in the Rift Valley province. The court found that section 2(1) Law of Succession Act excludes the application of African customary law unless the Act makes provision for it. It does so under sections 32 and 33, but the exclusion is limited to property exempted from Part V of the Act by virtue of

¹⁶⁵ The application of Part V of the Law of Succession Act by the court in the matter was only partial so long as the court provided for unmarried daughters only. What the court did was to apply the Kikuyu custom which allows unmarried daughters to have a life interest in a portion of the estate rather than the provisions of the Act. Part V anticipates equal distribution among all the children including married daughters. The approach adopted by Githinji J is the same as that taken by the Court of Appeal in providing for an unmarried daughter under customary law in *Kanyi v Muthiora* [1984] KLR 712 (Kneller JA Chesoni and Nyarangi AgJJA) to the exclusion of married daughters.

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section 32. Legal Notice number 94 of 1981 did not exclude property in Uasin Gishu District and therefore Keiyo customary law could not apply to the intestate estate of a resident of Uasin Gishu District.

Some decisions from the High Court give a wrong interpretation and application of sections 32 and 33 of the Law of Succession Act. In *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998, Ondeyo J correctly stated that under section 33 the law applicable to the distribution on intestacy of the properties specified in section 32 is the law or custom applicable to the deceased's community. She, however, did not consider whether the minister had gazetted, as required by section 32, property in Thika district as being subject to sections 32 and 33 of the Act. The court fell into error when it assumed that 'agricultural land' in section 32 applied to all agricultural land in the country, instead of being limited to the agricultural land in the areas specified in Legal Notice number 94 of 1981. She said in one part of her decision:

If it turns out to be that the subject land is agricultural land, then the personal law of the community of the deceased person would apply to it to determine who inherits it; in which case, the applicants, who are said to be the deceased persons married sisters, will have to prove that under the personal or customary law of their community, they would be entitled to inherit their dead brothers piece of land.

With respect, the finding was incorrect. Under section 33 customary laws, in the circumstances, applies only to such land as has been exempted from the provisions of Part V of the Act. Property in Thika district has not been so exempted.

9.3 RIGHTS OF A SURVIVING SPOUSE

For the purpose of the rules of intestacy, a divorced spouse has no rights to the intestate's estate; a judicially separated spouse is, however, entitled. This applies to all legal marriages whether contracted under statute or customary law. Customary law marriages include the woman-to-woman marriage arrangements.¹⁶⁶ Under section, 3(1) of the Law of Succession Act, a separated wife is considered a wife for succession purposes. The divorced spouse may make a claim under the family provisions in section 26 of the Law of Succession Act for reasonable provision

¹⁶⁶ See *In Re estate of Ng'etich* [2003] KLR 84 (Nambuye J) and *In the Matter of the Estate of Tabutany Chero-ono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001 (Kimaru J) and *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)* Nairobi High Court succession cause number 1781 of 2001 (Koome J).

from the estate. The definition in 29 of a dependant for the purpose of section 26 includes a former wife or former wives. It also covers the wife recognised as such and protected under section 3(5) of the Law of Succession Act.

A spouse's exact entitlement under the rules of intestacy depends on the closeness of any other surviving relatives of the intestate. One of two situations applies: the intestate leaves a spouse and issue, or the intestate leaves a spouse and parent(s) or brother(s) and sister(s) of whole blood.

These provisions apply equally to widows and widowers since the children ultimately get the property in either case. Where the surviving spouse is a widow, she will be considered the most important person as far as inheritance rights are concerned and two reasons are given for this. One, the property available for distribution would have been partly acquired by the deceased with her efforts. Two, she is in most cases the person who needs the property most. The paramount purpose of the rules of intestacy is to hand over the deceased's estate to the person who is likely to use it in the best interest of the deceased's heirs and dependants. This person is usually the mother of the deceased's children.

(a) Intestate leaves spouse and child or children

This is dealt with in sections 35 and 37 of the Law of Succession Act.¹⁶⁷ In such situations, the surviving spouse is entitled to the personal and household effects of the deceased absolutely and a life interest on the whole of the residue of the net intestate estate. Personal and household effects are defined in section 3(1) of the Act to mean clothing, articles of personal use, furniture, utensils, appliances, pictures, ornaments, food, drinks and all other articles of household use and decoration normally associated with a matrimonial home, but it does not include anything connected with the business or profession of the deceased. A surviving spouse includes a wife married under the customary law arrangement of woman-to-woman marriage, as illustrated by the cases of *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court Probate and Administration 157 of 2001 (Kimaru J), *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)* Nairobi High Court succession cause number 1781 (Koome J) and *In re estate of Ng'etich* [2003] KLR 84 (Nambuye J).

Under this provision, the surviving spouse only gets the chattels absolutely,

167 See *In the Matter of the Estate of Aggrey Makanga Wamira* Mombasa High Court succession cause number 89 of 1996 (Waki J).

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and is only entitled to a life interest on the rest. The ultimate destination of the property, the subject of the life interest, is to the children in the event of the demise of the surviving spouse.¹⁶⁸ The life interest operates as a safeguard for the children in cases where the surviving spouse is likely to waste the property. The surviving spouse enjoys the property in their lifetime and holds the same in trust for the children and others. In the case of *In the Matter of the Estate of Anjuri (Deceased)* High Court Probate and Administration 357 of 1997, the deceased was survived by the wife and three children. The widow applied for a grant of letters of administration of his intestate estate. Several persons who claimed to be beneficiaries opposed her application. Among them were the deceased's brothers, sisters, mother and alleged daughter. The court found that except for the mother, the rest had not proved dependency and dismissed their opposition to the application. In finding for the widow, the court observed that under intestacy, the estate would be administered under section 35(1) of the Act and so the surviving spouse would be entitled to personal and household effects of the deceased absolutely and a life interest in the whole of the net intestate estate. The court took into account, *inter alia*, the fact that the deceased and the widow acquired the assets forming the estate jointly during marriage and in any event, she was the owner of half of all the properties as of right.¹⁶⁹

A proviso to section 35(1) states that if the surviving spouse is a widow the life interest determines upon her remarriage. In *In the Matter of the Estate of Charles Muigai Ndung'u (deceased)* of Karinde Kiambu District Nairobi High Court Probate and Administration 2398 of 2002 (Koome J), the woman who had been cohabiting with the deceased was held by the court to be a wife arising from a prolonged cohabitation. The court, however, found that she was not entitled to a life interest as she remarried after the demise of the deceased, but her child with the deceased was found to be the sole heir to the estate of the deceased.

Section 37 allows the surviving spouse during life interest, subject to the consent of all the co-trustees and all the adult children or the consent of the court, to sell any of the property the subject of the life interest for their own maintenance. The widow may of necessity be compelled to sell some property for her own maintenance and that of her children. Where the subject property is immovable,

168 See section 35(5) and *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996 (Kamau J).

169 *In the Matter of the Estate of the late, Wanjilia Njuguna (deceased)* Nairobi High Court civil suit number 533 of 2002 (Ang'awa J) and *In the Matter of the Estate of Grace Nguhi Macho (deceased)* Nairobi High Court succession cause number 1978 of 2002 (Koome J).

the consent of the court is mandatory in view of the importance attached to family land in Kenya.

A life interest only entitles the surviving spouse to the use and utility of the property, the subject of the life interest. The surviving spouse holds the property during their life interest as a trustee and stands in a fiduciary position in relation to the property. The property does not pass to the surviving spouse absolutely. In *In the Matter of the Estate of Basen Chepkwony (deceased)* Nairobi High Court succession cause number 842 of 1991, Koome J held that where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she only enjoys a life interest and holds the same in trust for the children and other heirs.

The division of property of an intestate who dies leaving a spouse and children should be in accordance with section 35. Sections 26, 27 and 28 of the Law of Succession Act are not relevant for the purpose of Part V of the Act. Sections 26, 27 and 28 are only relevant for applications brought under section 26 of the Act. The provisions of Part V do not come into play at all in applications brought under section 26 of the Act for reasonable provision. In the circumstances, the decision of Kimaru J in *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001 is not supported by the law. In that case, what was before the court was an application brought by the customary law wife of the deceased (in a woman-to-woman arrangement) for the revocation of a grant made to the daughters of the deceased (by her deceased husband). In the end, the court found that the widow and daughters were all dependants. Thereafter, the court expressed itself as guided by sections 26, 27 and 28 in making the final orders on the distribution of the estate. This was not proper, as there was no application before the court brought under section 26 for reasonable provision out of the estate. The court fell into error when it held that the parties were dependants, instead of survivors and heirs of the deceased.¹⁷⁰ If the court had come to the conclusion that the widow and daughters were heirs and survivors, it would have held that the property fell for distribution in accordance with section 35 in Part V of the Act. Interestingly, the court did not consider Part V at all.

170 See *In the Matter of the Estate of Elijah Mbondo Nthekeetha (deceased)* Nairobi High Court succession cause number 193 of 1997 (Koome J).

(b) Intestate leaving spouse and no children of their own

Under section 36 where the intestate has left one surviving spouse but no child or children, the surviving spouse is entitled out of the net intestate estate to: the personal and household effects of the deceased absolutely, the first KShs 10 000.00 out of the residue of the net intestate estate or 20% of the residue of the net intestate whichever is greater, and a life interest in the whole of the remainder. The life interest is lost upon the re-marriage of surviving spouse. Section 36(2) gives the minister discretion to alter or vary the amount of KShs 10 000.00 in section 36(1) (b). This discretion has not been exercised so far, although the figure of KShs 10 000.00 was fixed in 1972. The variation of the amount of KShs 10 000.00 is long overdue given the prevailing economic circumstances.

The provision is silent on what becomes of the rest of the property, that is the remaining 80%, and the final destination of the property the subject of the life interest in the event of the termination of the life interest. The Court of Appeal has held in *Willingstone Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA) that the property, that is, the remaining 80% and the final destination of the property the subject of the life interest, devolves upon the other surviving relatives of the deceased as set out in section 39 of the Law of Succession Act.

9.4 RIGHTS OF CHILDREN

(a) Surviving spouse holds the estate as trustee for the children

The children of the deceased are the next category of next of kin of an intestate to benefit from an estate after any surviving spouse. Where the intestate leaves a surviving spouse, the children are not entitled absolutely to property, but the surviving spouse holds the estate in trust for the children. Section 35(5) deals with what should happen in the event of the death of the surviving spouse or the re-marriage of the widow. The whole residue of the net intestate estate, that is the portion subject to the life interest, devolves upon the surviving child, or if more than one, to the children. In the latter case it should be divided equally among the children taking into consideration any property held in trust for a child or any previous benefits or any power of appointment or any award of the court made under section 35(3) and (4). In *In the Matter of the Estate of Johana Olishorua Leseya (deceased)* Nairobi High Court succession cause number 3084 of 2002, Aluoch J

stated that section 35, read together with section 58(1) of the Act where there are minor children, means that the surviving spouse holds the property as a trustee as the surviving spouse only enjoys a life interest in the net intestate estate.

(b) Surviving spouse's power of appointment

Under section 35(2), a surviving spouse has the power of appointment, that is the power to dispose of the capital of the intestate estate by way of gift taking effect immediately among the surviving child or children. The power cannot be exercised by way of will or take effect at a future date. Section 35(3) allows a child aggrieved by the exercise of the power of appointment to move the court for appropriate orders.

(c) Equal division of the property among the children

It would appear that the division of the property among the children should be in equal shares.¹⁷¹ In *In the Matter of the Estate of the Late Wanjihia Njuguna (deceased)* Nairobi High Court succession cause number 533 of 2002, Ang'awa J postponed the confirmation of grant to allow the parties to disclose daughters, if any, in compliance with section 35. In *In the Matter of the Estate of Kinyuru Karanja (deceased)*, Waweru J held that a proposal by a woman to share out the estate of her deceased husband among their sons in a manner which would have resulted in one of them getting a larger share was wrong. He directed that the estate be divided equally between the sons.¹⁷² Omolo JA in *Rono v Rono and another* (2005) 1 EA 363 expressed the opinion that section 40 does not provide that each child must receive the same or equal portion. In his opinion, this would work an injustice, particularly in the case of a young child who is still to be maintained, educated and generally seen through life.

(d) Where deceased is survived by children but no spouse

Where the intestate has left a surviving child or children but no spouse section 38 applies.¹⁷³ The net intestate estate devolves upon the child or children. In *In the Matter of the Estate of Dorcas Njeri Githuku (deceased)* Nairobi High Court succession

¹⁷¹ See section 35(5) of the Law of Succession Act.

¹⁷² What is disturbing about this decision is that although there were two daughters they were not provided for, and it is not clear whether they had disclaimed their share.

¹⁷³ See *In the Matter of the Estate of Fatuma binti Mwanzi Umri (deceased)* Mombasa High Court Probate and Administration 21 of 1994.

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cause number 1968 of 2002 (Koome J), the deceased was survived by one child, a married daughter, and it was held that she was her sole survivor and therefore the person entitled to the estate under section 38. It was held that the stepchildren of the deceased did not have a superior claim to that of the deceased's own married daughter. Where the deceased has more than one child the estate is divided equally among them.¹⁷⁴ In *In the Matter of the Estate of Mary Wanjiru Thairu (deceased)* Nairobi High Court succession cause number 1403 of 2002 (Ang'awa J), a son and six daughters survived a single parent. The son attempted to inherit the entire estate. His application was rejected. In *In the Matter of the Estate of Ellah Warue Nthawa (deceased)* Nairobi High Court succession cause number 971 of 2001 (Ang'awa J), two sons and a daughter survived the deceased. It was proposed that the majority of the properties be divided equally between the two sons, with the female survivor getting a small portion. The money in the bank was to be shared by the sons equally to the exclusion of the daughter. The court rejected the proposal on the basis that section 38 envisages the equal division of the estate amongst all the children.

In *In the Matter of the Estate of George Karegwa Gitau (deceased)* Nairobi High Court succession cause number 959 of 2001 (Ang'awa J), where the deceased was survived by two sons and two daughters, the court accepted the proposal to have the property shared equally among the four children as being in keeping with section 38 of the Law of Succession Act. In *In the Matter of the Estate of Wilson Wamagata (deceased)* Nairobi High Court succession cause number 261 of 1998 (Waweru J), the deceased was survived by six children and one of them sought to get a larger share of the estate on the grounds that he had helped the deceased in paying off a debt. The court held that it was bound by section 38, which required that the estate be divided equally among all the six children. In *In the Matter of the Estate of Loice Njeri Ngige* Eldoret High Court probate and administration number 113 of 1994 (Nambuye J), the deceased, who was single, was survived by a minor daughter and it was held that she was entitled to the estate.

Section 38 of the Law of Succession Act applies to the estates of persons dying after the Act came into force. For those who died before 1 July 1981, the applicable law is the law that was applying at the time, that is to say the African customary law of intestate succession. It would be wrong in the circumstances for the court to apply section 38 in distributing the estate of a person who died

¹⁷⁴ See also *In the Matter of the Estate of Patrick Mungai Kugega (deceased)* Nairobi High Court succession cause number 1374 of 2000 (Koome J).

in 1967 as Koome J did in *In the Matter of the Estate of Gathererie Muturi (deceased)* Nairobi High Court succession cause number 2170 of 1999.

(e) Statutory trust in favour of minor children

The share of the estate to which children, who are below age, are entitled is held on statutory trust, the terms of which are set out in section 41 of the Act.¹⁷⁵ Section 41 provides that the share of the children is to be divided equally between the children of the intestate living or *en ventre sa mere*, subject to such children fulfilling the contingency of attaining the age of eighteen years or, in case of female children, marrying under eighteen. In *In the Matter of the Estate of Joseph Kimemia Gichuhi* Nairobi High Court succession cause number 1072 of 2002, Koome J stated that section 41 of the Act requires that the property devolving upon the children should be held in trust for the children until they attain the age of eighteen. In *In the Matter of the Estate of Loice Njeri Ngige Eldoret* High Court probate and administration number 113 of 1994 (Nambuye J), the court directed the administrators to open bank accounts on account of the minor survivor. It was further directed that the administrators' trusteeship was to terminate upon the minor survivor coming of age when all the property held in trust for her should revert to her.

(f) Rights of grand children

The provisions on children, sections 35 and 38 of the Act, are silent on the fate of surviving grandchildren, whose parents have pre-deceased the intestate. The rule of substitution of a grand child for his or her parent in all cases of intestacy where the parent dies before the intestate¹⁷⁶ is known as the principle of representation. The law on this is section 41. If a child of the intestate has predeceased the intestate or dies before attaining eighteen years, then that child's issue alive or *en ventre sa mere* at the date of the intestate's death will take in equal shares *per stirpes* contingent on attaining the age of majority or, if female, marrying under that age. *Per stirpes* means that the issue of the testator's grand child or grand children taking child of the intestate take between them the share their parent would have taken had the parent been alive at the intestate's death and, either before or after the intestate's death, attained eighteen years or, if female, married under that age.

175 See *In the Matter of the Estate of Charles Muigai Ndung'u (deceased)* of Karinde Kiambu District Nairobi High Court probate and administration number 2398 of 2002).

176 Republic of Kenya, Report of the Commission on the Law of Succession, Government Printer, Nairobi, 1968, at 43.

(g) Bringing property to the hotchpot

Section 42 requires that in determining the final share of a child, grand children or house account should be taken of a previous benefit that is: property settled or given during lifetime or by will, and any property appointed or awarded to any child or grandchild under sections 26 and 35 of the Law of Succession Act. This is called bringing the property to the hotchpots.¹⁷⁷

(h) Non-discrimination of daughters

Reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters. In *In the Matter of the Estate of Dorcas Njeri Githuku (deceased)* Nairobi High Court succession cause number 1968 of 2002, Koome J stated that the definition of a child is without reference to the child's gender or marital status. In *Peter Kiiru Gathemba and others v Margaret Wanjiku and another* Nairobi High Court civil appeal number 167 of 1994, Amin J stated that the Law of Succession Act does not make a distinction between married and unmarried children in matters of intestate succession. In *In the Matter of the Estate of Mariko Marumbi Kiuru (deceased)* Nairobi High Court succession cause number 2011 of 1997, Ang'awa J stated that the Law of Succession Act takes into account women in the distribution of the estate. She stressed that unless there is a disclaimer by the daughters, they, whether married or not, will be entitled to the estate. Rawal J in *In the Matter of the Estate of Mwaura Gathari (deceased)* Nairobi High Court succession cause number 1678 of 1999 pointed out that the Act does not discriminate between male and female children.¹⁷⁸ Waki JA stated similarly in *Rono v Rono and another* [2005] 1 EA 363, where he said that there is no discrimination of the children on account of their sex.

Unfortunately, some of the male members of the High Court bench still apply customary law in determining questions of distribution of estates as between male and female children, in spite of the very clear provisions in sections 35 and

177 See *Teresia Wambui Maruhi v Onesmus Maina Maruhi and another* Nairobi High Court civil appeal number 3 of 2002 (Kamau J).

178 See also *Mary Rono v Jane Rono and another* Eldoret Court of Appeal civil appeal number 66 of 2002 (Omolo, O'Kubasu and Waki JJA), *In the Matter of the Estate of Benson Kagunda Ngururi (deceased)* Nakuru High Court succession cause number 341 of 1993 (Ondeyo J), *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996 (Kamau J), *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998 (Ondeyo J) and *In the Matter of the Estate of Elijah Mbondo Ntheketha (deceased)* Nairobi High Court succession cause number 193 of 1997 (Koome J).

38 of the Act. In *In the Matter of the Estate of Mutio Ikonyo (deceased)* Machakos High Court probate and administration number 203 of 1996, the deceased had died in 1988, and the court held that a married daughter of the deceased was not entitled to a share of the estate. According to Mwera J the married daughter, being a Kamba, ought to have known that under Kamba customary law only unmarried daughters or those divorced (and dowry returned) can claim to inherit. With respect, customary law is of no application at all its application having been ousted by sections 2(1), 35 and 38 of the Act. In *In the Matter of the Estate of Kamau Mwangi (deceased)* Nairobi High Court succession cause number 1579 of 1994, Osiemo J implied that it is a matter of generosity for a married daughter to get a share of her deceased father's estate.

(i) Rights of Illegitimate children

The children of a male deceased person include his children born out of wedlock to women who were not married to him. The fact that the mother was not married to the deceased is no bar to the child inheriting his or her deceased father in intestacy.¹⁷⁹ Marriage is not a factor in determining a child's right to inherit his father. Mwera J in *In the Matter of the Estate of Jonathan Mutua Misi (deceased)* Machakos High Court probate and administration number 95 of 1995, held that a child of an adulterous union is entitled to inherit his father, as he is his progeny and cannot be expected to prove his mother's marriage to his father. The Court of Appeal in *John Ndung'u Mubea v Milka Nyambura Mubea* Nairobi Court of Appeal civil appeal number 76 of 1990 (Gicheru, Kwach and Tunoi JJA) held that the children of an adulterous union are children for the purposes of succession.

(j) Proof of paternity

Issues of paternity often arise on the question of whether a particular child is the progeny of the deceased and therefore an heir in intestacy. Section 118 of the Evidence Act is a guide in determining the matter. It provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, should be conclusive proof that he was the legitimate son of the man, unless it can be shown that the parties to the marriage had no access to each other at any time when he would have been begotten.¹⁸⁰ Section 3 of the Law of Succession Act is instructive where the issue of paternity

179 See *In Matheka and another v Matheka* Nairobi [2005] 1 EA 251 (Omolo, O'Kubasu and Onyango Otieno JJA), *In the Matter of the Estate of Stephen Wanyoike Muhia (deceased)* Nairobi High Court civil appeal number 6 of 2002 (Koome J).

180 See *In the Matter of the Estate of Elijah Mbondo Nthekeetha (deceased)* Nairobi High Court succession cause number 193 of 1997 (Koome J).

cannot be proved, where there is evidence that the deceased took in the child and accepted him as his own, he will be treated as a child for the purpose of succession. The most effective proof of paternity remains the DNA test.

9.5 THE RIGHTS OF OTHER RELATIVES

(a) Where deceased is survived by spouse and issue

The effect of section 35 of the Law of Succession Act is that if the intestate is survived by a spouse and child or children then no other relative of the intestate will benefit.¹⁸¹ Other relatives can only access the estate through section 26 of the Act for reasonable provision if they can show that they were dependent on the intestate immediately prior to his death. In *In the Matter of the Estate of Fatuma binti Mwanzi Umri (deceased)* Nairobi High Court probate and administration number 21 of 1994, the deceased was survived by her son and a brother. Kasanga Mulwa J held that the son was the sole heir in intestacy; the brother could only access the estate through section 26 of the Act.

(b) Where deceased is survived by spouse, but without children

If a spouse survives the intestate but there are no children, section 36 of the Act applies. The surviving spouse takes a portion of the estate absolutely, that is: the personal and household goods absolutely, the first KShs 10 000.00 out of the residue of the net intestate estate or 20% of the residue whichever is greater and a life interest of the remainder, which determines following the remarriage of the widow. According to the Court of Appeal in *Willingstone Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA), upon the determination of the life interest, the property involved devolves upon the kindred of the intestate as set out in section 39 of the Act, and where there is no such kindred the net estate devolves upon the state and is paid into the Consolidated Fund.

(c) Where deceased is survived by neither spouse nor children

Where the intestate leaves no surviving spouse or children section 39 applies. The net intestate estate should devolve upon the kindred of the intestate, that is blood relatives, in the following order: father, or if dead; mother, or if dead; brothers

¹⁸¹ See *In the Matter of the Estate of Isaac Kireu Njuguna (deceased)* Nairobi High Court succession cause number 1064 of 1994 (Aluoch J).

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and sisters and any child or children of the deceased's brothers and sisters, in the equal shares, or if none; half-brothers and half sisters and any child or children of the deceased's half brothers and half sisters in equal shares, or if none; the relatives who are in the nearest degree of consanguinity (blood relation) up to and including the sixth degree in equal shares; and if there are no such relatives the net intestate estate devolves upon the state *bona vacantia*. The estate is liquidated and the proceeds paid into the Consolidated Fund.

In the Matter of the Estate of Henry Ng'ang'a Wangendo (deceased) Nairobi High Court succession cause number 528 of 2000 (Ang'awa J), the deceased was survived by his mother only. The court held that the law allows and specifically states that where the deceased has no spouse or children the next in line by way of consanguinity are the parents, and the mother was therefore the sole survivor and heir of the deceased. In *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998, Ondeyo J held that section 39 recognises the rights of sisters of a deceased person who dies intestate without a wife or children and parents. In *the Matter of the Estate of Beatrice Amalemba* High Court succession cause number 2610 of 2000 (Koome J), the deceased, a married woman, had been pre-deceased by her husband and died without children. A dispute erupted between her father and her in-laws on who was entitled to inherit and administer her estate. In determining the matter the court followed section 39 of the Act and held that the father of the deceased had priority in law to be issued with the grant of letters of administration for the administration of the estate of his deceased daughter, the fact of marriage notwithstanding. In *In the Matter of the Estate of Wamuhu Murimi (deceased)* Nairobi High Court succession cause number 460 of 2002 (Koome J), the deceased, who died single and without children, was survived by a nephew and three nieces. The court directed that the estate fell for distribution under section 39 to the nephews and nieces in equal shares. The property the subject of *Mwathi v Mwathi and another* should have been divided in accordance with section 39 following the invalidation of the will of the deceased.

Each category must be considered in the order listed in section 39. The parties in each category take in equal shares. Only if there is no one in a particular category is it necessary to proceed to the next category. The spouse of a person within any of the categories has no claim, as a blood relationship is necessary in order to benefit under the intestacy rules. Relatives take on the statutory trusts, so they must be alive at the date of the intestate's death, and attain the age of eighteen or, if female, marry under that age.¹⁸²

182 See section 41 of the Law of Succession Act.

9.6 DIVISION OF THE INTESATE ESTATE OF A POLYGAMIST

Section 40 addresses the case of the estate of a polygamous intestate. His personal and household effects and the residue of the net intestate estate should in the first place be divided among the houses according to the number of children in each house. Distribution of the estate should thereafter follow the provisions in sections 35 to 38 of the Act. In *Rono v Rono and another* [2005] 1 EA 363 (Omolo, O’Kubasu and Waki JJA), the deceased was survived by his two widows and their nine children. The first widow had three sons and two daughters while the other widow had four daughters. The first house sought to have the estate shared in accordance with customary law, which meant that the second house was entitled to a small share since daughters are not entitled under customary law to inherit their deceased parents. The Court of Appeal held that customary law did not apply: the applicable law is section 40 of the Act, which makes provision for distribution of the net estate to the houses according to the number of children in each house, but adding any wife as an additional unit to the number of children. Omolo JA stated that section 40 did not require that the estate be divided equally between the houses, as the provision calls for the consideration of the number of children in each house.

In the Matter of the Estate of Benson Ndirangu Mathenge (deceased) Nakuru High Court succession cause number 231 of 1998 (Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while the second had seven units. The two houses of the deceased were combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.¹⁸³ In *In the Matter of the Estate of Nelson Kimotho Mbiti (deceased)* High Court succession cause number 169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units.¹⁸⁴

183 See also *In the Matter of the Estate of Benson Kagunda Ngururi (deceased)* Nakuru High Court succession cause number 341 of 1993 (Ondeyo J).

184 See also *In the Matter of the Estate of Erastus Gakobo Chege (deceased)* Nairobi High Court succession cause number 711 of 1998 (Waweru J), *In the Matter of the Estate of Joseph Kimemia Gichuhi (deceased)* Nairobi High Court succession cause number 1072 of 2002 (Koome J), *In the Matter of the Estate of Wanuru Kairu* Nairobi High Court succession cause number 2525 of 1997 (Koome J), *In the Matter of the Estate of Macharia Ngugi Gaturu (deceased)* Nairobi High Court succession cause number 708 of 2000 (Waweru J),

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In *In the Matter of the Estate of Mwangi Gitire (deceased)* High Court succession cause number 1033 of 1996 (Kooome J), the quarrel between the two houses was over the distribution of the estate. One house argued for equal distribution in accordance with customary law, while the other favoured distribution according to section 40 of the Act. It was held that the court had no discretion in the matter and was bound to follow section 40 of the Act, which provides that the estate be divided between the houses taking into account the number of children in each house. The court, however, decried the unfairness of the provision to the widows who are treated the same as the children. This unfairness is particularly glaring where the first wife participated in the acquisition of the greater part of the estate, but in the end has to take a share equal to that of the younger wife who is married many years after the acquisition of the bulk of the estate, and who has contributed very little to the acquisition of the assets making up the estate.

In *Kuria and another v Kuria* [2004] KLR (Musinga J), the dispute was on the distribution of the estate of the deceased between a son of a deceased's first wife and a surviving widow of the deceased on one hand, and a married daughter of the deceased on the other. The son and widow based their claim on customary law arguing that since the daughter was married she was not entitled to inherit any share of the deceased's land even if her husband died and she went back to her father's land. The court ruled that the applicable law was section 40(1) of the Law of Succession Act which does not discriminate between daughters and sons of a deceased person in matters of intestate succession. The estate was divided between the two houses according to the number of children in each house, adding the surviving widow as an additional unit to the number of children. The children and the widow were altogether nine. The land was divided into nine equal units and each one of the nine survivors given a share each. It was further ordered that it was upon the married daughters to choose to surrender their shares to their siblings.

There is a trend by a section of the High Court where polygamists' estates are distributed following the principles set out in section 28 of Part III of the Act and customary law, instead of section 40 of the Act. In *In the Matter of the Estate of Chumo Arusei*, Eldoret High Court probate and administration number 26 of 1998 (Nambuye J), the court applied customary law to the estate although the

In the Matter of the Estate of Mariko Marumbi Kiuru (deceased) Nairobi High Court succession cause number 2011 of 1997 (Ang'awa J). *Francis Njoroge Muigai and another v Johnson Njoroge Muigai* Nairobi High Court civil appeal number 18 of 2001 (Kamau J) and *Teresia Wambui Maruhi v Onesmus Maina Maruhi and another* Nairobi High Court civil appeal number 3 of 2002 (Kamau J).

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deceased died after the commencement of the Law of Succession Act. The court in distributing the estate did not follow section 40, but instead followed section 28 of the Act. The correctness of the court's decision is doubtful. The law applying to the distribution of an intestate polygamist's estate is section 40 in Part V of the Law of Succession Act and not African customary law. Section 28 of the Law of Succession Act will also not apply except in cases where the court is handling an application under section 26 by a person asking for reasonable provision from the estate.

The court similarly wrongly applied African customary law and section 28 of the Act to an intestate polygamist's estate in *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 (Nambuye J), where the polygamist's family was unable to agree on the mode of distribution and invited the court for orders on distribution. Although the deceased had died in 2000, and therefore after the Act came into force, the court chose to apply Nandi customary law on distribution instead of section 40 of the Act. Further, the court expressed itself as being guided by section 28 of the Act, instead of sections 40, 41 and 42 of the Law of Succession Act. This was improper since section 28 of the Law of Succession Act only applies where the court is ruling on an application under section 26 for reasonable provision.¹⁸⁵

Juma J in *In the Matter of the Estate of Wairia Muhoro (deceased)* Nyeri High Court succession cause number 3 of 1999, Ondeyo J in *In the Matter of the Estate of Evanson Kiragu Mureithi (deceased)* Nakuru High Court succession cause number 163 of 1995 and Rimita J in *In the Matter of the Estate of Amos Kiprono Sirma* Nakuru High Court succession cause number 231 of 1994 improperly applied customary law in the division of estates of intestate polygamists who died after the Law of Succession Act came into force. In both matters, it was ordered that the estates be divided equally between the two houses of the deceased, instead of being shared out in accordance with the provisions of section 40, 41 and 42 of the Act.¹⁸⁶

185 See also *In the Matter of the Estate of Serwenje Korko (deceased)* Eldoret High Court probate and administration number 31 of 1995 (Nambuye J).

186 See *Willingstone Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA).

9.7 DEVOLUTION TO THE STATE

Where an intestate is not survived by any of the relatives set out in section 39 of the Law of Succession Act, under section 39(2) the estate devolves upon the state, is liquidated and paid into the Consolidated Fund.¹⁸⁷ In *Re Barnett's Trust* (1) [1902] 1 Ch 847 (Kekewich J) it was stated that the state steps in and takes the property because there is no one who can claim the same through the deceased. It takes it *bona vacantia* as property which no one claims and in respect of which there is no succession. The state does not claim it by succession at all, but because there is no succession. In the instant case, an Austrian bastard, who was entitled to some property in England, died in Austria intestate and without heirs. The Austrian government claimed the property under Austrian law, but the English court held that the right claimed was not in the nature of a succession and that the British Crown was entitled to the property *bona vacantia*. In the Tanzanian case of *Re Yusuf bin Simbani (Deceased)* [1962] EA 623 (Horsfall AgCJ), a deceased person died intestate leaving no widow or kindred, and it was held that under the relevant law the property of an intestate who died in those circumstances devolved upon the state in *bona vacantia*.

The state holds a radical title to property, which does not have an owner. In *Dyke v Walford* (2) (1848) 5 Moo PCC 434, it was said that the origin of the right by the state to such property existed from the foundation of the monarchy and the right of the state to property which has no owner.

9.8 ADOPTED, LEGITIMATED AND ILLEGITIMATE CHILDREN

Previously, intestacy provisions in English succession law statutes only applied to legitimate children, whether of the deceased or any other relative. African customary law and Islamic law generally provide only for the legitimate children of the intestate. In recognition of the hardship occasioned to illegitimate children by African customary and Islamic law in terms of disinheritance, the Law of Succession Act has modified the position and provides for adopted, legitimated and illegitimate children.

¹⁸⁷ See also *In the Matter of the Estate of Benjamin Mutitu (deceased)* Nairobi High Court civil case number 2197 of 1996, where Rawal J, while acknowledging that the applicable law was section 40 of the Law of Succession Act and that one of the houses had more children than the other, ignored section 40 and ordered that the estate be divided equally between the two houses. This holding, although silent on the point, was in consonance with African customary law on the distribution of the intestate estate of a polygamist.

(a) Adopted children

For the purpose of entitlement under the rules of intestacy, an adopted child is deemed, by virtue of sections 171, 172, 174, 175 and 176 of the Children Act of 2001,¹⁸⁸ related to the adopted parent and not the natural parental. For the purpose of determining whether an adopted child was living at the date of the intestate's death, the adopted child is treated as having been born on the date of the adoption. An adopted child cannot therefore claim on the intestacy of a natural but takes on the intestacy of the adoptive parent and other relatives by adoption, such as grand parents, brothers and sisters, and so on. Likewise, if the adopted child dies intestate, the child's adopting parents, and not the natural parents, will be capable of benefiting under the rules of intestacy- as will brothers and sisters, grand parents and so on by adoption.

According to the Court of Appeal in *Willingstone Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA), a child informally adopted by a female deceased person is not a child for the purpose of the succession to the estate of such deceased person. Section 3(2) of the Law of Succession Act only caters for children who have been recognised by a male person as his own or in respect of whom he has voluntarily assumed permanent responsibility.

(b) Legitimated children

An illegitimate child is legitimated by the subsequent marriage of their natural parents. Legitimated children are deemed to have been born legitimate and can therefore take on intestacy in the same way as any legitimate child. Under section 5(1) of the Legitimacy Act,¹⁸⁹ a legitimated person, his spouse, children and remoter issue are entitled to take any interest in the estate of an intestate after the date of the legitimation, as if the legitimated person had been born legitimate. Where a legitimated person or a child of a legitimated person dies intestate in respect of all or any his property, under section 6 of the Legitimacy Act, his property devolves upon the persons who would normally be entitled, if the legitimated person had been born legitimate.

188 Act number 8 of 2001.

189 Chapter 145 Laws of Kenya.

(c) Illegitimate children

The definition of a child in section 3(2) of the Act includes an illegitimate child, that is: a child born to a female person outside wedlock, a child whom a male person has recognised or in fact accepted as his child or for whom he has assumed permanent responsibility. The Court of Appeal in *Willington Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA), stated that the definition in section 3(2) of a child whom the deceased in fact had accepted as his own or for whom the deceased had assumed permanent responsibility only applies to a child whom a male deceased person had accepted or assumed permanent responsibility over. Instances of temporary responsibility do not suffice. It is provided in section 10 of the Legitimacy Act, that an illegitimate child and the mother of an illegitimate child are entitled to succeed on the intestacy of the other, but the provision is unclear on the position of the father of the illegitimate child.

As regards determination of paternity, section 118 of the Evidence Act is a guide. The provision states that the fact that a child was born during the continuance of a valid marriage between the mother of the child and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, should be taken to be conclusive proof that the child is a legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when the child would have been begotten.¹⁹⁰ Under section 3(2) of the Law of Succession Act, the illegitimate child has the same inheritance rights as the legitimate children of the intestate.

Usually, no problem arises in relation to the inheritance rights of children born as a result of invalid marriages as they are treated as if their parents were validly married. The problem normally concerns children born out of wedlock. Such children are entitled to inherit their mother's property and her kindred's property and they rank equal with the mother's legitimate children. The illegitimate child is capable of inheriting from their natural father or from any person who regards him as his child. In the circumstances, a child should be capable of inheriting the property of any man either who has officially adopted them or who has taken them into his household as his own. Where a child has not been adopted or where the mother has not married, thus giving rise to the adoption of the child into her

190 See *In the Matter of the Estate of Elijah Mbondo Nthekeetha (deceased)* Nairobi High Court succession cause number 193 of 1997 (Koome J).

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husband's child, the illegitimate child inherits from his natural father, if known or has expressly recognised the child as his. In other cases, the court has to decide whether a particular person is the father of the child on a balance of probability. Where the child is known to be the illegitimate child of the deceased, he should rank equally with the legitimate children of the deceased for the purposes of inheritance to property. Such a child is entitled to apply to court under section 26 as a dependant of the deceased where the deceased fails to adequately provide for the child by his will or the child is not adequately catered for in intestacy.

9.9 FORFEITURE AND INTESTACY

A person who commits the murder of the deceased is debarred, by section 96 of the Law of Succession Act, on grounds of public policy from taking a benefit on the intestacy of the deceased. This is founded on the equitable principle that 'no man can profit from his own wrong'.

9.10 COMMORIENTES AND INTESTACY

The doctrine of *commorientes* or survivorship is embodied in section 43 of the Act. It establishes that where the order of deaths of two or more persons is uncertain, the persons are presumed to have died in the order of seniority with the older person predeceasing the younger one.¹⁹¹ The presumption as to the time of death is successive. Under the provision, the doctrine does not apply as between spouses, who are presumed in the circumstances to have died simultaneously.

¹⁹¹ See *The Administrator – General of Zanzibar v Khalfan bin Ali bin Mohamed El-Battashy and others* [1963] EA 230 (Horsfall AgCJ).

PART FOUR
PROTECTION OF ESTATES

CHAPTER TEN

PROTECTION PROVISIONS

10.1 INTRODUCTION

Following the death of a person, it often happens that those who should obtain representation to the deceased's estate do not take immediate steps, thus exposing the estate to wastage and misapplication or haphazard administration by either the beneficiaries or other unauthorised persons. Death is often seen as an opportunity for relatives and even strangers to help themselves out of whatever tangible property the deceased has left behind. There are provisions in the law to protect the estate from such an eventuality.

10.2 INTERMEDDLING

(a) Elements of intermeddling

The Law of Succession Act at section 45 provides that no person should handle, take possession, dispose of, or otherwise intermeddle with the free property of a deceased person unless authorized by law to do so or by a grant of representation. Under section 45(2)(a), it is a criminal offence to intermeddle with an estate without legal authorisation punishable with a fine, imprisonment, or both.¹⁹² In *In the Matter of the Estate of Dr John Muia Kalii (deceased)* Machakos High Court succession cause number 81 of 1995, Mwera J pointed out that since intermeddling is a criminal offence, evidence in support of the allegation should be strong. Waki J stated in *In the Matter of the Estate of Huseinbhai Karimbhai Anjarwalla* Mombasa High Court probate and administration number 118 of 1989 that section 45 does not apply where the alleged intermeddler is the person who is lawfully allowed to deal with the affairs of the estate. Emukule J in *Shital Bimal Shah and two others v Akiba Bank Limited and four others* [2005] KLR, said that section 45 does not apply to acts of personal representatives under a grant of probate.

In *Gitau and two others, v Wandai and five others* [1989], KLR 231 (Tanui J) it was held that the act of one of the parties to the suit of entering into a sale agreement before grant of representation had been obtained amounted to intermeddling

¹⁹² See *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS) (Nyamu J).

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with the affairs of the deceased. In *Mauji Narsi v Premji Purshottam* (1918-22) 2 ZLR 47 (Reed J), a party was found to be an intermeddler since he had taken possession of trust property, knowing it was trust property. It was further held that he had not duly discharged himself from liability by handing over the property to the proper trustee or to the persons absolutely entitled to it. In *Ombogo v Standard Chartered Bank of Kenya Limited* [2000] 2 EA 481, the Court of Appeal held that the practice at the time by the Law Society of Kenya (facilitated by Legal Notice number 279 of 1995) of appointing practising advocates to wind up the firms of their deceased colleagues was inconsistent with section 45 of the Law of Succession Act, as the estate of a deceased advocate included the money held in trust for his clients. The acts of the advocates so appointed amounted to intermeddling with the estate of the deceased advocate. In *John Kasyoki Kieti v Tabitha Nzivulu Kieti and another* Machakos High Court civil case number 95 of 2001, Mwera J stated that doing anything affecting the estate of a deceased person, including commencing action on behalf of the estate before obtaining representation, amounted to intermeddling with the estate.¹⁹³ Nambuye J, in *Re Katumo and another* [2003] 2 EA 508, stated that altering the state or condition of an asset which forms part of the estate amounts to intermeddling with the asset. In *Kothari v Qureshi and another* [1967] EA 564, Rudd J stated that the act of the executor, who had not yet taken out a grant, of consenting to have his name put on the court file as a party amounted into intermeddling in the estate and by appearing through an advocate to conduct the appeal, the executor had further intermeddled in the estate.

(b) Protective provisions concerning intermeddling

Hayanga J in *In the Matter of the Estate of Mohamed Saleh Said Sherman also known as Mohamed Swaleh Sherman (deceased)* Mombasa High Court civil case number 145 of 1998, stated that the Law of Succession Act provides for protective powers to be exercised against wrongful disposal and intermeddling with any free property of the deceased except in accordance with the Act. In the opinion of the court, the spirit of the Law of Succession Act gives the court wide jurisdiction in dealing with testamentary and administration issues. This is through section 47, which gives the court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and orders as may be expedient.

¹⁹³ See also *Mary Mbeke Ngovu and another v Bernard Mutinda Mutisya* Machakos High Court civil case number 352 of 1998 (Mwera J) and *In the Matter of the Estate of Aggrey Makanga Wamina* Mombasa High Court succession cause number 89 of 1996 (Waki J).

The court then in exercise of inherent jurisdiction and compliance with the open jurisdiction under section 47 made restraining orders to safeguard the estate. In *In the Matter of the Estate of David Murage Muchina (deceased)* Nairobi High Court succession cause number 2077 of 2002, Kamau J gave restraining orders to stop a party from intermeddling in any manner whatsoever with any of the assets of the estate of the deceased pending the hearing and disposal of a pending revocation application. It is not indicated under which provisions the restraining orders were made, the orders were presumably made in exercise of inherent powers. In *In the Matter of the Estate of Kitema Mutiso* Machakos High Court probate and administration number 1 'B' of 2004, Wendoh J granted interim injunctive orders directed at intermeddlers. The decision, unhelpfully, does not indicate the provisions on which it was premised.¹⁹⁴

According to Nyamu J in *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS), sections 45 and 46 of the Act provide detailed protective provisions concerning intermeddling with the estates of deceased persons. Furthermore, the probate court is empowered by section 47 to give all necessary orders, including injunctions where appropriate, to safeguard the deceased's estate. In the court's opinion an application for restraining orders brought outside the provisions of the Law of Succession Act, in this case under order XXXVI of the Civil Procedure rules, is incompetent. It was emphasised that order XXXVI does not empower the court to grant injunctions in deceased estates outside the provisions of the Law of Succession Act. In any event, a beneficiary, although entitled to bring an action under order XXXVI, is not empowered under order XXXVI to institute suit and to obtain an injunction to stop intermeddling without in the first place obtaining a full or limited grant of representation.

This contrasts with the position taken by Khamoni J in *In Re Estate of Kilungu (deceased)* [2002] 2 KLR 136, where an injunction was sought under order XXXIX of the Civil Procedure rules. It was contended by the applicants that an injunction was available as sections 45(1) and 47 of the Law of Succession Act, read together with rules 44, 49, 63 and 73 of the Probate and Administration rules, allow the court to entertain such an application for injunction in probate proceedings. The court held that none of the provisions cited allowed the court to entertain an injunction application under order XXXIX of the Civil Procedure Rules.

194 See also *In the Matter of Estate of Gerald Kuria Thiari* Nakuru High Court succession cause number 127 of 1995 (Lessit J).

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Restraining orders can only be properly granted in a civil action brought under the Civil Procedure Act and Rules in accordance with the principles set out in order XXXIX. A party who is beneficially interested in the estate of the deceased should quickly move the probate court for a grant, whether full or limited, and thereafter bring an ordinary suit under the Civil Procedure Act and Rules for injunctive orders. Although, section 47 of the Law of Succession Act is a necessarily wide provision, to it is not wide enough to allow the making of injunction orders in probate and succession causes.

Nambuye J, in *Re Katumo and another* [2003] 2 EA 508, however, takes the position that there are no provisions in the Law of Succession Act for enforcing the protection provisions. In the opinion of the court, although the High Court has power vested in it by section 47 of the Law of Succession Act to hear and determine all manner and nature of applications the Act does not have a provision whereby a named beneficiary could move in and seek to protect the estate in the absence of a grant of representation. The court concluded that where there is no provision covering a particular aspect of the dispute the court has no jurisdiction. The applicant had moved the court under sections 45 and 47 of the Act seeking an order that an asset, which formed part of the estate of the deceased, be taken over by the court and be put in proper custody or in the alternative be handed over to the custody of the applicant.

(c) Consequences of intermeddling

The intermeddler, who is also known as an executor *de son tort*, that is an executor by his own wrong, may be required to apply for grant of representation. If he does not apply for representation, he will be answerable to the rightful executor or administrator to the extent to which he has intermeddled, after deducting any payments made in the due course of administration (section 45(2)(b) of the Law of Succession Act). In *In the Matter of the Estate of Wilson Nzuki Nyolo (deceased)* Machakos High Court probate and administration number 152 of 2000 (Mwera J), an intermeddler was directed to lay before the court the full and accurate statement of account in respect of all the rents she had collected from the tenants of one of the assets of the estate and explain how she had applied the money. According to Koome J in *In the Matter of David Wahinya Mathene (deceased)* Nairobi High Court succession cause number 1670 of 2004, the remedy available against intermeddling by an executor, who has not taken a grant, is through the procedure for seeking accountability.

10.3 PUBLIC OFFICERS AND THE PROTECTION OF ESTATES

Section 46 vests authority on public officers with regard to protecting estates of persons who die within the public officers' area of jurisdiction. In *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS), Nyamu J stated that sections 45 and 46 provide detailed protective provisions concerning intermeddling with estates of deceased persons. These provisions specifically empower the police, the provincial administration and the Public Trustee to deal with issues relating to intermeddling with estates of deceased persons.

Immediately upon the occurrence of a death or a report of the same being made to them, the police or administrative officers are obligated to forthwith report the fact of the death of any person, to the local assistant chief or chief or any other administrative officer of the area where the deceased had his last place of residence. The assistant chief of the sub-location where a deceased person has left some tangible property is regarded as the most suitable officer in the circumstances to deal with the matter. He is the most likely person to hear first of the death, and to be acquainted with the possessions, relatives and other circumstances of the deceased. The public officer to whom the report is made should, upon the request of any person who appears to have a legitimate interest in the estate of the deceased person or if no one has made an application for representation within one month, proceed to the deceased's place of residence, ascertain his free property and preserve it. He should also ascertain all the persons who appear to have an interest in succession to or administration of the estate, and guide the prospective executors or administrators on the formalities and their duties relating to the administration of estate. The public officer should thereafter report the fact of the death, as well as the steps he has taken with regard to the estate, to the Public Trustee. Where the last known place of residence of the deceased is within a municipality, or the deceased dies abroad regardless of where his property is situated, the public officer to whom the report is made should not take any steps unless he first reports the death to the Public Trustee. The Public Trustee may, upon receipt of the report take up the matter.

The Court of Appeal in *Ombogo v Standard Chartered Bank of Kenya Limited* [2000] 2 EA 481, stated that section 46 applies to all classes of deceased persons. It makes no distinction between professionals and ordinary people, rural and urban people. It was pointed out that the public officers are expected to take the steps

mentioned in section 46 if no application for representation of the estate has been made within one month. On the facts of the case, it was held that advocates appointed by the Law Society of Kenya to wind up the law firm of the deceased advocate could not fall within the requirements of section 46 of the Law of Succession Act. In *Re Katumo and another* [2003] 2 EA 509, Nambuye J stated that the only persons who can be relied upon to protect estates of deceased persons are the chief and his assistant since they are given authority to do so by section 46 of the Act. The court directed the chief and his assistant of the area where the estate of the deceased was situated to ensure that a particular asset was protected from being vandalised and ensure that the same was well preserved pending the issuance of a grant of representation.

10.4 THE PUBLIC TRUSTEE AND THE PROTECTION OF ESTATES

The Public Trustee, upon receipt of a report made to him by virtue of section 46 of the Law of Succession Act, should, under section 6 of the Public Trustee Act, make further inquiries as to the estate of the deceased. Where after making the inquiries, it appears to the Public Trustee that: the person died intestate; the deceased, having made a will, has omitted to appoint an executor; the persons appointed as executors in the will of the deceased are dead or have renounced probate or are unable to act; or the deceased has appointed the Public Trustee as the executor of his will, he may apply for a grant of representation under the Law of Succession Act.

Under section 8(1) of the Public Trustee Act, where the estate of a deceased person consists of property whose gross value does not exceed KShs 20 000.00 and the deceased has died intestate or left a will in circumstances that require the Public Trustee to apply for a grant under section 6 of the Public Trustee Act, the Public Trustee may take possession of the estate and administer the same without having to make an application to the court, under the Law of Succession Act, for a grant of representation. Section 8(2) of the Public Trustee Act states that where an estate of a deceased person consists of property whose gross value does not exceed KShs 5 000.00 the Public Trustee may issue a certificate of summary administration on application of any person to whom probate or letters of administration may be granted. This would entitle the person holding the certificate to administer the estate without a grant of representation, and to pay

out of the estate any debts or charges, and any surplus to the person or persons who are entitled to it.

The other circumstance where the Public Trustee is expected to protect an estate is in relation to property of a person who resides abroad. Under section 10 of the Public Trustee Act, where the agent in charge of any such estate dies leaving the property without any responsible person in charge, the Public Trustee should, upon being notified of the fact, apply to the court for an order allowing him to take charge of the property.

10.5 PROTECTION UNDER THE PENAL CODE¹⁹⁵

The Penal Code provides criminal sanctions for protection of estates. Section 276 of the Penal Code makes the stealing of a testamentary instrument, whether the testator is alive or dead, a crime, punishable by imprisonment for ten years. Concealing a will, with intent to defraud, is an offence under section 287 of the Penal Code. Under section 327 of the Penal Code any person who, being an executor, including an executor *de son tort*, or an heir or an administrator of the estate of a deceased person, destroys any property making up the estate with intent to defraud or with the intent to defraud converts the property to any unauthorised use, is guilty of a felony. The malicious damage of a testamentary instrument is a criminal offence under section 339(4) of the Penal Code. It is an offence under section 350 to forge a will,¹⁹⁶ while under section 358 it is criminal to demand payment upon a forged testamentary instrument.

195 Chapter 63 Laws of Kenya.

196 See *In the Matter of the Estate of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996 (Koome J).

PART FIVE

GRANTS OF REPRESENTATION

CHAPTER ELEVEN

GRANTS OF REPRESENTATION

11.1 INTRODUCTION

A grant of representation is an order, in the form of a certificate, issued by the court to confirm that a particular person is to act as a personal representative of the dead person. A grant should only be made in respect of the estate of one deceased person. It is not permissible to issue one grant in respect of two or more estates. The High Court has jurisdiction under section 47 of the Law of Succession Act to make grants. The Chief Justice may under the same provision appoint resident magistrates to represent the High Court, the resident magistrates so appointed have jurisdiction to make certain types or classes of grants.

11.2 PURPOSES AND TYPES

There are two forms of grants under section 53 of the Law of Succession Act, namely, grants of probate and grants of letters of administration. Grants of letters of administration are further classified into grants of letters of administration with will annexed and grants of simple administration. The court may limit a grant of representation as to property, purpose or time. It may also, in circumstances where the original personal representatives have not completed administration, issue a grant limited to completion of administration.

The grant of administration in the case of testate succession establishes the validity of the will, while in intestacy; it establishes that the deceased died intestate. A grant of representation is needed to administer the estate of a deceased person, except for very small estates, which may be administered without a grant.¹⁹⁷

11.3 EXECUTORS AND ADMINISTRATORS

The personal representative represents the deceased. His role, generally known as representation, is that of a person authorised in law to dispose of the property of someone who has died. He steps into the shoes of the deceased in the sense of being able to lawfully do such things as the deceased himself may have done if he were alive. The office of personal representative is one for life.

¹⁹⁷ See section 11.14 here below.

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A personal representative appointed under a will to distribute the property of a dead person according to the terms of the will is called an executor, as he executes the wishes of the dead person. The person appointed by the court in case of intestacy, and in testate cases where there is no proving executor, is called an administrator. The executor in testate succession derives his authority from the will and the grant of probate merely confirms the executor's authority. In intestacy, the grant of letters of administration is the source of the authority of the administrator. Administrators are normally appointed where the deceased dies intestate. They will also be appointed in cases where the deceased dies leaving a will that, while disposing of the assets, does not appoint any executors or those appointed are unable or unwilling to act.

Khamoni J in *In the Matter of the Estate of Joseph Muchoki Muriuki (deceased)* Nyeri High Court succession cause number 396 of 1999, stated that executors and administrators should not be confused with beneficiaries. Beneficiaries are those persons benefiting from the distribution of the estate of a deceased person. A Personal representative can also be a beneficiary if he is entitled to a share of the estate. Ang'awa J in *In the Matter of Habakuk Ochieng Adede (deceased)* Nairobi High Court succession cause number 721 of 2000 pointed out that the person who petitions for grant of representation is not necessarily the one who will inherit the deceased's property. According to the court, all that the administrator does is to administer the estate, by gathering the assets, identifying the liabilities and agreeing on the apportionment of the assets with the family. The grant of representation does not at all make the administrators heirs. The Court of Appeal pointed out in *Seve v Sewe and another* [1991] KLR 105 (Gachuhi, Gicheru JJA and Cockar AgJA) that the appointment of administrators is not the same as distributing the assets to those who are entitled to inherit.

11.4 APPOINTMENT OF EXECUTORS

Executors are usually expressly appointed by the will. Section 6 of the Law of Succession Act provides that a testator may appoint his executor or executors by will. The appointment of executors is not a mandatory requirement, but in practice a will is considered incomplete or badly drafted if it omits to appoint executors.

(a) Persons qualified for appointment

Persons who are usually appointed executors include spouses, advocates, banks, friends and the Public Trustee.

*Grants of Representation**(i) Spouses*

A husband usually appoints his wife to be his executor and *vice-versa*, especially where they do not have grown up children. This is preferable because in most cases, the spouse is the residuary legatee and it is only sensible that the person with the biggest stake in the estate should have a hand in its administration. Where a spouse is appointed, it is also advisable to appoint a co-executor especially one of the grown-up children.

(ii) Advocates

Advocates may also be appointed as executors, but the testator is not obliged to appoint as executor the advocate who drafts the will or keeps it in safe custody. Where an advocate is appointed as executor, the will should also provide for his remuneration for acting as such. The relevant clause in the will usually provides that the advocate will charge his professional fees on the estate. Advocates are normally appointed executors where they are involved in the management of the estate. For example, where the advocate handles the legal affairs of the estate's businesses or has been a family lawyer for the deceased.

(iii) Banks

The bank is the most suitable choice of all available possible executors, particularly where there is family strife such that the appointment of a person within the family will lead to discontent. It may also happen where there is no other suitable individual at hand, for example, where a widow is making a will in favour of her children who are minors. A bank is most suitable as an executor where the will creates trusts that are likely to continue for many years. The advantage with this is that the bank is capable of remaining executor for a longer period than a mortal executor who will need to be replaced eventually. Most banks have trustee departments whose sole responsibility is to manage the estates of persons who have appointed them executors.¹⁹⁸

(iv) The Public Trustee

The Public Trustee is an office in the Attorney-General's chambers, which is designed to administer the estates of those persons who have appointed it to act as such or those who have failed to appoint anyone at all.

198 In *Muigai v Muigai and another* [1995-1998] 1 EA 206 (Amin J) the court ordered that the grant be made to the Kenya Commercial Bank Limited. This was a dispute over an intestate estate, but the spirit guiding the order is the same as that informing the appointment of a bank as an executor.

(b) Implied appointment of executors

In some cases, the executors may be impliedly appointed. Such executors are called ‘executors according to the tenor of the will’. To be so impliedly appointed, it must be shown that the testator intended that the person so appointed should carry out the duties of an executor (rule 28(i) of the Probate and Administration Rules). Whether a person is impliedly appointed an executor is dependent on the construction of the will. In *Re Russell’s Goods* (1892), P 380 trustees were appointed ‘to carry out my will and this was held to be sufficient to make the trustees the executors according to the tenor of the will. In *Re Adamson* [1875] LR 3, it was held that the persons instructed under the terms of the will to pay the deceased’s debts and funeral expenses, and to pay the balance of the estate to named persons were executors according to the tenor of the will.

(c) Specialist executors

Where the estate is made up of certain types of property the testator may, and it is desirable that he should, appoint different people to deal with different parts of the estate. It is advisable that such executors be specialists in their fields. Persons falling in the category of specialist executors include advocates, banks, trust corporations and the Public Trustee.

11.5 NUMBERS OF EXECUTORS AND ADMINISTRATORS

Under rule 25(b) of the Probate and Administration Rule, a grant may be made either to a single person (including the Public Trustee and a trust corporation) or jointly to two or more persons (including a trust corporation) not exceeding four.

Section 6 of the Law of Succession Act does not limit the number of executors who may be appointed by will, but by virtue of section 56(1)(b) of the Law of Succession Act only four executors may take out a grant with respect to the same property or a particular part of the estate. Section 56(1)(b) does not specify the minimum number of executors who may take a grant, but one executor is considered to be sufficient. This contrasts with the position of the administrators. The Law of Succession Act at sections 58, 71(2A), 75(A), 81 and 95(2) requires the appointment of a minimum of two administrators where there is a minority or life interest or where one arises thereafter in relation to the estate. *In the Matter*

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of the *Estate of Gathii Gatimu (deceased)* Nairobi High Court succession cause number 599 of 1994 (Koome J) it was held that the substitution of a deceased administratrix by two persons brought the number of administrators to five contrary to the provisions of section 56(1) of the Act. The order on substitution was reviewed and the grant made to four persons. In *Veronica Mwikali Mwangangi v Daniel Kyalo Musyoka* [2005] KLR (Ang'awa J), a suit was struck out because the limited grant giving authority to the administrator contravened section 58 which requires that where a continuing trust arises the grant should be made to more than one person.¹⁹⁹

If a dispute arises between the executors appointed under a will or in intestacy, between more than four persons entitled to act as administrators with respect to who is to take out a grant, the matter may have to be resolved by a hearing before the judge or magistrate.²⁰⁰ Where there are several personal representatives they all should be made parties to any suit by or against them.²⁰¹

11.6 CAPACITY TO TAKE OUT A GRANT

In the case of testate succession, any person may be appointed an executor of the will, but that is not to say any one may take out a grant of representation. Under section 56(1)(a) of the Law of Succession Act a minor, a person of unsound mind and a bankrupt, have no capacity to take out a grant of representation. Under rule 32(1) of the Probate and Administration Rules in intestacy cases where the person to whom a grant ought to be made is a minor, administration should be made to an adult or adults for the use and benefit of the minor until he attains the age of eighteen. A similar provision is found in rule 33 with relation to testate succession where one of the executors is a minor.

A grant of representation may also be made, by virtue of section 56, to a body corporate, subject to certain restrictions. With respect to grants of letters of administration, section 56(2) provides that none should be made to a body

199 See also *In the Matter of the Estate of Muriranja Mboro Njiri* Nairobi High Court succession cause number 890 of 2003 (Kamau AgJ) *Musa v Musa* 2002]1 EA 182 (Ringera J), *In the Matter of the Estate of Joseph Kimemia Gichuhi (deceased)* Nairobi High Court succession cause number 1072 of 2002 (Koome J), *In the Matter of the Estate of Loice Njeri Ngige Eldoret* High Court probate and administration number 113 of 1994 (Nambuye), *Sewe v Sewe* [1991] KLR 105 (Gachuhi, Gicheru JJA and Cockar A J), *In the Matter of the Estate of Joseph Ogada Olunga (deceased)* Nairobi High Court succession cause number (2517 of 2002) (Ang'awa J) and *In the Matter of the Estate of David Wahinya Mathene (deceased)* Nairobi High Court succession cause number 1670 of 2004 (Koome J).

200 See *In the Matter of the Estate of the late W.K. Kihika* Nairobi High Court succession cause number 967 of 1988 (Khamoni J).

201 See *Sargent v Gautama* [1968] EA 338 (Sir Clement de Lestang VP, Duffus and Spry JJA).

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corporate other than the Public Trustee or a trust corporation. Under section 57, no grant should be made to a syndic or nominee on behalf of a body corporate, but the application for grant may be signed by and affidavits in support sworn by officers or directors of the body corporate.

Under section 18 of the Married Women's Property Act of 1882, a married woman has capacity to act as an executrix or administratrix alone or jointly with any other person or persons of the estate of a deceased person, without her husband, as if she were a *feme sole*. She can only act alone in testate succession, and intestacy where there are no minor children, since in the event of intestacy sections 58, 71(2A), 75(A), 81 and 93(2) of the Law of Succession Act apply and require the widow as surviving spouse to grant jointly with another.

11.7 EXECUTOR DE SON TORT

The term executor *de son tort* literally means an executor because of his own wrong. It refers to any person who acts as executor or administrator in the administration of an estate without authority the term is usually taken to refer to someone who is not the deceased's personal representative, but who is acting as though they are. In intestate succession, the person may be entitled to a grant, but before obtaining the grant, has no authority to act. The acts complained of must not be of humanity or necessity since such acts do not constitute the person an executor *de son tort*. The acts must be consistent with the administration of the estate, such as paying the debts of the estate that strictly amounts to intermeddling with the estate and thus making the person an executor *de son tort*.

An executor *de son tort* has no rights over the estate, but is liable to creditors and beneficiaries of the estate to the extent that the assets pass through their hand.²⁰² The executor *de son tort* is answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the normal course of administration.²⁰³ The liability of an executor *de son tort* ceases when he hands over the assets to the lawful personal representative.

A citation may issue upon an executor, or a person who is entitled to apply for grant in intestacy, who has intermeddled in the estate of the deceased to show cause why he should not take a grant. It can be used to compel such an executor *de son tort* or person intermeddling in the estate to take a grant. The citation issues at the instance of any person interested in the estate, and it should be brought after three months from the date of the death of the deceased.²⁰⁴

202 See *Panayotis Nicolaus Catravas v Khanubai Mohamed Ali Harji Bhanji* [1957] EA 234 (Lowe J).

203 See section 45(2)(b) of the Law of succession Act.

204 See *Gitau and two others v. Wandai and five others* [1989] KLR 231 (Tanui J).

11.8 GRANT OF PROBATE

(a) Issues in respect of testacy

A grant of probate is made, under section 53(a), in respect of the estate of the testate where it is proved that the deceased had left a valid will, whether oral or written. The grant should be in respect of all the property to which the will provides. It is usually made to or obtained by the executor or executors appointed by the will. Where the will of the deceased does not effectively dispose of all the property, he will be deemed to have died partially intestate and a grant of probate will be made in respect of the property to which the will provides.

(b) Effect of a grant of probate

One effect of a grant of probate is proof of the terms and the proper execution of the will. The other effect is to confirm the executor's authority to act. It merely confirms the executor's authority since the executor actually derives his authority from the will itself as stated in *Lalitaben Kantilal Shah v Southern Credit Banking Corporation Ltd* Nairobi Milimani High Court civil case number 543 of 2005 (Kasango J). Theoretically, the executor can administer the estate of the deceased before obtaining a grant. They can collect in assets and distribute the estate, sue and be sued, and exercise any of the administrative powers conferred upon them by the will or by statute before the grant of probate is obtained. In practice, however, they need a grant of probate as evidence of their authority to act to enable them discharge their duties as such effectively.²⁰⁵

In *Kothari v Qureshi and another* [1967] EA 564 Rudd J stated that it is elementary law that an executor's title dates from the death of the deceased and springs from the will and not from the grant of probate. An executor's acts before probate are therefore valid in themselves and have effect by virtue of the will, and probate is merely the authentication of the will in such cases and if the will is ultimately proved no one can question the validity of such acts. The executor may commence suit before grant of probate and can carry on the proceedings

See *Mauji Narsi v. Premji Purshottam* (1918-22) 2 ZLR 47 (Reed J, Pickering J and Morris-Carter CJ) and *Raphael Jacob Samuel v The Public Trustee and others* Nairobi Court of Appeal civil appeal number 16 of 1980 (Law JA).

See rule 22(3) of the Probate and Administration Rules.

See *Mauji Narsi v. Premji Purshottam* (1918-22) 2 ZLR 47 (Reed J, Pickering J and Morris-Carter CJ) and *Raphael Jacob Samuel v The Public Trustee and others* Nairobi Court of Appeal civil appeal number 16 of 1980 (Law JA).

205 See *Williams on Wills*, (7ed), at 225.

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without a grant as far as is possible until he has to prove his title, when he must then obtain the grant of probate to evidence his title. An executor can before grant commence action, release a debt and generally act as the representative of the deceased until he is required to prove his title as such. An executor can be sued before probate is granted if he has not renounced probate and if he has intermeddled in the estate he cannot renounce.

This position was reiterated in *Otieno v Ougo and another* (Number 4) [1987] KLR 407 (Nyarangi, Platt and Gachuhi JJA) where it was stated that under section 80(1) of the Law of Succession Act a grant of probate establishes the will as from the date of death, and renders valid all intermediate acts of the executor or executors to whom the grant is made and which are consistent with their duties as such. The executor may perform most of the acts pertaining to his office before probate, including filing suit, because he derives title from the will and the property of the deceased vests in him from the moment of the testator's death.

(c) Persons entitled to the grant of probate

A grant can only be sought by and issue to an executor appointed under the will. According to section 60 of the Law of Succession Act, where a will appoints more than one executor, probate may be granted to them all simultaneously, or at different times. They do not all have to take out a grant of probate. Any executor who decides not to take out a grant has to renounce their right to probate. Under rule 19(1) of the Probate and Administration Rules, the executors who do not renounce probate or apply for grant may later on apply to be joined by endorsement to the grant. Where one or two or more executors is a minor, probate may be granted by the court to the other executor or executors not under disability, with power reserved of making the like grant to the minor on his attaining majority age.²⁰⁶

(d) Application of the principle of relation back

The doctrine of relation back²⁰⁷ applies to grants of probate. It was stated in *Whitehead v Taylor* (1839) 10 A and E 210 (Lord Denman CJ) that there is no interval between the testator's death and the vesting of the right of his representative, and as soon as he obtains probate his right is considered as accruing from that period.

²⁰⁶ See rule 33 of the Probate and Administration Rules.

²⁰⁷ The doctrine of relation back operates to protect the deceased's estate from harm between the date of death and the date of the grant. Where the doctrine applies, the grant of letters of administration relates back to the date of the deceased's death. It does not allow an administrator to commence action on behalf of the estate before obtaining a grant (*Ingall v Moran* (1944) KB 160). See also *Burns v Campbell* (1952) KB 15 and *Wankford v Wankford* (1703) 1 Salk 299.

According to Kasango J in *Lalitaben Kantilal Shah v Southern Credit Banking Corporation Ltd* Nairobi Milimani High Court civil case number 543 of 2005, under section 80(1) of the Law of Succession Act, once a grant is issued to a party, all the intermediate acts that the party will have undertaken without the grant of probate will be validated. This is so because the executor derives his title from the will and all the estate and interest in the testator's property vests in him on the testator's death he can do any act before probate, which is a mere authentication of his title.²⁰⁸

11.9 GRANT OF LETTERS OF ADMINISTRATION WITH WILL ANNEXED

(a) Issues in testacy where there is no proving executor

A grant of letters of administration with the will annexed (also referred to as grant *cum testamento annexo*) is made in circumstances where the deceased dies leaving a valid will, but there is no proving executor.²⁰⁹ This is usually the case where: the will does not appoint an executor (or executors) or the executor (or executors) appointed has pre-deceased the testator or the executor (executors) has renounced executorship or the executor (executors) appointed has been cited to take out a grant of probate and has failed to do so.²¹⁰

(b) Persons entitled to grant of letters with will annexed

The persons entitled to a grant of letters of administration with the will annexed include in the order of priority: the universal or residuary legatee and a personal representative of a deceased residuary legatee. The person or persons entitled to the administration of the estate of the deceased residuary legatee may, under section 63, apply for and a grant may be made to him in circumstances where an executor has not been appointed under the will or the executors appointed under the will have either died, renounced executorship, failed to apply for probate within the time given to them by a citation or are unable for whatever reason to act as executors. The representative of a residuary legatee who dies before the estate is fully administered may also apply and be granted probate under section 64. Where none of the persons named above are available to take out probate or where they decline to do so or are incapable of acting the person who would be

²⁰⁸ See *Kothari v Qureshi and another* (1967) EA 564 (Rudd and Mosdell JJ) and *Otieno v Ougo and another* (number 4) [1987] KLR 407 (Nyarangi, Platt and Gachuhi JJA).

²⁰⁹ See section 53(a)(ii) of the Law of Succession Act.

²¹⁰ See section 63 the Law of Succession Act.

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entitled to the administration of the estate if the deceased had died intestate or the Public Trustee or any other legatee with beneficial interest or a creditor may, by virtue of section 65, apply for and a grant of letters of administration may be made to them.

(c) Effect of the grant with will annexed

A grant of letters of administration with the will annexed is conclusive proof as to the terms of the will and that the will had been duly executed. Unlike the grant of probate, which merely confirms the authority of the executor, the grant of administration with the will annexed actually confers authority on the administrator and vests the deceased's property in him. The explanation for this is that the administrator is so appointed, not by the will, but by the court through the grant of letters of administration. This means that the principle of relation back does not apply to a grant of letters of administration with will annexed.

11.10 GRANT OF SIMPLE ADMINISTRATION

(a) Issues in the event of intestacy

A grant of simple administration will be made in the vast majority of cases where the deceased dies totally intestate, that is without having made a will or where his will is invalidated. Where intestacy is partial, a grant of simple administration will be made in respect of property that is not dealt with under the deceased's will, but to any executor or executors who prove the will. However, where the deceased has made a will that makes an effective appointment of an executor, but dies totally intestate as the will fails to dispose effectively of any of their property, a grant of probate will be made.

(b) Persons entitled to grant in simple administration

Under section 66 of the Law of Succession, Act the following categories of persons may apply for and be granted letters of administration: surviving spouse or spouses, children, parents, siblings, half siblings and other relatives (in the nearest degree of consanguinity up to the sixth degree) of the deceased, the Public Trustee and creditors. Kamau J in *In the Matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu District* Nairobi High Court succession cause number 2398 of 2002 stated that section 66 of the Law of Succession Act provides a general guide

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in hierarchical order of the persons who would be entitled to administer the estate of the deceased.²¹¹ According to Koome J in *In the Matter of the Estate of Gathii Gatimu (deceased)* Nairobi High Court succession cause number 599 of 1994, section 66 provides for preferences to be given to persons who should become administrators.

Section 66 sets out the order of priority of persons entitled to a grant of simple administration.²¹² The order follows the order of entitlement to an estate on intestacy²¹³ and it requires that a person applying for the grant should have a beneficial interest in the estate. Each category is listed in priority; with preference being to spouses, descendants and ascendants in that order. Under section 66 the order of priority is as follows: the surviving spouse or spouses; the children of the intestate; the parents of the deceased; brothers and sisters of the whole blood and the issue of any deceased brother or sister who died before the intestate; brothers and sisters of the half-blood and the issue of any deceased brother or sister the half-blood who died before the intestate; and the relatives who are in the nearest degree of consanguinity up to and including the sixth degree.²¹⁴ In *Re Kibiego* [1972], EA 179 Madan J held that the widow is the proper person to obtain representation to her husband's estate, particularly where children are underage as she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children.

There is a general preference for a living person over a personal representative of a deceased person,²¹⁵ but where a person who is entitled on intestacy dies before taking out a grant, the personal representative of such a person who falls within the categories set out in section 66 of the Law of Succession Act has same right to a grant as the person they represent. Under the same provision, a person of full age is preferred to the guardian of a minor where persons are entitled in the same degree. If no one in the categories set out in section 66 has a beneficial interest in the estate, then a grant may be issued to the Public Trustee who claims *bona vacantia* on behalf of the state or to creditors.²¹⁶

211 See also *In the Matter of the Estate of Gichia Kabiti (deceased)* Nairobi High Court succession cause number 2559 of 2002 (Koome J), *Musa v Musa* (2002) 1 EA 182 (Ringera J) and *In the Estate of Naftali (deceased)* [2002] 2 KLR 684 (Waki J).

212 See *In the Matter of the Estate of Gichia Kabiti (deceased)* Nairobi High Court succession cause number 2559 of 2002 (Koome J).

213 See Part V of the Law of Succession Act.

214 See *In the Matter of the Estate of Charles Muigai Ndung'u (deceased)* of Karinde Kiambu District Nairobi High Court Probate and Administration 2398 of 2002.

215 See rule 26(3) the Probate and Administration Rules.

216 See section 66 (c)(d) the Law of Succession Act.

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The intestacy provisions at sections 35, 36, 37, 38, 39 and 40 of the Law of Succession Act also provide a useful guide in determining to whom the grant of letters of administration should be made between various competing claimants. In *In the Matter of the Estate of Aggrey Makanga Wamira* Mombasa High Court succession cause number 89 of 1996, Waki J stated that priority in taking a grant should be given to the surviving spouse followed by the children by virtue of section 35, while the other relatives set out in section 39 take only where there is no surviving spouse and children. In *Re Kibiego* [1972] EA 179, Madan J said that a widow is the most suitable person to obtain representation to her deceased husband's estate. According to the judge in the normal course of events, she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children. In *In the Matter of the Estate of Beatrice Amalemba* Nairobi High Court succession cause number 2610 of 2000, the contest for grant of letters of administration was between the father of the deceased on one hand and the mother-in-law and brother-in-law of the deceased on the other. Koome J held that grant be made to the father after considering who between the claimants would be entitled to inherit the estate by virtue of section 39 of the Law of Succession Act.

(c) Effect of grant in simple administration

A grant of simple administration is conclusive evidence that the deceased died wholly intestate and without leaving a will. Unlike a grant of probate, which merely confirms authority, a grant of simple administration confers authority to act and vests the deceased's property in the administrator.²¹⁷

In *The Public Trustee v Jotham Kinoti and another* Nairobi High Court succession cause number 3111 of 1985, Khamoni J stated that a grant of letters of administration is the source of the administrator's authority to administer the estate of the deceased. The authority conferred by the grant only covers the property disclosed in the cause; it does not extend to assets which are not set out in the succession cause. A grant does not therefore give the grantee authority to recover property sold by the family before the administrator's appointment and which is not included in the petition.

(d) The non-application of the principle of relation back

An administrator (whether simple or with the will annexed) has no authority in relation to the deceased's estate prior to the grant. In other words, a grant of letters of administration is of no retrospective effect. Section 80(2) of the Law of

²¹⁷ *Kothari v Qureshi and another* [1967] EA 564 (Rudd and Mosdell JJ).

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Succession Act provides that a grant of letters of administration, with or without the will annexed, takes effect only as from the date of the grant. It is considered dangerous to offer prospective administrators immunity for intermeddling before their rights to a grant have been established.²¹⁸ The doctrine of relation back does not apply to a grant of letters of administration under Kenyan law. In *Otieno v Ougo and another* (number 4) [1987] KLR 407 (Nyarangi, Platt and Gachuhi JJA)²¹⁹ the Court of Appeal found that the appellant's claim of entitlement to bury the remains of her husband on the basis of her being his personal representative failed on the ground that she had not obtained a grant of representation. She could only assert her right to do if she had a right to act on his behalf, which right stems from grant.²²⁰ In *Troustik Union International and another v Mrs Jane Mbeyu and another*. Nairobi Court of Appeal civil appeal number 145 of 1991 it was held that a person, whether a spouse or not, cannot sue on behalf of the intestate estate of the deceased person unless they have a grant of representation at the time of filing suit. The respondents claim for damages under the Law Reform Act²²¹ failed on this ground that is lack of locus standi to sue on behalf of the estate on account of lack of a grant of representation.

The decision in *Troustik Union International and another v Mrs Jane Mbeyu and another* Nairobi Court of Appeal civil appeal number 145 of 1991 was followed in *Martin Odera Okumu v Edwin Otieno Ombajo* High Court succession cause number 9479 of 1996 and *Coast Bus Services Limited v Samuel Mbuvi Lai Nairobi* Court of Appeal civil appeal number 8 of 1996 (Gicheru, Tunoi and Shah JJA)²²². In *Coast Bus Services Limited v Samuel Mbuvi Lai Nairobi* Court of Appeal civil appeal number 8 of 1996, the Court of Appeal stated that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, the suit would be incompetent as at the date of inception. The doctrine of relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked as to render the action competent. The court held on the facts of the case that the party lacked the standing to present a suit for the benefit of the deceased's

218 Report of the Commission at 71.

219 (1982-1988) 1 KAR1048.

220 Compare with the Ugandan case of *Najeno v Serwanga* [1974] EA 322 (Allen AgJ) where it was held that a grant is necessary to constitute anyone the legal or personal representative of another for the purpose of substituting a deceased party in a suit. See also *Bolton v Sakai Khamoni* (1957) EA 360

221 Chapter 26 Laws of Kenya

222 See also *Mary Mbeke Ngovu and another v Bernard Mutinda Mutisya* Machakos High Court civil case number 352 of 1998 (Mwera J)

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estate without a grant of representation at the time of filing suit. Mwera J in *Peter Maundu Mua v Leonard Mutunga and another* Machakos High Court civil case number 305 of 1995, stated that for a person in law to represent an estate of a deceased person, he must be given such capacity and authority by the law, which capacity and authority comes by way of grant of representation. Accordingly, a person without such grant cannot be termed a legal representative of an estate of a deceased person.²²³ The decision of Tuiyot J in *Ann Kathanga v Mohamed Mjahid t/a C-Line Company and another* Meru High Court civil case number 74 of 1998, where he held that a widow does not need a grant of representation to sue on behalf of her deceased husband's estate, is not good law.

The authority in *Roman Carl Hintz v Mwang'ombe Mwakima* (1982-1988) 1 KAR 482 was held in the *Troustik Union International and another v Mrs Jane Mbeyu and another* Nairobi Court of Appeal civil appeal number 145 of 1991 to be bad law. It had been held in *Roman Carl Hintz v Mwang'ombe Mwakima* (1982-1988) 1 KAR 482 that one need not obtain grant of letters of administration before commencing action, but should have the grant to entitle him to receive the decretal or judgement sum. The right to sue or respond to a suit derives from the grant of representation and certainly, without it a person would have no standing in law to sue or be sued on behalf of the estate. The dissent by Kneller JA in *Roman Carl Hintz v Mwang'ombe Mwakima* (1982-1988) 1 KAR 482 reflects the correct legal position, which view was subsequently upheld by the bench of five in the *Troustik Union International and another v Mrs Jane Mbeyu and another* Nairobi Court of Appeal civil appeal number 145 of 1991.

11.11 GRANTS TO THE PUBLIC TRUSTEE

Grants of representation may be made to the Public Trustee in a variety of circumstances. These are set out in section 6(2) of the Public Trustee Act. They include situations where: the deceased died intestate and no one has taken out probate or representation (section 46 of the Law of Succession Act) or the beneficiaries or dependants are unable to agree on who should take out representation; the deceased has died testate, but has omitted to appoint an executor; the persons named as executors in the will are dead or have renounced probate or are unwilling to act; probate of the will of the deceased or letters of administration with the will annexed to the deceased's estate has not been obtained within six months from the date of the death of the deceased; the deceased has appointed the Public

²²³ A similar point was made by Tanui J in *Gitau and 2 others v Wandai and others* [1989] KLR 23.

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Trustee as an executor; and the estate of the deceased has wholly or partially been left unadministered and a grant of representation has been made, but the personal representatives are either dead or unwilling to complete the administration of the estate.²²⁴

In *Saleh bin Mohamed bin Omar Bakor v Noor binti Sheikh Mohamed bin Omar Bakor* (1951) 18 EACA 30 (Sir Barclay Nihill P, Sir Newnham Worley VP and Lockhart-Smith JA) it was stated that the Public Trustee's role as administrator ends when the registrar's certificate is issued under rule 3 of the Public Trustee's Rules. The certificate renders the Public Trustee *functus officio* and the grant stands revoked.

11.12 LIMITED GRANTS

A limited grant is a grant that does not give the personal representative authority (or confirm the authority, in the case of a grant of probate) to act with respect to the whole estate in all respects until the administration is completed.²²⁵ It may be described as a restricted grant. Section 54 allows the court to limit a grant of representation that it has jurisdiction to make. A grant may be limited as to special purpose, or property, or time, or it may be one of the various special types. The various classes of limited grants are set out in the 5th Schedule to the Law of Succession Act.

(a) Limited as to purpose

Such limited grants are provided for under paragraphs 11 and 12 of the 5th Schedule. There are several types of grant that are each limited as to purpose in different ways.

(i) *Grant ad colligenda bona*

It is provided for under section 67 of the Law of Succession Act, and rules 36 and 37 of the Probate and Administration Rules and it only issues from the High Court. It was stated by the Court of Appeal in *Morjaria v Abdalla* [1984] KLR 490 (Hancox JA, Chesoni and Nyarangi AgJJ) that a grant *ad colligenda bona* is normally made where the assets of the estate are of perishable or precarious nature and which need quick attention.²²⁶ The grant *ad colligenda bona* is intended to give the

224 See *Willington Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA).

225 See *Re Succession – Limited Grant* [2000] 2 EA 495 (Ang'awa J).

226 See also *Re Succession – Limited Grant* [2000] 2 EA 495 (Ang'awa J).

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administrator power only to collect and preserve the assets of the estate, pending the making of a full grant, according to Mwera J in *In the Matter of Dr John Muia Kalii (deceased)* Machakos High Court succession cause number 81 of 1995.²²⁷ It is made where some urgent action is needed in relation to the assets of the estate and there may be delay in obtaining grant.

The appointment of a person as an administrator *ad colligenda bona* in respect of the estate of a deceased person does not include the right to take the place of the deceased for the purpose of instituting an action or suit since there is express provision for that purpose in the Law of Succession Act.²²⁸

According to Ringera J *In the Estate of Kahawa Sukari Limited* Milimani High Court winding-up cause number 23 of 2002, a grant of letters of administration *ad colligenda bona* cannot confer the grantee the status of a personal representative of a deceased person. Section 2 of the Law of Succession Act defines a personal representative as the executor or administrator of a deceased person. Administrator is defined to mean a person to whom a grant of letters of administration has been made under the Act. Consequently, a grant of letters can only be a full grant since a limited grant *ad colligenda bona* cannot confer on the grantee the right to administer the estate of the deceased person.

The facts of the case were that following the demise of the deceased, who was a member of the board of Kahawa Sukari Limited, his family requested the company to allow the petitioner to join the board of the company as a representative of the deceased. It was advised that it was necessary for the petitioner or other members of the family to obtain letters of administration to the estate of the deceased. The petitioner applied for and obtained a grant of administration *ad colligenda bona*. He thereafter notified the company of the fact. Despite the notification, he was not admitted to the board or made a signatory of the company's accounts or otherwise made a representative of the deceased in the company. It was in the backdrop of the foregoing that the petitioner moved the court by way of a petition under section 211 of the Companies Act.²²⁹ The main issue which fell for determination by the court was whether or not the petitioner had the *locus standi* to file the petition and seek the orders prayed for in the petition. The court found that in the first place, the grant obtained by the petitioner was invalid

227 See also *Raphael Jacob Samuel v The Public Trustee and others* Nairobi Court of Appeal civil appeal number 16 of 1980 (Law, Miller and Potter JJA).

228 See *Morjaria v Abdalla* [1984] KLR 490 (Hancox JA, Chesoni and Nyarangi AgJJA).

229 Chapter 486 Laws of Kenya.

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because it did not indicate the purpose for which it was obtained. The grant issued to the petitioner was expressed to be a limited grant of letters of administration *ad colligenda bona* and was to last for a period of three months. The usual words expressing the purpose for which it was issued, that is 'collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation is granted' were cancelled out. The cancellation of those had the effect of rendering the grant meaningless. It ceased to be a grant *ad colligenda bona* for collecting and getting in the estate. The grant lost its character through the cancellation of those words. In the second place, even if the grant was a valid one it would not have been sufficient to constitute the petitioner a member of the company within the meaning of section 211 of the Companies Act. One, because it could not confer upon the grantee the status of a personal representative. Two, even the holder of a full grant, who is truly the personal representative of the deceased, cannot be treated as a member of the company unless he satisfies the requirements of section 28 of the Companies Act.

(ii) Grant ad litem

It is granted to enable someone represent the estate where the estate has been sued or intends to sue.²³⁰ It is sought where it is necessary to make an estate a party to a suit.²³¹ It is usually taken out where a third party wishes to make the estate a defendant in an action and no person entitled to a grant has taken one out.

(iii) Grant pendente lite

It is granted under paragraphs 10 and 14 of the 5th Schedule, where there is a pending suit, particularly a dispute as to the validity of the will or right to administer. It is limited to the duration of the pendency of the suit. It allows the administrator appointed by the court to administer the estate until the action is completed as stated in *In the Matter of the Estate of Onesmus Mwilu Mbuvi (deceased)* Machakos High Court probate and administration number 111 of 1996 by Mwera J.²³² It is limited in purpose in that it does not give authority to the administrator to distribute the estate and it is also limited in time to the completion of the pending proceedings. In *Francis Kamau Mbugua v James Kinyanjui Mbugua* Nairobi High

230 See paragraph 15 of the 5th Schedule to the Law of Succession Act.

231 See *Re Succession: Limited Grant* [2000] 2 EA 495 (Ang'awa J).

232 See also *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS) (Nyamu J).

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Court civil case number 111 of 2004 (OS), Nyamu J held that a party wishing to obtain court orders to restrain intermeddling has to obtain a full grant or a grant *pendente lite* under paragraph 10 of the 5th Schedule in order to obtain interim relief.

(iv) *Grant de bonis non administratis*

This is granted under paragraph 20 of the 5th Schedule, where the personal representative has not completed the administration of the estate either because he has died or for some other reason part of the estate has been left unadministered. A grant limited to the purpose of administering the unadministered part may be issued. In *In the Matter of the Estate of Hannah Njoroge Njuki (deceased)* Nairobi High Court succession cause number 453 of 1997 (Ang'awa J), the grant of letters had initially been made to the deceased's husband who subsequently died before completing the administration of the estate. Her son brought an application seeking the removal of the deceased administrator's name and its substitution with his. The court directed that where an administrator dies and the estate is not fully administered, any of the beneficiaries entitled to the estate might file for letters *de bonis non*.²³³ A similar holding had been made earlier by Pelly Murphy J in *Maamun bin Rashid bin Salim El-Rumhy v Haider Mohamed bin Rashid El-Basamy* (1963) EA 438, where it was stated that any of the heirs have a right to a grant of administration *de bonis non* after the death of the personal representative.

The application before Khamoni J in *In the Matter of the Estate of Mwangi Mugwe alias Elieza Ngware (deceased)* and *In the Matter of the Estate of Mary Wairimu Ngware (deceased)* Nairobi High Court succession cause number 2018 of 2001 should have been resolved by asking the applicant to apply for administration *de bonis non*. The applicant brought a summons for the substitution of an administrator who died after the making of the grant, but before its confirmation. The court directed that there is no provision for the substitution of a deceased administrator under the Law of Succession Act, and counselled the applicant to apply for the revocation of the grant on the grounds that it had become inoperative and useless.

In making a grant *de bonis non* the court should be guided by the same rules as applied to original grants.

²³³ See also *In the Matter of the Estate of Peris Wanjiku Nduati (deceased)* Nairobi High Court succession cause number 2349 of 2001 (Ang'awa J).

(v) *Cessate grant*

This is made under paragraph 21 of the 5th Schedule, when the original grant was limited as to time and that period has now expired, provided that the administration of the estate is still incomplete.

(vi) *Temporary grant by a resident magistrate under section 49 of the Law of Succession Act*

A resident magistrate grants this in cases of apparent urgency and it is limited to collection of assets situated within his jurisdiction and payment of debts. It differs from the grant *ad colligenda bona* in that it is limited to collection of assets and payment of the debts of the estate, and not collection and preservation of the assets. Its life is limited to six months.

(b) Limited as to property

This type of limited grant is made under paragraph 13 of the 5th Schedule. It may be granted where a person dies leaving property of which he was the sole or surviving trustee or in which he had no beneficial interest on his own account and leaves no general representative or one who is unable or unwilling to act as such: letters of administration limited to that property may be granted to the person beneficially interested in the property or to another on his behalf.

A grant limited to property may also be made under rule 28 of the Probate and Administration Rules, where the whole estate of a deceased person whose domicile is outside Kenya, comprises of immovable property situated in Kenya.

It may also be granted where a testator appoints executors only of certain assets in a specified area. Such executors obtain probate limited to that property. It is usually made in cases where the estate includes settled land or because the testator has chosen to appoint executors who are experts in a particular type of property to deal with part of the estate.

(c) Limited as to time

There are several such grants and they are provided for under paragraphs 1 to 10 of the 5th Schedule and section 49 of the Act.

*Law of Succession**(i) Grant durante aetate minore*

This is taken out under paragraph 7 and 8 of the 5th Schedule, where either the executors or the administrators are minors and as such, they are not entitled to a grant in their own right. A will may limit the time within which the representative is to act as executor for example during the minority of the testator's children a grant may be made in the circumstances limited to the duration of the minority. The grant automatically expires when the minor reaches 18 years old, unless some other time is specified by the court.

(ii) Grant durante absentia

Where the personal representative is outside the jurisdiction, the court may, under paragraphs 4, 5 and 6 of the 5th Schedule, grant representation to another person limited to the duration of the absence of the personal representative. In *Re Mauchauffee* [1969] EA 424 (Harris J) it was directed that a grant be made to a petitioner without citing her sister, who was out of the country, but limited until the sister herself applied for and obtained a grant.

(iii) Grant where will is unavailable

Where the deceased had made a will, but the same is lost, misplaced or otherwise unavailable; either because the will is outside jurisdiction or held in a foreign court, a limited grant may be given under paragraphs 1, 2 and 3 of the 5th Schedule, until the original or more authentic copy is found or availed. In *Re Estate of Motichand Devji Shah* Nairobi High Court probate and administration number 234 of 1964, the court admitted a carbon copy of the will of the deceased to probate and issued a limited grant of probate to the executors pending the production of the original will whose whereabouts were unknown.

(iv) Administration for use and benefit of a person of unsound mind

Where a sole executor or sole universal or residuary legatee or a person who would be solely entitled to the estate of the intestate according to the rules of intestacy is mentally incapacitated, a grant of letters of administration will be made, under paragraph 9 of the 5th Schedule, to the person to whom the care of his estate has been committed by a competent authority, or if there is no such person any other person as the court thinks fit, for the use and benefit of the person of unsound mind, with power reserved for the incapacitated executor or administrator to take out a grant when their disability ceases.

*Grants of Representation**(v) Temporary grant limited to collection of assets and payment of debts*

This is provided for under section 49 of the Law of Succession Act and rule 37 of the Probate and Administration Rules. It is related to the grant *ad colligenda bona*, the only difference between them being that the limited grant under section 49 goes beyond collection of assets to cover payment of debts. It is made pending the making of a full grant, and its life is six years.

(vi) Special limited grant Legal Notice number 39 of 2002

This type of limited grant is provided for under the Probate and Administration (Amendment of the 5th Schedule) rules through Legal Notice number 39 of 2002. The limited grant is made in special circumstances where the urgency of the matter is so great that it would not be possible for the court to make a full grant in sufficient time to meet the necessities of the estate. It is not clear in what respects the special limited grant differs from a grant *ad colligenda bona*²³⁴ or the temporary limited grant made under section 49(3) of the Laws of Succession Act.

11.13 FOREIGN GRANTS

A grant of representation obtained in Kenya only enables the personal representatives to deal with the deceased's property that is in Kenya. If the deceased has assets outside Kenya, it is necessary to obtain in that country a separate grant that fulfils the probate requirements of that country. However, whether grants issued in Kenya can deal with property located in foreign jurisdictions depends largely on the law in those jurisdictions.

The Law of Succession Act allows, to a limited extent, the recognition of foreign grants in Kenya. Section 4(1)(a) rules out the recognition of foreign grants with relation to real property. The provision states that succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, the domicile²³⁵ of the deceased at the time of his death notwithstanding. Section 4(1)(b) provides that succession to the movable property of a deceased person, wherever situated, shall be regulated by the law of the country of the domicile of the person at the time of his death.²³⁶ This would mean that foreign grants are recognised in Kenya to the extent only of movable property.

234 *In the Matter of the Estate of Evans Nguti Kamanda (deceased)* Eldoret High Court civil case number 36 of 2002 (Omondi Tunya J).

235 The Kenyan law on domicile is the Law of Domicil Act (Chapter 37 Laws of Kenya).

236 See *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684 (Waki J).

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Under section 77(1) of the Law of Succession Act, foreign grants have to be deposited with the High Court (the principal registry and the Mombasa registry only) and sealed with the seal of that court, where after the same have the same effect and operation in Kenya as if granted and confirmed by the High Court of Kenya.²³⁷ However, the High Court can only reseal grants issued by courts or the Minister may designate other relevant authorities of such countries as by a notice in the official gazette. In *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684 (Waki J) it was remarked *obiter* that the purpose of resealing foreign grants is to eliminate frauds and conflicts.

As a rule, no suit can be brought against an administrator in his official capacity, except in the courts of the country from which he derives authority to act according to Pickering J in *National Bank of India Ltd v The Administrator General of Zanzibar* [1924–1926] 10 KLR. In the Ugandan case of *Keshavlal Bhoja v Tejalal Bhoja* [1967], EA 217 (Fuad J) a Ugandan resident sued another as the administrator of their deceased father's estate. The defendant had obtained the grant of letters of administration from a Kenyan court. It was held that the suit was not maintainable in Uganda.

11.14 ADMINISTRATION OF AN ESTATE WITHOUT GRANT

For fairly small estates, a grant of representation is not mandatory; the estate may be administered without it. In respect of estates not exceeding KShs 20 000.00 in gross value, section 8(1) of the Public Trustee Act empowers the Public Trustee, where the deceased has died intestate or died testate leaving a will in circumstances which would require the Public Trustee to apply for a grant under section 6 of the Public Trustee Act, to administer such estates without reference to any court. Where the gross value of the estate does not exceed KShs 4 000.00 the Public Trustee may, under section 8(2) of the Public Trustee Act, issue a certificate of summary administration on the application of any person to whom grant may be made under the provisions of the Law of Succession Act.

²³⁷ See *In the Matter of the Estate of Gerald Felix Nyawira Otiso (deceased)* Nairobi High Court civil case number 2715 of 1996 (Ang'awa J).

CHAPTER TWELVE

PROBATE JURISDICTION

12.1 INTRODUCTION

A grant of representation can normally be made in the courts of Kenya if the deceased died in Kenya, or the deceased appointed an executor in Kenya over personality situated in Kenya. Probate business is divided into non-contentious and contentious probate. Non-contentious probate is often referred to as probate in common form, while contentious probate is known as probate in solemn form.

The Law of Succession Act gives both original and appellate jurisdiction to the courts over probate and administration matters. The Act confers original jurisdiction to the High Court, resident magistrate's courts and *Kadhis's* courts. Whereas the Act does expressly provide appellate jurisdiction to the High Court, it is silent on the appellate jurisdiction of the Court of Appeal.

12.2 ORIGINAL JURISDICTION

(a) High Court

Under section 47, the High Court is vested with jurisdiction over probate and administration matters, specifically to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders, as it may consider expedient. This provision is reinforced by section 48 of the Law of Succession Act, which provides that where there is a High Court, the resident magistrates shall have no jurisdiction, but the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under the Law of Succession Act.

According to Hayanga J in *In the Matter of the Estate of Mohamed Saleh Said Sherman also known as Mohamed Swaleh Sherman (deceased)* Mombasa High Court succession cause number 145 of 1998, the spirit of the Law of Succession Act, through section 47, gives wide discretion to the High Court in dealing with testamentary and 'estate administrative issues'²³⁸. Nambuye J in *Re Katumo and another* [2003] 2

²³⁸ See also *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996 (Kamau AgJ).

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EA 509 stated that section 47 vests the court with power 'to hear and determine all manner and nature of applications'. In *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS), Nyamu J stated that section 47 of the Act empowered the probate court to give all necessary orders and it gives the court an unlimited jurisdiction to deal with any dispute under the Act. According to Koome J in *In the Matter of the Estate of Henry Ng'ang'a (deceased)* Nairobi High Court succession cause number 1330 of 1999, section 47 is a broad provision under which the court can make any order. Under this provision, the court directed a land agent who had been collecting rent on behalf of the estate to furnish to the court a full and accurate account of the rents so far recovered. It was further ordered that the estate be referred to a locational chief for arbitration on the issue of distribution. In *In the Matter of the Estate of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996, Koome J invoked section 47 to apply section 26 of the Act while handling objection proceedings although there was no application before her for reasonable provision.

This provision is not as broad as a section of the High Court has interpreted it to be. The section provides that:

The High Court shall have jurisdiction to entertain any application and determine any disputes under this Act and to pronounce such decrees and make such orders therein as may be expedient.

It only vests the High Court with jurisdiction to entertain such applications and disputes as may be allowed in the Act and the supporting subsidiary legislation. A section of the High Court treats section 47 as not really giving a wide or broad jurisdiction. In *Re Katumo and another* [2003] 2 EA 509, Nambuye J stated that jurisdiction under section 47 of the Act has to be exercised within the provisions of the Act. Where there is no particular provision covering a particular aspect of the dispute there is no jurisdiction. In the instant case the application before the court was brought under sections 45 and 47 of the Act for an order that a particular asset be taken over by the court from the persons having possession of it and put it in proper custody; alternatively the asset be handed over to the applicant— a creditor. The court declined to grant the orders for lack of provision covering the situation. In the court's opinion section, 47 could not be employed to grant the orders sought.²³⁹

²³⁹ The disturbing thing about *Re Katumo and another* is that the court took conflicting positions that is it appeared to be taking two mutually conflicting positions. On the one hand the court appeared to be saying that section 47 allows the court to hear and determine all manner and nature of applications, while on the other hand the court appeared to saying that the provision is not broad.

Probate Jurisdiction

The Court of Appeal has stated in *Wairimu Gathute v Theuri Wambugu* and another Nyeri Court of Appeal civil appeal number 33 of 1991 (Gicheru, Kwach and Muli JJA) that the High Court exercising its power under sections 47 or 48 of the Act should not delegate its jurisdiction to arbitrators, since the law gives it exclusive jurisdiction. Delegation amounts to an abdication of statutory responsibility. Later decisions of the Court of Appeal, however, depart from this position. In *Thumbi Weru and others v John Wachira Mwaniki* Nyeri Court of Appeal civil appeal number 191 of 1998 (Kwach, Akiwumi and Shah JJA) and *Macharia v Wanjohi and another* (2004) 1 EA 111 (Omolo JA, Onyango Otieno and Ringera AgJ), the Court of Appeal approved the application of Order XLV rule 1 of the Civil Procedure Rules by the High Court where certain matters relating to the estate of the deceased were referred to arbitration by the local provincial administration. The High Court has adopted the approach and frequently refers some matters for arbitration by the provincial administration or under the traditional society's clan system. In *In the Matter of the Estate of Henry Ng'ang'a (deceased)* Nairobi High Court succession cause number 1330 of 1999, for example, Koome J referred a dispute on distribution to arbitration by a locational chief. In *In the Matter of the Estate of Elijah Ndambuki Kituku (deceased)* Machakos High Court probate and administration number 23 of 1993, (Mwera J) two sets of clan arbitrators were put in place to arbitrate on the distribution of the estate. Mwera J in *In the Matter of the Estate of Mwalolo Nguli (deceased)* Machakos High Court probate and administration number 288 of 1994 adopted a distribution proposed by a clan following an order of the court, which distribution was in accordance with Kamba customary law.²⁴⁰ In *In the Matter of the Estate of Mathu Ngwaro alias Nikola (deceased)* Nairobi High Court succession cause number 45 of 1994 (Waweru J) the question of the respective relationships between two women, claiming to be the wives of the deceased, and the deceased was remitted for consideration by a panel of four independent elders to be appointed by the local assistant chief.

Where, for whatever reason, the provisions of sections 48 and 49 of the Law of Succession Act (relating to jurisdiction of resident magistrates) are suspended in respect of any specified area falling under the jurisdiction of a resident magistrate, the High Court by virtue of section 44(2) of the Law of Succession Act may issue grants of representation in respect of the estate of a deceased resident of the area. This would be so regardless of the value of the estate.

240 See also *In the Estate of Nzioka Wambua (deceased)* Machakos High Court probate and administration number 6 of 1992 (Mwera J).

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Under section 11 of the Public Trustee Act where grant of representation has been made to the Public Trustee under the Public Trustee Act, the court has jurisdiction, on a petition by the Public Trustee or any person interested in the estate, to determine all disputes, matters, claims and demands and to make such orders as it thinks fit concerning the collection, sale, investment, disposal or administration of the estate. Where, however, the estate is valued at less than KShs 8 000.00 any such disputes, claims, matters and demands should be decided by the Public Trustee.

(b) Resident magistrates

For judicial stations where there is no High Court, the Chief Justice may appoint a resident magistrate to represent the High Court.²⁴¹ The resident magistrate so appointed exercises the same powers as the High Court, including the power, in cases of apparent urgency, to make grants limited to the collection of assets and payment of debts with respect to property within his jurisdiction.

The jurisdiction of the resident magistrate is, however, limited with respect to some matters.²⁴² The resident magistrate cannot entertain applications to revoke a grant and cannot make orders regarding estates whose gross value exceeds KShs 100 000.00.²⁴³ The resident magistrates have no jurisdiction in any place where there is a High Court that is in Nairobi, Mombasa, Nakuru, Nyeri, Machakos, Bungoma, Kakamega, Eldoret, Kisumu, Kisii, Meru, Embu and Malindi.²⁴⁴ Ondeyo J in *In the Matter of the Estate of Karanja Gikonyo Mwaniki (deceased)* Nakuru High Court Miscellaneous 245 of 1998, correctly held that the jurisdiction of a resident magistrate is limited, by virtue of section 48 of the Law of Succession Act, to an estate whose value does not exceed KShs 100 000.00. It was further held that a grant made by such a resident magistrate in respect of an estate whose value exceeded KShs 100 000.00 was a nullity.

241 See section 47 of the Law of Succession Act.

242 See sections 48 and 49 of the Law of Succession Act.

243 The figure of KShs 100 000.00 was proposed in 1968 by the Commission on the Law of Succession in its report, and subsequently inserted in the law passed in 1972. The suggestion by Ang'awa J in *In the Matter of the Estate of Morarji Bhanji Dhanak (deceased)* Nairobi High Court succession cause number 1731 of 2000 that the figure of KShs 100 000.00 is meant to be applied in remote parts of Kenya and in respect of small estates is erroneous. It applies in all cases where there is no High Court. The figure of KShs 100 000.00 was a large sum of money in 1968 when it was first floated. Indeed the figure of KShs 100 000.00 was at the time higher than the pecuniary jurisdiction of the resident magistrates, and it was recommended that the resident magistrates jurisdiction be upped to KShs 100 000.00.

244 See *Re Succession – Limited Grant* [2000] 2 EA 495 (Ang'awa J).

The decision by Ang'awa J in *In the Matter of the Estate of Kuria Wairagu (deceased)* Nairobi High Court succession cause number 905 of 2002 should be taken with circumspection. The court held that resident magistrates appointed under section 47 represent the High Court and therefore they have the same jurisdiction as the High Court so long as there is no High Court in that station, and therefore their jurisdiction is not limited to estates whose value is below KShs 100 000.00. The judge further held that resident magistrates who are not gazetted under section 47 of the Act have jurisdiction in probate matters over estates whose value does not exceed KShs 100 000.00 and that where there is no magistrate the jurisdiction is exercised by a District Commissioner. With respect, there are no provisions in the Law of Succession Act to that effect. It was implied by the Court of Appeal in *Kenya Bus Services Ltd v Kawira* [2003] 2 EA 519 (Omolo, Tunoi and Githinji JJA), that a grant made by a resident magistrate in excess of the court's pecuniary jurisdiction would nevertheless be valid. Section 48 clearly says that the resident magistrate has jurisdiction over estates whose gross value does not exceed KShs 100 000.00.

The resident magistrate has the same powers as the High Court for the purpose of section 11 of the Public Trustee Act, which defines the court to mean any court having jurisdiction in the matter in question under the Law of Succession Act.

(c) Kadhi's Court

The Law of Succession Act confers jurisdiction on Kadhi's courts regarding administration of the estate of a deceased Muslim. Under sections, 2(3) and 48(2) of the Law of Succession Act the substantive provisions of the Act do not apply to the estate of deceased; Muslim Islamic law applies instead. However, section 2(4) of the Act applies Part VII of the Act, which relates to the administration of estates, to the estate of a deceased Muslim and appears to grant to the *Kadhi* the same jurisdiction as the resident magistrate. Section 50(A) empowers the Chief Justice, in consultation with the Chief *Kadhi*, to make rules of court for the carrying to effect, with relation to the estate of a deceased Muslim, of sections 47, 48, 49 and 50 of the Act. No rules have been made so far.

12.3 APPELLATE JURISDICTION

(a) High Court

An appeal lies, by virtue of section 50(1) of the Law of Succession Act, from the decision of the resident magistrate to the High Court. The Act, however, does not have regulations or procedures for the filing and hearing of such appeals. There

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is silence on the process. It is not indicated whether the Civil Procedure Act and Rules on procedure on appeals apply. In practice, the Civil Procedure Act and Rules apply in defining what should be addressed. The decision of the High Court on the appeal is final (*In the Matter of Habakuk Ochieng Adede (deceased)* Nairobi High Court succession cause number 721 of 2000 (Ang'awa J)). Section 50(2) of the Act provides similarly for appeals from the decision of a *Kadhi*, but the decision of the High Court on the appeal from the *Kadhi's* decision is not final as there is provision for a further appeal to the Court of Appeal in respect of any point of Islamic law. In such case, an appeal to the Court of Appeal should be with the prior leave of the High Court.²⁴⁵

(b) Court of Appeal

The Law of Succession Act does not provide for an appeal from the decision of the High Court in exercise of its original jurisdiction to the Court of Appeal. The Court of Appeal, however, has held in *Makhangu v Kibwana* [1995-1998] 1 EA 175 (Cockar CJ, Kwach and Shah JJA), that an appeal does lie to the Court of Appeal from a decision of the High Court in probate matters. According to the court, under section 47 of the Law of Succession Act, the High Court has jurisdiction on hearing any application to pronounce decrees or orders. Any order or decree made under this section is appealable under section 66 of the Civil Procedure Act, either as a matter of right if it fell within the ambit of section 75 of the Civil Procedure Act or by leave of the court if it did not.²⁴⁶ This decision was based on the Court of Appeal's earlier decision in *Commissioner of Income Tax v Ramesh K Menon* (1982-88) 1 KAR 695 (Madan and Hancox JJA, with Platt AgJA dissenting). The decision of the Court of Appeal in *Makhangu v Kibwana* [1995-1998] 1 EA 175 (Cockar CJ, Kwach and Shah JJA) was followed with approval by the Court of Appeal in *Kaboi v Kaboi and others* [2003] 2 EA 472 (Keiwua JA) and with reservation by the High Court in *In the Matter of the Estate of Hezron Bernard Wamunga (deceased)* Nairobi High Court succession cause number 1813 of 1999 (Koome J).

The High Court holds a position, which is in conflict with the Court of Appeal on the issue of appeals from the High Court. *Makhangu v Kibwana* (1995-1998)

²⁴⁵ See *In the Matter of Habakuk Ochieng Adede (deceased)* Nairobi High Court succession cause number 721 of 2000 (Ang'awa J).

²⁴⁶ See also *Carmella Wathugu Karigaca v Mary Nyokabi Karigaca* Nairobi Court of Appeal civil appeal number 30 of 1995 (Tunoi, Lakha and Pall JJA) and *George Itotia Ng'ang'a v Mary Wanjiku Kimaru* Nairobi Court of Appeal civil appeal number Nairobi 115 of 2000 (Shah JJA).

1 EA 175 (Cockar CJ, Kwach and Shah JJA) was decided in 1996, but the High Court has been rather reluctant to follow it. The High Court holds that the Law of Succession Act is a comprehensive code, which depends on the provisions of the Civil Procedure Act to the extent the Civil Procedure Act is allowed by the Law of Succession Act. The Law of Succession Act does not provide for an appeal from the High Court to the Court of Appeal, and it does not say that the provisions of the Civil Procedure Act on appeals apply. Koome J apparently followed *Makhangu v Kibwana* reluctantly in *In the Matter of the Estate of Hezron Bernard Wamunga (deceased)* Nairobi High Court succession cause number 1813 of 1999. She said in the ruling that the Law of Succession Act is a specialised piece of legislation complete with its own rules of procedure, and that the Act regulates all the proceedings and provides for procedures to be followed.

The other High Court decisions, although made after 1996, do not advert to *Makhangu v Kibwana* at all. In *In the Matter of Habakuk Ochieng Adede (deceased)* Nairobi High Court succession cause number 721 of 2000, Ang'awa J²⁴⁷ stated that there was no right of appeal (under the Law of Succession Act) to the Court of Appeal from the decision of the High Court. The court noted that the practice in Kenya is that parties who wish to appeal to the Court of Appeal go round the issue of no right of appeal by first seeking a review of the High Court's decision under order XLIV of the Civil Procedure Rules (which is one of the provisions of the Civil Procedure Rules allowed to apply to succession causes under the Law of Succession Act). Thereafter, the party may appeal the decision of the High Court on review to the Court of Appeal. Ang'awa J reiterated the position in *In the Matter of the Estate of Mariko Marumbi Kiuru (deceased)* Nairobi High Court succession cause number 2011 of 1997,²⁴⁸ where it was stated that there is no right of appeal to the Court of Appeal from a decision of the High Court: what the parties usually do is to apply for a review whose determination gives them a technical right of appeal to the Court of Appeal.²⁴⁹

Waweru J in *In the Matter of the Estate of James Gitumbi Kagwiri (deceased)* Nairobi High Court succession cause number 782 of 1999, while declining to grant leave to appeal said:

It is trite law that a right of appeal must be granted by statute. Where there is no

²⁴⁷ The decision was made on 15 February 2001.

²⁴⁸ The decision was made on 29 July 2003.

²⁴⁹ See also *In the Matter of the Estate of Mary Gachuru Kabogo (deceased)* Nairobi High Court succession cause number 2830 of 2001 (Ang'awa J).

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direct right of appeal granted by statute, the power of court to grant leave to appeal must be provided for by statute. The orders sought to be appealed against were made in proceedings under the Law of Succession Act (Chapter 160). I see nothing in this Act which empowers me to grant the leave sought, none has been pointed out to me. I have no jurisdiction to grant leave to lodge the intended appeal. My inherent jurisdiction does not include the power to confer a right of appeal where none has been provided by statute.²⁵⁰

Hayanga J in *In the Matter of the Estate of Mohamed Saleh Said Sherman also known as Mohamed Swaleh Sherman (deceased)* Mombasa High Court succession cause number 145 of 1998, while similarly refusing to grant leave to appeal said:

There is no provision under the Law of Succession Act allowing an automatic right of appeal to the Court of Appeal from a High Court order but it can be made when there is leave. The right to appeal is not automatic and does not arise from any case that is adjudicated in a lower court. It must be given by statute or by any legal rules. Where it is not given then it does not exist.²⁵¹

In *In the Matter of the Estate of Mary Gachuru Kabogo (deceased)* Nairobi High Court succession cause number 2830 of 2001, Ang'awa J was of the view that during the confirmation process disputes relating to properties should be heard under Order XXXVI. This would allow the bringing of an appeal against the order, if made by the High Court, to the Court of Appeal since the Law of Succession Act does not provide for an appeal from the decision of the High Court in exercise of its original jurisdiction to the Court of Appeal.

The position taken by the High Court is akin to that stated by Ringera J in *Welamondi v The Chairman, Electoral Commission of Kenya* [2002] 1 KLR 486 and *Ndete v Chairman Land Disputes Tribunal and another* [2002] 1 KLR 392 regarding judicial review proceedings. According to Ringera J, judicial review proceedings are *sui generis*, created by their own independent legislation which confers special jurisdiction upon the courts with respect to those proceedings. Being a special procedure sets it apart from ordinary civil proceedings, and the provisions of the Civil Procedure Act and Rules cannot be invoked. Onyancha J held similarly in *Shah v Shah* (number 2) [2002] 2 KLR 607, with respect to matrimonial proceedings. Similarly, the Law of Succession Act creates a special procedure, and the provisions of the Civil Procedure Act cannot be invoked in succession matters, unless there is express provision in the Law of Succession Act for it.²⁵²

250 The decision was made on 22 May 2003

251 The decision is not dated, but it is founded on an application dated 21 May 2001.

252 See section 12.6 here below

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It is imperative that the Attorney General should take steps to have the Law of Succession Act amended to expressly and clearly provide for an appeal from the decision of the High Court in probate and succession causes to the Court of Appeal. The right of appeal in such matters should not be left to the generosity or ingenuity of the Court of Appeal in granting such right where none has been given by statute.

The administration of a deceased person's estate by an administrator is not an execution of a court decree or order. In the circumstances, according to Khamoni J in *In the Matter of the Estate of Joseph Mwinga Mwaganu (deceased)* Nairobi High Court succession cause number 1814 of 1996, it is not possible for stay of execution pending appeal to be granted under Order XLI, rule 4 of the Civil Procedure Rules.

12.4 INHERENT JURISDICTION

The High Court, in a number of decisions, has held that section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, gives the High Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This section and rule are akin to section 3A of the Civil Procedure Act According to Hayanga J in *In the Estate of Mohamed Saleh Said Sherman (deceased)* Mombasa High Court succession cause number 145 of 1998 section 47 of the Act gives the court inherent jurisdictional powers to make such orders as are expedient. In that, matter the court invoked section 47 to order monthly advancements to the widow and daughters of the deceased. In *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996, Kamau J invoked section 47 and rule 73 to hold that an application was properly on record even though it had serious procedural defects. In *In the Matter of the Matter of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996, Koome J invoked section 47 and rule 73 to apply section 26 of the Act although she was not handling an application under section 26, but objection proceedings. In *In the Matter of the Estate of Joram Waweru Mogondu (deceased)* Nairobi High Court succession cause number 2721 of 2002 Koome J cited section 47 and rule 73 while directing personal representatives to produce to the court a full inventory and an account of their dealings with the estate. In *In the Matter of the Estate of Mathu Ngwaro alias Nikola (deceased)* Nairobi High Court succession cause number 45 of 1994 (Waweru J) a reference to elders to decide on the nature of

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the relationship between the deceased and two women who were claiming to be his wives was made under the inherent powers.

The Court of Appeal in *Morris Mutuli and another v Alice Mutuli and others* Kisumu Court of Appeal civil appeal number 236 of 2000 (Kwach, Omolo and Tunoi JJA) held that the High Court was entitled and had power to make orders, in exercise of its inherent jurisdiction and in accordance with rule 73 of the Probate and Administration Rules, to restrict the filing of applications by parties without the consent of the court, where the parties had previously filed numerous applications in the cause that had the effect of delaying the proper administration of the estate causing hardship to the beneficiaries. In *In the Estate of Benjamin Gicheha (deceased)* Nairobi High Court succession cause number 692 of 1994, Koome J invoked rule 73 to dismiss an application for want of prosecution. In *In the Matter of Peter Gicheru Kagotho (deceased)* Nairobi High Court succession cause number 376 of 1983, Githinji J invoked the inherent powers of the court to order the rectification of a register under section 143 of the Registered Land Act.²⁵³

However, opinion is divided on the circumstances under which the inherent powers of the court under section 47 and rule 73 may be invoked. In *In Re Estate of Kilungu (deceased)* [2002] 2 KLR 136, Khamoni J, while saying that rule 73 of the Probate and Administration Rules saves the court's inherent powers in the same way as section 3A Civil Procedure Act, cautioned that rule 73 cannot be used to do what the Law of Succession Act does not allow the court to do. He pointed out that rule 73, just like section 3A of the Civil Procedure Act, has to be used to do what is lawful only. In the context of the case rule, 73 could not be invoked to apply Order XXXIX of the Civil Procedure Rules in probate matters. In another matter, *In the Matter of the Estate of Erastus Njoroge Gitau (deceased)* Nairobi High Court succession cause number 1930 of 1997 Khamoni J pointed out that rule 73 should only be used in deserving situations where no specific provisions exist to deal with the issues in question. In that case, the applicants wanted the court to authorise the Registrar of the High Court or his deputy to sign certain documents on behalf of the personal representative because the latter had neglected or refused to sign the documents. The court held that it would not be lawful for the court in exercising its inherent power, reserved under rule 73, to overlook the substantive provisions of the Act covering the situation. Ang'awa J in *In the Matter of the Estate of Late Simon Timaiyo Mokosio also known as Simon Nemokoosio (deceased)* Nairobi

²⁵³ The propriety of this decision is doubtful. Rectification of a land register can only be properly done under the provisions of the Registered Land Act in proceedings brought under that law, not in probate proceedings.

High Court succession cause number 1063 of 1987 stated that it is not necessary to invoke rule 73 where there are express provisions in the Act and the rules covering the situation. In the instant case, the court was dealing with rectification of grants, where it was held that the appropriate application ought to be brought under the relevant provisions in the Act and the Rules, and not rule 73 of the Probate and Administration Rules. Contrast this with the invocation of rule 73 by Rimita J in *Amos Kimondo Ngotho v Margaret Wanjiku Kimondo* Nakuru High Court succession cause number 287 of 1998 to revoke a grant on the court's own motion, even though section 76 gives power to the court to revoke a grant on its own motion. According to Koome J in *In the Matter of the Estate of Hannah Nyangahu Mwenja (deceased)* Nairobi High Court probate and administration number 901 of 1996, the inherent power of the court can be used by the court to give effect to its own orders, to give orders as may be expedient and to prevent the abuse of the process.

12.5 SUPERVISORY JURISDICTION

The High Court exercises, under section 49 of the Law of Succession Act, supervisory jurisdiction over the resident magistrate in succession matters. The resident magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other resident magistrate with jurisdiction. The High Court, in cases where the deceased's last known place of residence is outside Kenya, determines which resident magistrate should have jurisdiction over the estate.

12.6 APPLICABILITY OF THE PROVISIONS OF THE CIVIL PROCEDURE ACT AND THE CIVIL PROCEDURE RULES TO SUCCESSION CAUSES

(a) Probate proceedings are special proceedings

The Law of Succession Act, inclusive of its support subsidiary legislation, is a comprehensive code of substantive and procedural succession law.²⁵⁴ Section 2(1) of the Act provides that the Act constitutes the Laws of Kenya in respect of and has universal application in all cases of testate and intestate succession and to the administration of estates, except where otherwise provided in the Act or any oth-

²⁵⁴ See *In the Matter of David Wahinya Mathene (deceased)* Nairobi High Court succession cause number 1670 of 2004 (Koome J).

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er written law. According to Nyamu J in *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS) the Law of Succession Act is a complete code except as regards third party rights or strangers, who should have recourse to provisions outside the Act. The court asserted that in the event of any conflict between the Law of Succession Act, section 47 in particular, and order XXXVI of the Civil Procedure Rules the Law of Succession Act should prevail. There are however, orders that cannot be granted in probate proceedings.

Probate proceedings are not, in the strict sense, civil proceedings, just like judicial review proceedings. They are *sui generis* or special proceedings, and they are, therefore, not dependent on the Civil Procedure Act and its supporting subsidiary legislation. In succession causes, the probate court exercises its jurisdiction under the Law of Succession Act and its subsidiary legislation. The provisions of the Civil Procedure Act and the Civil Procedure Rules apply, and the probate court exercises jurisdiction under them, only to such extent as may be allowed by the Law of Succession Act and the Probate and Administration Rules. Ringera J in *Welcome Properties v Jackson Kamau Karuga and others* Milimani High Court Miscellaneous applicant number 70 of 2001, held that section 3 of the Civil Procedure Act saves special jurisdiction and powers including procedural rules and forms under any other law in force, such as the Law of Succession Act. According to Onyancha J in *Shah v Shah* (number 2) [2002] 2 KLR 607, where any proceedings are governed by special legislation, the provisions of the special legislation must be strictly construed and applied and that the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such special legislation, and the position remains the same even if the special legislation is silent about and does not exclude the Civil Procedure Act and Rules.

(b) The provisions of the Civil Procedure Act applicable in probate matters

No provisions of the Civil Procedure Act have been adopted by the Law of Succession Act as being applicable to probate causes, but some provisions of the Civil Procedure Rules, set out in rule 63(1) of the Probate and Administration Rules,²⁵⁵ are of application in succession causes. The relevant provisions are orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX of the Civil Procedure Rules. These deal with

²⁵⁵ See *In the Matter of the Estate of Ruth Wamucii (deceased)* Nairobi High Court probate and administration number 1012 of 1992 (Ang'awa J).

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service of summons, interrogatories, discovery, inspection, and consolidation of suits, summoning and attendance of witnesses, affidavits, security for costs, review and computation of time.

The High Court has stated that the other provisions of the Civil Procedure Act and the Civil Procedure Rules, that is those not mentioned in rule 63 of the Probate and Administration Rules, are of no application at all. In *In the Matter of the Estate of Joseph Mwinga Mwaganu (deceased)* Nairobi High Court succession cause number 1814 of 1996, Khamoni J said, in an application brought under Order XLI, rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, that the said provisions did not apply as probate proceedings are governed by their own rules of procedure, specifically the Probate and Administration Rules,²⁵⁶ and added that the Civil Procedure Act and Rules only apply where allowed by rule 63 of the Probate and Administration Rules. A party inviting the court to invoke its inherent powers should move under section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules and not section 3A of the Civil Procedure Act. Koome J, in *In the Matter of Joram Waweru Mogondu (deceased)* Nairobi High Court succession cause number 2721 of 2002, declined to make orders for execution of an order of the probate court sought in an application brought under Order XXI of the Civil Procedure Rules on the basis that Order XXI has not been imported into the Law of Succession Act. Waweru J, in *In the Matter of the Estate of Mathu Ngwaro alias Nikola (deceased)* Nairobi High Court succession cause number 45 of 1994, declined to grant an application made under Order XLV of the Civil Procedure Rules for the setting aside of an order on the grounds that Order XLV is of no application in succession causes.

In *In Re Estate of Kilungu (deceased)* [2002] 2 KLR 136 Khamoni J held that the probate court exercising jurisdiction conferred by the Law of Succession Act cannot entertain an application for injunction brought under Order XXXIX of the Civil Procedure Rules. This is so because the Probate and Administration Rules in rule 63 does not allow the application of Order XXXIX in probate matters. The court also stated that section 3A of the Civil Procedure Act does not apply either since the rule 73 of the Probate and Administration Rules give the probate court inherent powers in succession causes brought under the Law of Succession Act. The point was also made that rule 73 cannot be used to do what the Law of Succession Act does not allow. The position taken by Khamoni J in *In Re Estate*

256 See *In the Matter of the Estate of Angeline Anyango Oband a (deceased)* Nairobi High Court succession cause number 2747 of 1997 (Ang'awa J).

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of *Kilungu (deceased)* [2002] 2 KLR 136 compares with that adopted by Wendoh J in *In the Matter of the Estate of Makali Nzyoka* Machakos High Court probate and administration number 60 of 1997. It was held in that matter that an application for injunction brought in probate proceedings was incompetent as Order XXXIX of the Civil Procedure Rules is not applicable in probate proceedings since order XXXIX of the Civil Procedure Rules is not one of the orders listed in rule 63 of the Probate and Administration Rules. This contrasts with the decisions in other probate matters where the High Court granted restraining orders, but without indicating the law under which the court was acting. In *In the Matter of the Estate of Gerald Kuria Thiari* Nakuru High Court succession cause number 127 of 1885, Lessit J gave orders prohibiting the disposal of or intermeddling with the estate by the petitioner or her servants or other persons. In *In the Matter of the Estate of Kitema Mutiso* Machakos High Court probate and administration number 1 'B' of 2004, Wendoh J gave orders restraining a clan from interfering with the estate of the deceased and, in particular, from evicting one of the claimants from the suit land. Similar orders were made in *In the Matter of the Estate of David Murage Muchina (deceased)* Nairobi High Court succession cause number 2077 of 2002, where Kamau J restrained the grantee from intermeddling in any manner whatsoever with any of the assets of the estate of the deceased until a pending application for revocation of grant was heard and disposed of. Hayanga J, however, in *In the Estate of Mohamed Saleh Said Sherman also known as Mohamed Swaleh Sherman (deceased)* Mombasa High Court succession cause number 145 of 1998 granted injunctive orders under what he called the court's 'inherent jurisdiction or open jurisdiction as given under section 47 of the Law of Succession Act'.

The Law of Succession Act does not provide for the making of restraining orders, and it is not clear the principles which guide the probate court in making restraining orders. There are only two species of restraining orders in the Kenya civil jurisdiction, injunctions under order XXXIX of the Civil Procedure Rules and the prohibitory under made under order LIII of the Civil Procedure Rules. These orders are governed by particular principles. It is not clear which principles influence the granting of injunctions under the inherent powers. It would appear that no injunctive orders should be issued in probate matters. Any persons seeking restraining orders should file a civil suit under the Civil Procedure Act.²⁵⁷

In *In Re Estate of Njuguna (Deceased)* [2002] 2 KLR 292 (Khamoni J) the court

257 *Kangwana and Company Advocates v Solomon I. Kisil* Nakuru Court of Appeal civil appeal number 41 of 1984 (Platt, Apaloo JJA and Masime AgJA).

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pointed out that there are no provisions under the Law of Succession Act and the Probate and Administration Rules empowering the Registrar of the High Court or his deputy to perform the duties and carry out the responsibilities of a personal representative of the estate of a deceased person.²⁵⁸ It was further emphasized that the Civil Procedure Act and the rules made under it do not apply to probate matters except where expressly provided under the Law of Succession Act. Khamoni J's order contrasts with that made by Aganyanya J in *In the Matter of Samuel Munjuga Njuguna (deceased)* Nairobi High Court succession cause number 348 of 1989, where he directed a party to sign certain documents within a specified period failing which the documents be signed by the Deputy Registrar of the High Court.

The position adopted by the High Court over the applicability of the Civil Procedure Act in succession causes is often complicated by the application by the same court of some provisions of the Civil Procedure Act and the Civil Procedure Rules, which are not allowed by the Law of Succession Act and the Probate and Administration Rules. In *In the Matter of the Estate of Stephen Kemei Asis* Eldoret High Court succession cause number 32 of 1997, Etyang J held that a succession cause filed and pending before a resident magistrate's court can be properly transferred to the High Court pursuant to the provisions of section 18 of the Civil Procedure Act. Koome J in *In the Matter of the Estate of Basen Chepkwony (deceased)* Nairobi High Court succession cause number 842 of 1991, directed the transfer of a succession cause from the High Court at Nairobi to the High Court at Eldoret. She, however, did not indicate the law, which empowered her to make such an order. In *In the Matter of the Estate of the Late Esther Wairimu Mahihu Mwangi (deceased)* Nairobi High Court succession cause number 1053 of 1992, Ang'awa J directed the Deputy Registrar to record a consent order under order XLVIII of the Civil Procedure Rules, yet order XLVIII is not one of the provisions of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules.

The Court of Appeal has similarly been applying provisions of the Civil Procedure Rules, which are not applied to probate causes by rule 63 of the Probate and Administration Rules. The Court of Appeal in *Macharia v Wanjohi and another* [2004] 1 EA 111 (Omolo JA, Onyango Otieno and Ringera AgJJA), for example,

258 Khamoni J made similar orders in *In the Matter of the Estate of Ng'ang'a Kamau (deceased)* Nairobi High Court probate and administration number 875 of 1993 and *In the Matter of the Estate of Erastus Njoroge Gitau (deceased)* Nairobi High Court succession cause number 1930 of 1997

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was of the view that there was nothing wrong with the court referring a dispute on the question of entitlement to arbitration by the provincial administration under Order XLV of the Civil Procedure Rules. The Court of Appeal in *Thumbi Weru and others v John Wachira Mwaniki* Nyeri Court of Appeal civil appeal number 191 of 1998 (Kwach, Akiwumi and Shah JJA), similarly upheld the application of Order XLV of the Civil Procedure Rules although the same is not one of the provisions of the Civil Procedure Rules envisaged by rule 63 of the Probate and Administration Rules.

The High Court and the Court of Appeal hold divergent positions on the question of the applicability of the Civil Procedure Act and the Rules to appeals in succession causes. The High Court has, in various decisions, which include *In the Matter of Habakuk Ochieng Adede (deceased)* Nairobi High Court succession cause number 721 of 2000 (Ang'awa J), *In the Matter of the Estate of Mariko Marumbi Kiuru (deceased)* Nairobi High Court succession cause number 2011 of 1997, *In the Matter of the Estate of James Gitumbi Kagwiri (deceased)* Nairobi High Court succession cause number 782 of 1999 (Waweru J) and *In the Matter of the Estate of Mohamed Saleh Said Sherman also known as Mohamed Swaleh Sherman (deceased)* Mombasa High Court succession cause number 145 of 1998 (Hayanga J), held that the Law of Succession Act does not give a right of appeal from the decision of the High Court to the Court of Appeal, and therefore no appeal can lie directly from a decision of the High Court to the Court of Appeal. On the other hand, the Court of Appeal has held, in *Makhangu v Kibwana* [1995–1998] 1 EA 175 (Cockar CJ, Kwach and Shah JJA), *Benard Gachoki Kaboi v John Kaburachi Kaboi and others* (2003) 2 EA 472 (Keiwua JA), *Carmella Wathugu Karigaca v Mary Nyokabi Karigaca* Nairobi Court of Appeal civil appeal number 30 of 1995 (Tunoi, Lakha and Pall JJA) and *George Itotia Ng'ang'a v Mary Wanjiku Kimaru* Nairobi Court of Appeal civil appeal number 115 of 2000 (Shah JA),²⁵⁹ that there is a right of appeal from the decision of the High Court to the Court of Appeal arising from section 47 of the Law of Succession Act as read with the sections 66 and 75 of the Civil Procedure Act.

²⁵⁹ Koome J in *In the Matter of the Estate of Hezron Bernard Wamunga (deceased)* Nairobi High Court succession cause number 1813 of 1999 apparently reluctantly followed the Court of Appeal's decision in *Makhangu v Kibwana* [1995–1998] 1 EA 175 (Cockar CJ, Kwach and Shah JJA), but not before stressing that the Law of Succession Act does not provide for appeals from the High Court on succession causes to the Court of Appeal.

(c) When to use the provisions of the Civil Procedure Act

The Civil Procedure Act and the rules made under it have elaborate provisions, which set out the procedures for the bringing of administration proceedings and suits. The relevant provisions are Order XXX and Order XXXVI, rules 1 and 5 of the Civil Procedure Rules. The Court of Appeal in *Kangwana and Company Advocates v Solomon I. Kisili Nakuru* Court of Appeal civil appeal number 41 of 1984 (Platt, Apaloo JJA and Masime AgJA), stated that actions against executors and administrators could be brought under Order XXX, Order XXXVI and order IV rule 1 of the Civil Procedure Rules. Such proceedings are not governed by and are, therefore, not subject to the Law of Succession Act. The rationale being that probate proceeding are not suits in the ordinary sense of civil actions, and orders and decrees issued by the probate court under the provisions of the Law of Succession Act are, therefore, not capable of execution under the provisions of the Civil Procedure Act and the Civil Procedure Rules. The Law of Succession Act and the Probate and Administration Rules do not carry provisions for the enforcement of orders and decrees issued under the Law of Succession Act. Therefore, a party wishing to obtain a court order or decree on probate or administration matters capable of enforcement by the court must bring action under the provisions of the Civil Procedure Act and the Civil Procedure Rules.

CHAPTER THIRTEEN

NON-CONTENTIOUS PROBATE

13.1 INTRODUCTION

Both the High Court and the resident magistrates²⁶⁰ deal with non-contentious business. Probate will be granted in common form in non-contentious proceedings where there is no dispute as to the documents that ought to be admitted to probate or over entitlement to a grant. Theoretically, non-contentious probate is a judicial act, but in practice, it is granted without a formal hearing or court appearance.

A person wishing to apply for a grant must, personally or through an advocate, lodge certain papers with the principal registry or a district registry or a resident magistrate's registry. The registrar or resident magistrate and his staff consider the papers. Where they are satisfied that the documents are in order, a grant would be signed by the relevant judicial officer and sealed with the seal of the court. Sometimes non-contentious probate may involve a hearing before a judge or resident magistrate on some minor issue. Only if the issue develops into a dispute will the proceedings become contentious.

13.2 APPLYING FOR A GRANT

The procedure for applying for grant of representation is set out in section 51 of the Law of Succession Act and rule 7 through to rule 14 of the Probate and Administration Rules. The petition for grant should contain the full particulars of the deceased, namely: names, date and place of death, last known place of residence, relationship of the applicant with the deceased, whether or not the deceased left a valid will, and a full inventory of all the assets and liabilities of the deceased. Where the deceased died intestate, whether total or partial, the following particulars should be given: names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any pre-deceased child of the deceased.²⁶¹ In *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003, Kamau AgJ stated that it is mandatory that all these details be disclosed.²⁶²

260 Who have been appointed under section 47 of the Law of Succession Act to represent the High Court.

261 See *Willington Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number 168 of 1990 (Gachuhi, Muli and Akiwumi JJA).

262 See also *In the Matter of the Estate of Chege Njuguna (deceased)* Nairobi High Court succession cause number 832 of 1993 (Koome J).

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Where it is alleged that the deceased died testate and left a valid written will, the original will should be annexed to the petition and the details of the executors given. If it is alleged the original will is lost or destroyed otherwise than by way of revocation or the original will cannot be for whatever reason produced, then its authenticated copy should be annexed to the petition or, in the alternative, the names or addresses of all persons alleged to be able to prove its contents should be stated in the application. If the will is alleged to be oral, the names and addresses of all persons alleged to be witnesses must be stated in the petition.

The application for grant, taking the form of a petition, should be filed in the principal registry or a High Court district registry or in a resident magistrate's registry (in the case of an estate whose gross does not exceed one hundred thousand shillings). After the filing of the papers, the court may allow any person interested, upon request and payment of the necessary fees, to inspect the will, that is where the grant sought is one of probate of a written will or of letters of administration with the written will annexed. In *In Re estate of Ngetich* [2003] KLR 84 (Nambuye J) it was stated that there is no provision in the Law of Succession Act for substitution with the proper form where a party uses the wrong statutory form to apply for a grant. In such circumstances rule 14(1) of the Probate and Administration Rules provides for an amendment through the filing of the appropriate statutory forms.

The application has to be accompanied by proof of death. The petition is usually supported by a certificate of death. In some circumstances death may be presumed, under section 118(A) of the Evidence Act, where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive. The presumption is rebuttable by evidence to the contrary. Where a presumption of death has arisen, the person relying on it should obtain a declaratory order to that effect, which should then be attached to the application for grant.

13.3 CAVEATS

A caveat is a notice entered at a probate registry to prevent a grant or representation being made or confirmed without first being given to the person who enters the caveat, known as the caveator.²⁶³ The main purpose of a caveat is to enable a person who may be considering opposing a grant to obtain legal advice or evidence on the matter.

²⁶³ See rule 15(1) the Probate and Administration Rules and *Raphael Jacob Samuel v The Public Trustee and others* Nairobi Court of Appeal civil appeal number 16 of 1980 (Law, Miller and Potter JJA).

Rule 15(6) requires that where a caveat has been lodged against the making or confirming of a grant and a grant is applied for or confirmation of grant is sought, the registrar should be notified of the same and, under rule 15(8), the registrar should not allow grant to be made or confirmed. A proviso to rule 15(8), however, states that no caveat would prevent the making or confirming of a grant on the day on which the caveat is filed.²⁶⁴ Under rule 15(9), the registrar should warn the caveatee of the filing of the application for the making or confirmation of grant, and notify him that if he wishes to object to the making or confirmation of the grant he should lodge an objection to the application in accordance with the rules. Thus, the lodging of a caveat is not a substitute for lodging an objection.

In *D. D. Doshi v Abdulhussein Hassanali Jivanji* (1942) 22 EACA 25 (Thacker J), it was stated that any interest in the deceased's estate however slight, is sufficient to enable a party to lodge a caveat and oppose a testamentary paper or instrument. Where the person who is entitled to file a caveat has been cited it is unnecessary for him to file a caveat, unless he wishes to argue that the person who has the grant has no right to the grant.²⁶⁵

13.4 CITATIONS

A citation is a document issued by the probate registry whereby the person issuing the document (the citor) calls upon the person cited (the citee) to provide a reason why a particular step should not be taken.²⁶⁶ Citations occur in both contentious and non-contentious probate. In non-contentious probate, they serve the purpose of hurrying along or fast tracking the issue of a grant. It was held in the case of *Re Mauchauffee* [1969] EA 424 (Harris J) that where the estate is insolvent the court may dispense with the citation. It was stated by Sir Clement de Lestang J in *In the Estate of Sukhlal s/o Madhulal, deceased* [1949] 23(2) KLR 56 that whenever a party is entitled to be cited the citation must be directed to the citee and served upon him personally. Upon being served with a citation, the citee is required to appear by filing the prescribed appearance form and thereafter serving the same on the citor.²⁶⁷

264 See *Re the Estate of Petit (deceased)* [1958] EA 671 (Miles J).

265 See *Maamun bin Rashid bin Salim El-Rumhy v Haider Mohamed bin Rashid El-Basamy* [1963] EA 438 (Pelly Murphy J).

266 See rule 21 of the Probate and Administration Rules.

267 See rule 21(5) of the Probate and Administration Rules and *In the Matter of the Estate of Stephen Mwangi Mbugua (deceased)* Mombasa High Court civil case number 1 of 2003 (Sergon J). See also *In the Matter of the Estate of Gitau Chege Kibera (deceased)* Nairobi High Court succession cause number 1463 of 1991 (Aluoch J) and *In the Matter of the Estate of Jonah Karangae* Nairobi High Court succession cause number 1360 of 1989 (Ang'awa J).

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In *Maamun bin Rashid bin Salim El-Rumhy v Haider Mohamed bin Rashid El-Basamy* [1963] EA 438, Pelly Murphy J stated that where a person applies for representation, citations should not be issued to other heirs having equal rights to the grant, except where the court sees it fit to make such an order. The object of non-contentious citations is to call upon a person who has a superior right to a grant to take the grant. Any person who has an interest in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, the applicant must cite them calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce his right to it, the grant may be given to the citor.

There are three types of citations, namely: a citation to accept or refuse a grant of probate or administration, a citation to take out probate and a citation to propound the will. Citations are classified into special and general citations. Special citations are addressed to a particular person, while general citations call upon all persons without naming any particular person.

(a) Citation to accept or refuse a grant

This is used where a person (whether in intestacy or testate succession), who has an entitlement to a grant prior to that of the citor, delays or declines to take a grant, but at the same time fails to renounce his or her right to a grant so as to enable persons with inferior right to take out a grant in his or her place.²⁶⁸ He or she may be cited to accept or refuse the grant.²⁶⁹

(b) Citation to take out probate

This occurs where an executor (as opposed to an administrator) has intermeddled with an estate, and has not taken out a grant. Any person interested in the estate may cite the executor to provide reasons as to why he should not be compelled to take out a grant. The citation should be made at any time after the expiration of three months from the death of the deceased. It should, however, not be issued while proceedings as to the validity of the will are pending.²⁷⁰

268 See *In the Matter of the Estate of Gitau Chege Kibera (deceased)* Nairobi High Court succession cause number 1463 of 1991 Aluoch J).

269 See section 62 of the Law of Succession Act and rule 22(1)(2) of the Probate and Administration Rules) also *In the Matter of the Estate of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996 (Koome J).

270 See rule 22(3) of the Probate and Administration Rules.

(c) Citation to propound a will

Where a person who has an interest under an earlier will or under the rules of intestacy believes that a will, which has not yet been proved, is invalid, he or she may cite the executors and beneficiaries of the will to propound it.²⁷¹ After the determination of citation proceedings, according to Ang'awa J in *In the Matter of the Estate of John Mwangi Wainaina (deceased)* Nairobi High Court succession cause number 665 of 1997, the parties should proceed to file the petition for grant of representation in the usual way.²⁷²

13.5 Renunciation

Both executors and administrators may renounce their right to apply for a grant.²⁷³ The renunciation should be in writing, signed by the person entitled to the grant, or declared orally in court.²⁷⁴ Where a person entitled to a grant wishes to renounce it they must, as a rule, renounce as to the whole of the office, rather than with respect, only to some of their responsibilities. An infant's right to probate on attaining majority age, however, may not be renounced on his behalf.²⁷⁵ In *Kothari v Qureshi and another* [1967] EA 564 Rudd J stated that an executor who has intermeddled in the estate of the deceased cannot renounce probate.

In *In the Matter of the Estate of Gladwell Mumbi Njoroge (deceased)* Nairobi High Court succession cause number 158 of 1998 (Koome J) it was held that a son of the deceased and a beneficiary of the deceased's estate ought to have been notified of the petition for him to renounce his right generally to apply for a grant or to give his consent. In *In the Estate of Naftali (deceased)* [2002] 2 KLR 684, Waki J stated the petitioner, a brother of the deceased, was not the right person to seek the grant since there was the mother of the deceased who did not renounce her right and was notified. Waweru J in *In the Matter of the Estate of Laban King'ori Macharia (deceased)* Nairobi High Court probate and administration number 16 of

271 See rule 23(1) of the Probate and Administration Rules.

272 See also *In the Matter of the Estate of Jonah Karangae (deceased)* Nairobi High Court succession cause number 1360 of 1989 (Ang'awa J).

273 See *In the Matter of the Estate of Laban King'ori Macharia (deceased)* Nairobi High Court succession cause number 16 of 1988 (Waweru J) and *Daniel v Public Trustee* [1977] KLR 62 (Wambuzi P, Law VP and Musoke JA)

274 See *In the Matter of the Estate of Jonah Karangae (deceased)* Nairobi High Court succession cause number 1360 of 1989 (Ang'awa J), section 59 of the Law of Succession Act and rule 18(1) of the Probate and Administration Rules

275 See rule 34 of the Probate and Administration Rules.

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1988 stated that the renunciation can even be made or given after the grant had been issued.

Once renunciation has been made, it can only be retracted by an order of the court (rule 18(3) the Probate and Administration Rules) and such order will only be made if it can be shown that it is for the benefit of the estate, or the beneficiaries or the creditors of the estate. In *Re Gill's Goods* [1873] LR 3 P and D 113, where an executor had been given incorrect legal advice which had led him to renounce, leave to retract was refused, on grounds that it would not benefit the estate.

13.6 CONSENT TO GRANT BEING MADE TO SOMEONE ELSE

Rather than renouncing probate, a person who is entitled to apply for grant may consent in writing to the grant being made, to a person whose right of administration is inferior or equal to his.²⁷⁶ Where a grant is applied for without the persons entitled having renounced probate or consented to the application, and the applicant fails to file the affidavit envisaged by rule 26, the grant issued would be liable for revocation.²⁷⁷

13.7 MAKING OF GRANTS

(a) Procedure

Grants are issued through the principal registry, a High Court district registry, or a resident magistrate's registry, signed by the judge or resident magistrate obligated (as the case may be) and sealed with the seal of the registry. Before issuing the grant, the court is to make all the necessary inquiries, including inquiring into proof of the identity of the deceased and of the applicant. no grant should be made within fifteen days of the deceased's death. It may be made to a single person (including the Public Trustee or a trust corporation) or jointly to two or more persons (including a trust corporation) not exceeding four.²⁷⁸ It is a mandatory

²⁷⁶ See rule 26(2) of the Probate and Administration Rules

²⁷⁷ See *In the Matter of the Estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased)* Nairobi High Court succession cause number 783 of 1993 (Koome J), *In the Matter of Gladwell Mumbi Njoroge (deceased)* Nairobi High Court succession cause number 158 for 1998 (Koome J) and *In the Matter of the Estate of Mutambu Ndekei (deceased)* Nairobi High Court succession cause number 2688 of 2002 (Koome J) and *In the Matter of the Estate of Laban King'ori Macharia (deceased)* Nairobi High Court probate and administration number 16 of 1988, *In the Matter of the Estate of Gathii Gatimu (deceased)* Nairobi High Court succession cause number 599 of 1994 (Koome J) and *In the Matter of the Estate of James Kiarie Muiruri (deceased)* Nairobi High Court succession cause number 2413 of 2003 (Koome J).

²⁷⁸ See rule 25 of the Probate and Administration Rules

requirement, under section 58 of the Law of Succession Act, that where in intestacy continuing trusts are involved, the grant should be made to at least two administrators. Under section 70 of the Law of Succession Act, the court has power before making the grant to examine the petitioner on oath, to call for further evidence on the execution and contents of a will and related matters, and to issue a special citation to any person who may have reason to object to the application.

The practice of producing a letter from the locational chief or his assistant has developed from the need for the court to satisfy itself as to proof of identity of the deceased and the applicant. Ringera J pointed out in *Musa v Musa* [2002] 1 EA 182 that the letter from the chief is not an essential aspect of the proceedings as it is not required either by the Act or the Probate and Administration Rules. The omission to obtain the letter from the chief is not fatal to the application and it should not be a bar to the making of the grant.

According to Githinji J in *Karanja and another v Karanja* [2002] 2 KLR 22, the principal duty of a probate court at this stage is to decide whether or not a document is entitled to probate as a testamentary paper and who is entitled to be appointed the personal representative of the deceased. The probate court is not required to decide questions as to whether properties disposed of are wholly owned or jointly owned by the deceased or whether the deceased had power to dispose of some of the properties. The grant of probate of a will is only conclusive as to the validity of a will the contents of a will and appointment of the executors. It does not predetermine all other disputes, which may arise.

(b) Notices

Under rule 26 of the Probate and Administration Rules, a grant of letters of administration is not to be made without a notice being given to every other person entitled in the same degree as or in priority to the applicant. Where the applicant is entitled to a grant in a degree lesser or equal to that of other persons, the written consent or renunciation of those other persons must be obtained. In default of renunciation or written consent by all persons entitled equally or in priority, the applicant is required to file an affidavit setting the reasons why grant should be made to him in the circumstances. In *In Re Estate of Naftali (deceased)* 2 KLR 684, Waki J stated that the consents required under rule 26 are not necessary where an affidavit is sworn to support the petition.

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Section 67 of the Law of Succession Act, stipulates that no grant of representation, except the grant *ad colligenda bona*, should be made before a notice of the petition or application for the grant has been published inviting objections to the same.²⁷⁹ Under rule 7(4) of the Probate and Administration Rules, the registrar or resident magistrate is required to cause the insertion in the official gazette, a daily newspaper and to be exhibited conspicuously in the courthouse attached to the registry where the application is made, a notice of the application for the grant inviting objections to be made to that registry within a specified period of not less than thirty days. The notice informs the general public of the death of the deceased so that the creditors of the deceased might know who to contact for settlement of debts. It also gives an opportunity to other beneficiaries of the deceased to lodge objections if they wish against making of the grant to the petitioner.

(c) Persons entitled to a grant²⁸⁰

In testate succession, grant should be made to the executors named in the will of the deceased or to the persons named in sections 64 and 65 of the Law of Succession Act where the will has not appointed executors or the executors appointed in the will have renounced probate or for some reason are not able to act. The courts have a wide discretion as to the persons to whom grant of representation should be made on intestacy, so as to ensure the most competent and reliable administration. Section 66 of the Law of Succession Act lists in hierarchical order the persons to whom a grant of representation in intestacy may be made.

²⁸¹The surviving spouse has priority in applying for and being granted grant of letters administration.²⁸² The Court of Appeal stated in *Kimari and another v Kimari* [1988] KLR 587 (Platt JA, Gicheru and Kwach AgJJA) that section 66 gives the court final jurisdiction to decide to whom letters of administration should be granted and the decision should be in the best interest of all concerned. According to Waki J in *In the Matter of the Estate of Aggrey Makanga Wamira* Mombasa High Court succession cause number 89 of 1996, section 66 gives the court discretion

279 See *Re Succession – Limited Grant* [2000] 2 EA 495 (Ang’awa J).

280 See Chapter 11: sections 11.8, 11.9 and 11.10 *her above*.

281 See *In the Matter of the Estate of Gichia Kabiti (deceased)* Nairobi High Court succession cause number 2559 of 2002 (Koome J).

282 See *In the Matter of the Estate of Murathe Mwarua (deceased)* Nairobi High Court civil suit number 825 of 2003 (Koome J), *Otieno v Ougo and another* (number 4) [1987] KLR 407 (Nyarangi, Platt and Gachuhi JJA), *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684 (Waki J) and *Musa v Musa* [2002] 1 EA 182 (Ringera J).

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in the appointment of the person or persons who will administer the estate,²⁸³ but priority should be given to the widow and the children by virtue of sections 35, 36 and 38 of the Law of Succession Act. Other relatives, set out in section 39, should only come in where no spouse or children were left or where the widow and children are unsuitable. In *Kimari and another v Kimari* [1988] KLR 587 (Platt JA, Gicheru and Kwach AgJJA), the Court said that the purpose of section 66 is to place the widow in a stronger position than she had enjoyed at customary law. The preference given to the widow is not final and it is proper in some cases to allow the widow to administer the estate in association with some other member of the family.

A grant should also only be made to persons who have applied for the same. In *Florence Okutu Nandwa and another v John Atemba Kojwa* Kisumu Court of Appeal civil appeal number 306 of 1998 (Kwach, Shah and O’Kubasu JJA), the Court of Appeal held that a court should not proceed in *gratis* to issue a grant to a person who has not sought the grant. Aluoch J in *In the Matter of the Estate of Dr. Arvinder Singh Dhingra (deceased)* Nairobi High Court succession cause number 2572 of 1996 found that a grant made to the advocates for the parties, who had not applied for it, was made irregularly. A grant of representation should only be made in respect of one estate. Koome J in *In the Matter of the Estate of James Kiarie Muiruri (deceased)* Nairobi High Court High Court succession cause number 2413 of 2003 revoked a single grant of letters of administration made in respect of two deceased persons.

(d) Solvency of the proposed administrator

Under rule 29 of the Probate and Administration Rules, the court may before making the grant require to be satisfied as to the solvency of the administrator. This takes the form of requiring the proposed administrator to file an affidavit as to means. They may also, for reasons to be recorded, require one or more sureties to guarantee that they would make good any loss occasioned to any person beneficially interested in the estate by any breach of duty by the administrator. Ringera J in *Musa v. Musa* [2002] 1 EA 182, stated that there is no requirement in the Act

²⁸³ See also *In the Matter of the Estate of Charles Muigai Ndung’u (deceased)* of Karinde Kiambu District Nairobi High Court succession cause number 2398 of 2002 (Kamau AgJ), *Isabella Gichugu Matheka and another v Eric Muthui Matheka* Nairobi Court of Appeal civil appeal number 304 of 2002 (Omolo, O’Kubasu and Onyango Otieno JJA), *Otieno v Ougo and another* (number 4) (1987) KLR 407 (Nyarangi, Platt and Gachuhi JJA) and *In the Matter of the Estate of Chege Njuguna (deceased)* Nairobi High Court succession cause number 832 of 1993 (Koome J).

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or the rules that an application for a grant of letters of administration must be accompanied by more than one surety. Indeed, there is not even a requirement for one surety. The court emphasised that the court may as a condition for the grant of letters require production of sureties since the requirement for sureties is at the court's discretion.

(e) Limited grants

The principal registry and the High Court district registry have jurisdiction to make any limited grant, but the resident magistrate's jurisdiction is restricted, for example, in terms of monetary jurisdiction up to a limit of KShs 100 000.00. The resident magistrate may make limited grants subject to sections 48 and 49 of the Law of Succession Act. Rule 36(3) of the Probate and Succession Rules specifically confers upon the High Court exclusive jurisdiction over the making of grants *ad colligenda bona defuncti*, but section 49 of the Law of Succession Act gives the resident magistrate jurisdiction to make a comparable limited grant.

13.8 PASSING OVER

Under section 66 of the Law of Succession Act, rule 27 of the Probate and Administration Rules and clause 16 of the 5th schedule to the Law of Succession Act, the court has a power to pass over or bypass a person entitled to a grant of letters of administration if, by reason of special circumstances, it appears necessary or expedient to appoint as administrator some person other than the person entitled to the grant. The common circumstances are where an administrator is physically or mentally ill, insolvent, missing, resident abroad, or in prison; but no exact rules are laid out in the Law of Succession Act. In *Muigai v Muigai and another*, Amin J passed over the wives of the deceased, who were feuding over the estate and made the grant to the Kenya Commercial Bank Limited.

Under section 7 of the Public Trustee Act, the court may, on its own motion or upon hearing the Public Trustee, grant representation to the Public Trustee notwithstanding that there are persons who, under the Law of Succession Act or other written law, would be legally entitled to administer the estate of the deceased person in preference to the Public Trustee. In *In the Matter of the Estate of Charles Muigai Ndung'u (deceased)* of Karinde Kiambu District Nairobi High Court probate and administration number 2398 of 2002 (Koome J), the deceased was survived by a minor son and a widow who remarried. The court pronounced the minor

to be the sole heir of the deceased. It was directed that the grant be made to the Public Trustee, in keeping with section 66 of the Law of Succession Act and section 7 of the Public Trustee Act, because of the remarriage of the widow, the minority of the child of the deceased and the fact that the widow and father of the deceased were not on good terms.²⁸⁴ The court in *Swaboa Nassor Salim Hadi v Swaleh Salim Hadi* High Court probate and administration number 52 of 1990 passed over the daughter and brother of the deceased and made the same to the Public Trustee.

13.9 CONFIRMATION OF GRANT

(a) Procedure

The personal representative is obliged by section 71(1) to apply for confirmation of the grant after the expiry of six months from the date of the grant.²⁸⁵ The application for confirmation takes the Form of a summons for confirmation²⁸⁶ supported by an affidavit giving details of the persons who have survived the deceased. The application is basically non-contentious, but it becomes contentious if a protest is lodged against the confirmation by either a caveatee or the beneficiaries notified of the application. According to Kamau J in *In the Matter of the Estate of Gachunga Gachamba (deceased)* Nairobi High Court succession cause number 642 of 2000 the application for confirmation of a grant is a mandatory requirement of law and without it any confirmed grant would be void to the extent of the confirmation.

The court may also direct that the grant be confirmed before the expiration of six months from the date of grant in cases where there is no dependant of the deceased and where it is expedient so to direct. Under section, 73 the court is obligated to give notice to the holder of a grant to apply for confirmation in cases where the holder has failed to comply with section 71. According to the court in *In the Estate of Njoroge and another* [2003] KLR 73 (Etyang J) and *In the Matter of the Estate of Kihagi Wamai (deceased)* Nyeri High Court succession cause number 266 of 1995 (Okwengu J), confirmation should only be applied for by and be

284 See also *Swaboa Nassor Salim Hadi v Swaleh Salim Hadi* High Court probate and administration number 52 of 1990, where a brother and a daughter of the deceased were passed over in favour of the Public Trustee.

285 See *In the Matter of the Estate of James Kiarie Muiruri (deceased)* Nairobi High Court succession cause number 2413 of 2003 (Koombe J) and *In the Matter of the Estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased)* Nairobi High Court succession cause number 783 of 1993 (Koombe J).

286 See rule 40 Probate and Administration Rules.

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made to the holders of the grant.

The court upon the application for confirmation being made may confirm the grant, if satisfied that the grant was rightly made to the applicant, and that the applicant is administering and will administer the estate in accordance with the law. If not satisfied that the applicant will properly administer the estate, the court may issue a confirmed grant to another person or persons or order the postponement of the confirmation.²⁸⁷

(b) Effect of confirmation of grant

Confirmation means the confirmation of the contents in the grant, the appointment of personal representatives and the proposed distribution of the estate of the deceased person involved. The confirmation entitles or empowers the personal representative to distribute any capital assets. *Emukule J in Shital Bimal Shah and two others v Akiba Bank Limited* representation confers power to distribute any capital assets constituting a net estate or to make any conversion of property unless and until the grant has been confirmed under section 71 of the Act. In *In the Matter of the Estate of Mary Gachuru Kabogo (deceased)* Nairobi High Court succession cause number 2830 of 2001, Ang'awa J declined to order the release of funds held in a bank account to the credit of a deceased person on the grounds that there were no specific rules for the release of funds to an administrator before confirmation of a grant.

(c) Identity and shares of all persons beneficially entitled

With respect to intestacy, the grant of letters of administration should not be confirmed until the court is satisfied about the identities of and shares of all persons beneficially entitled.²⁸⁸ At the time of confirmation of a grant in intestacy, the confirmed grant should specify all such persons and their respective shares.²⁸⁹ In *In the Matter of the Estate of Wanjihia Njuguna (deceased)* Nairobi High Court suit case 5333 of 2002 (Ang'awa J) the court declined to grant confirmation because the daughters had not been included in the list of beneficiaries. It was held that section 35 of the Law of Succession Act had not been complied with. A similar

²⁸⁷ See *In the Matter of the Estate of Kahuri Kimani (deceased)* Nairobi High Court succession cause number 358 of 1996 (Rawal J).

²⁸⁸ See the proviso to section 71(2A) of the Law of Succession Act.

²⁸⁹ See *In the Matter of Joseph Kimemia Gichuhi (deceased)* Nairobi High Court succession cause number 1072 of 2002 (Koome J).

finding was made in *In the Matter of the Estate of Benjamin Mugunyu Kiyo* Nairobi High Court succession cause number 2678 of 2001 (Ang'awa J). In *In the matter of the Estate of Ellah Wamie Nthawa (deceased)* Nairobi High Court succession cause number 971 of 2001 (Ang'awa J) confirmation was denied because a daughter was given a very small share of the property relative to the shares given to the brothers. Section 38 requires that the estate should be shared equally among all the children, regardless of their gender.²⁹⁰

The certificate of confirmation issued following the confirmation of the grant must bear the identities of all persons beneficially entitled and their respective shares. In *In the Matter of the Estate of Justus Wangai Muthiru (deceased)* (Waweru J), a certificate which did not contain the names of some of the beneficiaries was cancelled and the order of confirmation granting it was set aside. Rule 40(8) of the Probate and Administration Rules requires that all dependants or other persons who are beneficially entitled to the estate to consent in writing to the confirmation. Where such consents are not obtained, the confirmation proceedings would, as stated by Kamau J in *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996, be defective in substance and liable for setting aside (*In the Matter of Laban King'ori Macharia (deceased)* Nairobi High Court probate and administration number 16 of 1988 (Waweru J)).²⁹¹ In *In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased)* Nairobi High Court succession cause number 2678 of 2001, Ang'awa J stated that even a beneficiary who has disclaimed their right to a share of the estate should file a consent to the confirmation in accord with rule 40(8) of the Probate and Administration Rules.

(d) Adjudication of competing proposals

Where the beneficiaries file rival proposals on the distribution of the estate, the court has to determine the matter by adjudicating the conflicting claims. In *In the Matter of the Estate of Mwangi Gitire (deceased)* Nairobi High Court succession

290 See also *In the Matter of the Estate of Mary Wanjiru Thairu (deceased)* Nairobi High Court succession cause number 1403 of 2002 (Ang'awa J), *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 (Kamau J) and *In the Matter of the Estate of George Karegwa Gitau (deceased)* Nairobi High Court succession cause number 959 of 2001 (Ang'awa J).

See *In the Matter of the Estate of Joseph Muchoki (deceased)* Nyeri High Court succession cause number 396 of 1999 (Khamoni J).

See *Wairimu Gathute v. Theuri and another* Nyeri Court of Appeal civil appeal number 33 of 1991 (Gicheru, Kwach and Muli JJA).

291 See also *In the Matter of Maria Wanja Njaungiri alias Wakahu Muthara (deceased)* Nairobi High Court Civil case number 2422 of 1995 (Githinji J).

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cause number 1033 of 1996 (Koome J), the co-administrators of a polygamist's estate represented the two houses. They put in conflicting proposals for confirmation. One house proposed the division of the estate equally between the houses in accord with Kikuyu customary law, while the other house suggested a division in accord with sections 35 and 40 of the Law of Succession Act. The court, although sympathetic to the plight of the first widow who claimed to have a bigger stake in the estate having helped the deceased acquire most of the assets before the second widow was married twenty-one years later, applied sections 35 and 40 of the Law of Succession Act on the basis that it is the law applicable in the circumstances the deceased having died after the Act came into force.²⁹²

(e) Effect of a pendency of application under section 26 of the Law of Succession Act

Under section 72 of the Law of Succession Act, the court should not confirm the grant where there is a pending application, under section 26 of the Law of Succession Act, for reasonable provision out of the estate.

(f) Importance of confirmation of a grant

The confirmation process provides an important safeguard in several respects. In the first place, it ensures that the personal representative to whom the original grant was made has administered the estate in the proper manner, by requiring him to produce an up-to-date account of his dealings in the estate. It gives the court the opportunity to sanction the distribution of the estate in the manner stipulated by the will of the deceased or according to the rules of intestacy, thereby ensuring that the property goes to the rightful beneficiaries. The six months period allowed before confirmation gives time for objections to be raised or for other applicants to come forward.²⁹³

13.10 ALTERATION OR RECTIFICATION OF GRANTS

Errors which are not of a material nature, such as those relating to names and descriptions or the setting and place of the deceased's death or the purpose in a limited grant, may be rectified by the court under of section 74 of the Law of Succession Act and rule 43 of the Probate and Administration Rules on the application of the holder of the grant. Thereafter the grant of representation, whether before or

²⁹² See also *In the Matter of the Estate of Link Pius Nyagwala Owiti (deceased)* Nairobi High Court probate and administration number 1537 of 1999 (Rawal J).

²⁹³ Report of the Commission at 68.

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after confirmation, may be accordingly altered and amended.²⁹⁴ Likewise, if a codicil is discovered after the grant of letters of administration with the will annexed or after the confirmation of such a grant, the same may be added to the grant and the grant accordingly altered and amended.²⁹⁵

Where there are complaints relating to a certificate of confirmation of grant or confirmation of grants generally, the person dissatisfied should not move the probate court for revocation of the grant. The certificate of confirmation should be dealt with without affecting the validity or soundness of the grant.²⁹⁶

In *In Kamau v Kirima* [2002] 2 KLR 172 and in *Re Estate of Kariuki* [2002] 2 KLR 125, Khamoni J) it was stated that a certificate of confirmation of grant confers on a beneficiary under it a beneficial interest in the estate of the deceased. Where the beneficiary dies before the personal representative of the deceased has effected the transfer of the resultant legal interest or title to the deceased beneficiary, it would not be proper to apply for the rectification of the certificate of grant to replace the deceased beneficiary with another person other than a confirmed personal representative of the deceased beneficiary. The correct procedure is that the person aspiring to replace the deceased beneficiary, has to apply for representation of the estate of the deceased beneficiary. After confirmation of the grant of representation of the estate of the deceased beneficiary, the grantee should then ask the administrator of the estate of the first deceased person to apply for the rectification of the certificate of confirmation of grant of the estate of the first deceased person to enable the personal representative of the deceased beneficiary to replace the deceased beneficiary

The Law of Succession Act does not set out a clear procedure for dealing with complaints about the confirmation process. Although section 74 does allow for the rectification and alteration of grants, including a confirmed one, to correct errors, the wording of the provision appears to confine it to correction of minors errors.²⁹⁷ Fundamental errors such as the failure to comply with the mandatory requirements of section 71 and rule 40(8) are obviously beyond the scope of section 74.

294 See *In the Matter of the Estate of Late Timaiyo Mokosio also known as Simon Nemokoosio (deceased)* Nairobi High Court succession cause number 1063 of 1987 (Ang'awa J).

295 See section 75 of the Law of Succession Act.

296 See *In Re Estate of Ngugi (deceased)* [2002] 2 KLR 434 (Khamoni J).

297 See *In the Matter of the Estate of Mr. James Thuo Kihoto (deceased)* Nairobi High Court succession cause number 909 of 1994 (Koome J) and *In the Matter of the Estate of Late Timaiyo Mokosio also known as Simon Nemokoosio (deceased)* Nairobi High Court succession cause number 1063 of 1987 (Ang'awa J).

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One remedy for such errors is the revocation of the grant. In *In the Matter of the Estate of Muniu Karugo (deceased)* Nairobi High Court succession cause number 2668 of 1997 Koome J dismissed for being misconceived an application seeking rectification of grant since it sought orders that would have substantively altered the mode of distribution of the estate, and in the circumstances rectification of the grant was not the appropriate remedy. The appropriate remedy ought to be an application for the revocation of the grant.²⁹⁸ This, however, is viewed as too drastic a measure where the complaint is limited to the confirmation process, and not the grant of representation in general.²⁹⁹ Revocation of grant at this stage seriously inconveniences the parties who have to start the exercise of applying for representation all over again. The other approaches are by way of applications for review under Order XLIV of the Civil Procedure Rules³⁰⁰ and rules 47 and 73 of the Probate and Administration Rules by invoking the inherent powers of the court.

13.11 OTHER NON-CONTENTIOUS PROCEEDINGS

(a) Applications under section 61(1) and section 75 of the Law of Succession Act

Where a codicil is discovered after the grant of probate or of letters of administration with will annexed or after the confirmation of such grant, and the codicil does not repeal the appointment of the executors made by the will or appoint different executors, a separate probate may be granted to the executor or the codicil may be added to the grant in the case of grant of letters. The application for the separate probate or for the addition of the codicil to the grant of letters is made under rule 47 of the Probate and Administration Rules by way of summons, supported by an affidavit, in the cause in which the will was proved and in the registry that granted the original grant.

298 See also *In the Matter of the Estate of Isaac Kiretu Njuguna (deceased)* Nairobi High Court succession cause number 1064 of 1994 (Aluoch J).

299 See *In Re Estate of Gitau (deceased)* [2002] 2 KLR 430 (Khamoni J) and *In Re Estate of Ngugi (deceased)* [2002] 2 KLR 434 (Khamoni J).

300 See *In the Matter of the Estate of Kamau Mwangi (deceased)* Nairobi High Court succession cause number 1579 of 1994 (Osiero J).

(b) Applications under section 61(2) of the Law of Succession Act

Where the codicil discovered after the making of the grant appoints different executors, the probate of the will should be revoked and a new probate granted of the will and codicil together. The application for the revocation of the grant and the making of a fresh one under section 61(2) is by summons brought under rule 48 of the Probate and Administration Rules, supported by an affidavit.

(c) Applications not otherwise provided for

Rule 49 of the Probate and Administration Rules allows a person desirous of making an application to the court relating to the estate of a deceased person where no provision is made under the Probate and Administration Rules. It takes the form of a summons supported if necessary by affidavit. An example of a non-contentious application that may be made under this rule is under section 37 by a surviving spouse during life interest for the consent of the court to sell any of the property subject to life interest for their own maintenance.

CHAPTER FOURTEEN

CONTENTIOUS PROBATE

14.1 INTRODUCTION

Contentious proceedings, also known as probate in solemn form, are dealt with mainly by the High Court, with limited power to resident magistrate to deal with some matters. They are usually commenced under the provisions of Probate and Administration Rules, but with respect to some matters, they may be commenced under Order XXXVI, rule 1 of the Civil Procedure Rules. Probate in solemn form is required where either there is a dispute as to the validity of a will or a dispute over entitlement to a grant or action is being taken to revoke a grant which has been made in common form or where probate of a lost will is sought and the persons with contrary interest have refused to consent to the probate in common form. In Kenya, contentious proceedings are common with relation to objections to the making or confirmation of a grant, revocation of grant and family provisions.

The contentious proceedings, whether commenced by way of cross-petition or ordinary summons or originating summons depending on the rules under which they are brought, may issue at the instance of the executor or any person who has an interest under the will (or any other will or codicil) whose interest will be adversely affected or by a person entitled in intestacy.

14.2 OBJECTIONS TO THE MAKING OF GRANTS

Most of the disputes, taking the form of objections and objection proceedings, are brought by persons who would like to be involved in the administration of the estate. Most beneficiaries appear to confuse personal representatives with beneficiaries. Even when the beneficiaries are disclosed in the petition, they would insist on being made personal representatives in the false belief that it is personal representatives who benefit from the estate.³⁰¹

(a) Procedure

A person who has not applied for a grant may lodge an objection under rules 7(4) and 17(1) of the Probate and Administration Rules in the registry in which the pending application has been made or at the principal registry. Objection

301 See *In the Matter of the Estate of Joseph Muchoki Muriuki (deceased)* Nyeri High Court succession cause number 396 of 1999 (Khamoni J).

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proceedings commenced after the making of the grant are incompetent.³⁰² Upon receipt of the objection, the court should notify the person or persons by whom the application for a grant has been made of the objection, and at the same time require the objector to file an answer to the petition for grant together with a petition by way of cross application. According to Kamau AgJ in *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996, only a definite class of people is entitled to bring objection proceedings under section 68 of the Law of Succession Act, the class being of the persons set out in section 66 of the Act as entitled to administer an estate.

Upon the filing of the proper form of answer and a petition by way of cross application by the objector, the matter should be set down for the hearing of the petition, answer and cross application. The hearing of the dispute may take the form of oral submissions based on the papers filed in court or on both submissions and viva-voce or oral evidence. Where notice of objection is lodged in court but the answer and cross application are not filed within the prescribed period or at all the court should make a grant in terms of the original petition.

It would appear that objection proceedings should be limited to issues that can be dealt with at the preliminary stage. Matters for which procedures have been set out in the Act should be properly dealt with through those procedures and not through objection proceedings. In *In the Matter of the Estate of David Wahinya Mathene (deceased)* Nairobi High Court succession cause number 1670 of 2004, Koome J declined to give the orders sought in objection proceedings on the basis that the grounds upon which the application was predicated were not proper. The issues raised could be properly dealt with under other provisions of the Act, not the objection proceedings. The matters raised by the objector centred on intermeddling with the estate and inadequate provision.

In *In Re-estate of Ngetich* [2003] KLR 84 (Nambuye J), the court after hearing objection proceedings, instead of deciding on who should be given the grant, went straight into distributing the estate. The procedure adopted by the court in this matter is doubtful; the objection proceedings should be limited to deciding on the simple issue of who should be given the grant. There is no room for dealing with distribution at this very early stage in the probate proceedings. It is also doubtful whether the court can at this stage apply section 26 of the Law of Succession Act and decides on the question of reasonable provision when there

302 See *In Re Estate of Mangece* [2002] 2 KLR 399 (Khamoni J).

is no application before it on the issue. The same approach was also adopted in *In the Matter of the Estate of Benson Ndirangu Mathenge (deceased)* Nakuru High Court succession cause number 231 of 1998 (Ondeyo J) and *In the Matter of the Estate of Loice Njeri Ngige* Eldoret High Court probate and administration number 113 of 1994 (Nambuye J). The objection proceedings are tailored to determine issues of representation and are unsuited for distribution purposes. The approach is also unprocedural and unlawful. Section 71 of the Law of Succession Act requires that the holder of the grant should apply for the confirmation of the grant after the expiration of six months. Disposing of distribution at the same time with the determination of representation overlooks the mandatory provisions of section 71. The court, even in exercise of its inherent power, cannot dispense with the requirements of section 71 of the Law of Succession Act.

Objection proceedings should not be confused with proceedings for the revocation of grant. Kimaru J in *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court Probate and Administration 157 of 2001, while dealing with an application for the revocation of grant, repeatedly described the revocation proceedings as objection proceedings. Objection proceedings and revocation proceedings are distinct and separate procedures, serving different purposes and one should not be mistaken for the other.

(b) Grounds upon which objections may be premised

The relevant provisions of the law relating to objections do not indicate the grounds upon which the same may be made, but in general, they relate to validity of the will, right to administration or entitlement to a grant, suitability or competence of applicant as administrator, among others.

(i) Invalidity of a will

In *In the Matter of Manubhai Kishabhai Patel alias Manibhai Kishabhai Patel, deceased* Nairobi (Milimani) High Court civil case number 2340 of 1996 (Onyango-Otieno J), objection to an application for a grant of probate was founded on the grounds that the purported signature of the deceased on the will was a forgery, the alleged will had not been properly executed and the property disclosed in the petition had been grossly undervalued. After hearing oral evidence, the court found that the will had been properly executed and dismissed the objection. In *In the Matter of the Estate of Philly Nyarangi Otundo, (deceased)* Nairobi High Court

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succession cause number 2078 of 1997 (Aluoch J), the objectors to the application for grant of probate claimed that the subject will was a forgery and described the executors as strangers. The objection was dismissed as the court found that the will had been made freely and properly. In *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)* Nairobi High Court succession cause number 1781 of 2001 (Koome J), the objection was founded on the ground that the alleged will had not been executed in accordance with the law. Evidence was taken on the circumstances of the making of the alleged will, after which the court concluded that the deceased had died intestate, as the purported will had been made under suspicious circumstances. In *Karanja and another v Karanja, Nyanjugu and another v Karanja* [2002] 2 KLR 22 (Githinji J), the objections to an application for grant of probate were founded on allegations that the wills were not signed by the deceased. Alternatively, it was alleged that the wills were made under undue influence, were not duly executed as provided in law and that they had been tampered with while in the custody of one of the beneficiaries. The court was convinced, upon the evidence adduced, that wills had been duly signed and dismissed the objections.

(ii) *Right to administration or entitlement to a grant*

In *Atemo v Imujaro* [2003] KLR 435 (Omolo, Shah and Waki JJA), *Muigai v Muigai and another* [1995–1998] 1 EA 206 (Amin J), *In the Matter of the Estate of James Mberi Muigai* Kenyatta Nairobi High Court succession cause number 2269 of 1998, (Aluoch J), *In the Matter of Estate of Gerishon John Mbogoh* Nairobi High Court succession cause number 989 and 1110 of 1999 (Visram J), *In the Matter of the Estate of Francis Kiarie Ndirangu* Nairobi High Court succession cause number 82 of 2002 (Koome J), *Estate of Stephen Kimuyu Ngeki (deceased)* Machakos High Court probate and administration number 267 of 1995 (Mwera J), and *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* Nakuru Court of Appeal civil appeal number 172 of 2000 (Nakuru 13/2000) (Tunoi, Bosire and Owuor JJA) the objections to applications for grants of representation were founded on the grounds that the objectors were wives of the deceased persons at customary law and, for that reason, they were entitled to, not only being recognised as beneficiaries, but also representation being made to them.³⁰³ In *In the Matter of Estate of Gerishon John Mbogoh* Nairobi High Court succession cause number 989 and

³⁰³ See also *In the Matter of the Estate of Joseph Mungai Njoroge (deceased)* Nakuru High Court succession cause number 250 of 1999 (Rimita J), *In the Matter of the Estate of Julius Munyi Kaara* Nairobi High Court probate and administration number 1934 of 1995 (Kasanga Mulwa J)

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1110 of 1999 (Visram J), the objector was unable to prove that she was married to the deceased under customary law as she lacked capacity to contract a customary law marriage with him on account of a subsisting statutory marriage. The objectors in *Mary Wanjiku Gachigi v Ruth Muthoni Kamau Nakuru* Court of Appeal civil appeal number 172 of 2000 (Nakuru 13/2000) (Tunoi, Bosire and Owuor JJA) and in *In the Matter of the Estate of James Mberi Muigai Kenyatta* Nairobi High Court succession cause number 2269 of 1998 (Aluoch J) were not able to prove their alleged customary law marriages to the deceased persons to the required standard. The objections in *Atemo v Imujaro* [2003] KLR 435 (Omolo, Shah and Waki JJA), *Muigai v Muigai and another* [1995–1998] 1 EA 206 (Amin J), *In the Matter of the Estate of Francis Kiarie Ndirangu* Nairobi High Court succession cause number 82 of 2002 (Koome J) and *Estate of Stephen Kimuyu Ngeki (deceased)* Machakos High Court Probate and Administration 267 of 1995 (Mwera J) succeeded since the objectors proved that they had been properly married under customary law to the deceased.

An objector alleging the existence of a customary law marriage must prove the fact to the required standard. Rule 64 of the Probate and Administration Rules is a guide on how customary law may be proved: by production of oral evidence or by reference to a recognised treatise or other publication on the matter. It was held in *Mwangiru v Mumbi* [1967] EA 639 that the onus of proving customary law marriage is on the party who claims it, which is on a balance of probabilities. Evidence as to the formalities required for a customary marriage must be proved to the required standard. In *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] EA 735 (Newbold VP and Duffus JA, with Crabbe JA dissenting) it was held that the custom or customary rule relied upon by the party must be established for the court's guidance.

The text referred to most in probate matters where a customary law marriage is alleged is Eugene Cotran's *Restatement of African Law: Law of Succession II*.³⁰⁴ The Court of Appeal in *Atemo v Imujaro* [2003] KLR 435 (Omolo, Shah and Waki JJA) cautioned that Cotran's *Restatement* should not be treated by the courts as the only source of customary succession law. It should not be taken that what is not recorded in the *Restatement* cannot form part of the customary succession laws of the various communities in Kenya.

Some objections are founded on marriages presumed from long cohabitation. In

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such cases, the objectors would essentially be asking the court to presume marriage from prolonged cohabitation between them and the deceased. The principles for determining presumption of marriage from prolonged cohabitation are stated in the famous cases of *Hortensiah Wanjiku Yawe v Public Trustee* Court of Appeal East Africa civil appeal number 13 of 1976 (Wambuzi P, Mustafa and Musoke JJA) and *Njoki v Mutheru* [1985] KLR 871 (Madan, Kneller and Nyarangi JJA), both of which were succession disputes where the issue of presumption of marriage fell to be decided.³⁰⁵ The presumption does not depend on any law or system of marriage. It is an assumption based on the fact of a very long cohabitation and repute that the parties are married. Some of the factors to be considered include: children fathered by the deceased, valuable property acquired jointly, and performance of some ceremony of marriage. There must be a quality cohabitation and not mere friendship. It should be beyond concubinage; a cohabitation which has crystallized into a marriage so that it would be safe to presume there is a marriage.

In *In the Matter of the Estate of John G. Kinyanjui (deceased)* Nairobi High Court Probate and Administration 317 of 1984, Butler-Sloss J held that cohabitation could be evidence from which it may be presumed that the parties to the cohabitation did marry. He, however, pointed out that cohabitation in itself is not tantamount to marriage. On the facts of the case before him the judge found that there had been some degree of cohabitation between the deceased and the objector, but declined to presume that from that cohabitation there was a marriage between the deceased and the objector largely because the objector herself said their was no marriage between them.³⁰⁶ Kamau J was similarly unconvinced that the cohabitation between the objector and the deceased in the case of *In the Matter of the Estate of Samuel Muchiru Githuka- deceased* Nairobi High Court succession cause number 1903 of 1994 amounted to a marriage since the cohabitation was not frequent.

Visram J stated in *In the Matter of Estate of Gerishon John Mbogoh* Nairobi High Court succession cause number 989 and 1110 of 1999 that the presumption of marriage is a rebuttable presumption; it can be rebutted by evidence to the contrary. In *In the Matter of the Estate of Michael Kamau Kahiri (deceased)* Nairobi High Court

305 See also *Kisito Charles Machani v Rosemary Moraa* Nairobi High Court Miscellaneous case number 364 of 1981 (Porter J). See also *Christopher Nderi Githambo v Samuel Muthui Munene* Nairobi High Court civil case number 1372 of 2001 (Hayanga J). This was a burial dispute between the father of the deceased and the man who was cohabiting with her. The decision on who was entitled to bury her remains turned on the determination of the question whether a marriage could be presumed from the long cohabitation of the deceased with the plaintiff.

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succession cause number 302 of 1999 (Ang'awa J) and in *In the Matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu District* Nairobi High Court succession cause number 2398 of 2002 (Koome J) the courts were satisfied that there were marriages which could be presumed from the deceaseds' long cohabitation with the objectors.³⁰⁷ Nambuye J in *In the Matter of the Estate of Loice Njeri Ngige* Eldoret High Court probate and administration number 113 of 1994, a decision whose correctness is doubtful, held that a party wishing to allege a marriage out of prolonged cohabitation should first obtain declaratory orders before asserting themselves in probate proceedings as persons entitled on that basis.

Other objections are by persons alleging to be the children and other relatives of the deceased who feel that their interests are not catered for or are unlikely to be protected if grant is made to the applicants. In *Chelang'a v Juma* [2002] 1 KLR 339 (Etyang J), the objections were by the mother and the siblings of the deceased, respectively. The mother's complaints were that, she had not been notified of the petition, one of the petitioners was not an heir and therefore he was not entitled to apply, and that she and two illegitimate children of the deceased were dependants of the deceased and should have been listed in the petition as survivors. The siblings grouse was that they were the brothers and sisters of the deceased and therefore dependants and heirs of the deceased. The court found that the second petitioner, a brother of the deceased's wife, was not a suitable person to be appointed in the circumstances of the case. It was further found that the surviving mother of the deceased was entitled to a share of his deceased son's estate, but illegitimate children have no inheritance rights under Islamic law. With respect to the siblings who were all non-Muslims, it was held that under the relevant law non-Muslim cannot inherit in intestacy from the estate of a deceased Muslim. In *In the Matter of the Estate of James Aran Njau Kibue (deceased)* Nairobi High Court succession cause number 2358 of 1996 (Aganyanya J), the objection was by persons claiming to be children of the deceased. They failed to convince the court that they were children of the deceased and their objection was dismissed.

(iii) *Deceased died testate*

In intestacy matters, the objections are often based on a claim that the deceased had died testate on the basis that he had made an oral will. In *In the Matter of the Estate of Amos Kiprono Sirma (deceased)* Nakuru High Court succession cause number 231 of 1994 (Rimita J), the objection to the application for grant of letters of

³⁰⁷ Compare with *In the Matter of the Estate of Late Evanson Kiragu Mureithi (deceased)* Nakuru High Court succession cause number 163 of 1995 (Ondeyo J) and *In the Matter of the Estate of Gerald Mukiri alias Mukiri Gachane* Nairobi High Court succession cause number 804 of 1999 (Rawal J).

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administration was founded on the grounds that the deceased had disposed of his estate during his lifetime through an oral will. The court, based on evidence, found that there was a valid oral will and upheld the objection and dismissed the petition. An objection based on similar grounds in *In the Estate of Nduva Mailu (deceased)* Machakos High Court succession cause number 110 of 1994 (Mwera J) was dismissed as the alleged oral will was not proved. In *In the Matter of the Estate of Benson Ndirangu Mathenge (deceased)* Nakuru High Court succession cause number 231 of 1998 (Ondeyo J), another decision whose correctness is suspect, the objection to an application for grant of letters of administration was predicated on a written will which was attached to the objection. The court did not make a finding on the validity of the written will, but disregarded it because of its alleged unfairness to some of the beneficiaries, with the result that the objection failed.

(iv) *Suitability or competence of the proposed administrator*

Objections are also founded on the unsuitability of or the lack of competence on the part of the petitioner or petitioners. In *In the Matter of the Estate of Aggrey Makanga Wamira* Mombasa High Court succession cause number 89 of 1996 (Waki J), the father of the deceased objected to an application for grant of letters of administration by his daughter-in-law and grand daughter in respect of his son's intestate estate. He argued that the petitioners were unsuited as administrators as the daughter-in-law was young and inexperienced and could not administer the estate properly. He also said that she was likely to remarry. He further argued that his grand daughter was just a minor. The court held that the widow was suited to manage the estate, and that the daughter was of age and thus qualified for appointment as administrator. The issue of suitability was alluded to by the court in *Chelang'a v Juma* [2002] 1 KLR 339 (Etyang J), where it was held that the brother-in-law of the deceased was entitled to apply for a grant of letters under the Law of Succession Act and Islamic law, but in the peculiar circumstances of the case he was unsuitable for appointment as a personal representative. In *Swaboa Nassor Salim Hadi v Swaleh Salim Hadi* High Court probate and administration number 52 of 1990, the petitioner was the eldest daughter of the deceased intestate, while the objector was her uncle who, under the Islamic law of inheritance, was entitled to a portion of the intestate estate of his late brother. The petitioner had just turned eighteen, the age of majority, before applying for the grant. The objector opposed the petition on the ground that the petitioner was too young; that she could be prone to manipulation and that, she lacked experience to manage the

vast estate. The petitioner argued that the respondent did not have interest in administering the estate for the benefit of the minor beneficiaries of the estate; his interest was to plunder the estate. The court found that none of them had the competence to administer the estate. The grant was made to the Public Trustee.

14.3 PROTESTS AT THE CONFIRMATION OF A GRANT

Where an application for confirmation of a grant to the estate of a deceased (which takes the form of a summons for confirmation) is made in regard to which a caveat has been entered and is subsisting, the registrar or resident magistrate should send a notice to the caveator alerting him of the making of the application for confirmation and notifying him that if he wishes to object to the confirmation of the grant, he should file an affidavit of protest against the confirmation setting out the grounds of his objection.³⁰⁸ Upon the filing of the affidavit in protest by the protestor or any other person who is opposed to the proposed distribution, the matter should proceed for the hearing of the application for confirmation during which the protestor's protest should be heard. The persons heard include the applicant seeking the confirmation of grant, the protestor and any other person interested.³⁰⁹

Kamau AgJ in *In the Matter of the Estate of Laban Gikonyo Kamau (deceased)* Nairobi High Court succession cause number 84 of 1999, stated that the affidavit of protest constitutes the basic foundation of a protestor's claim to the estate of the deceased. The affidavit or affidavits should be made in support of the protestor's claim averring to the deceased's intentions, among other matters, as regards the mode of distribution of his estate. The makers of such affidavits are usually the witnesses that the protestor produces during the confirmation hearing.

Ang'awa J in *In the Matter of the Estate of Mary Gachuru Kabogo (deceased)* Nairobi High Court succession cause number 2830 of 2001, set out the procedure for disposing of protest to confirmation hearings. When the matter is set down for the confirmation hearing, if the parties dispute over certain properties, under rule 40 of the Probate and Administration Rules the disputed properties go to the protest hearing. The properties that are not the subject of a dispute are confirmed under rule 41 of the Probate and Administration Rules. The disputes over the contested property should be heard under order XXXVI of The Civil Procedure Rules as

308 See rule 40(5)(6) of the Probate and Administration Rules.

309 See rule 41(1) of the Probate and Administration Rules.

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a separate cause.

In *In the Matter of the Estate of Patrick Mungai Kugega (deceased)* Nairobi High Court succession cause number 1374 of 2000 (Koome J), the beneficiaries were the children of the deceased, and it was proposed that the estate be distributed in equal shares between the beneficiaries, except for a daughter who was to get a slightly smaller share. The proposal was agreeable to all except for one son who filed an affidavit in protest. His case was that their deceased father had bequeathed to him a certain parcel of land. He also alleged that he used to send money to his father, which was used to purchase the other parcels of land. He wanted the other children to move out of the land allegedly bequeathed to him by the deceased. The court held that the evidence adduced was insufficient to show that the protestor helped the deceased acquire the property. It was also noted that the deceased had died intestate and did not leave a will. The court directed that the estate be equally shared between all the children of the deceased in keeping with section 38 of the Law of Succession Act.³¹⁰

In *In the Matter of the Estate of Kinyuru Karanja (deceased)* Nairobi High Court succession cause number 2361 (Waweru J), the protestors were two children of the personal representative who were opposed to their mother's proposed distribution of their father's estate. Their main quarrel was that their mother favoured one of the other children by giving him a bigger share than the others. Her explanation was that that particular son assisted her and the deceased with the money used to purchase the land the subject of the estate. It was held that whatever sentimental attachment the personal representative may have had to the favoured son the same was not sufficient reason for denying the other of their inheritance. It was directed that the property be shared equally among all the children.

14.4 REVOCATION OF A GRANT UNDER THE LAW OF SUCCESSION ACT

The grant of representation, whether or not confirmed, may be revoked or annulled at any time by the court on its own motion or on application by an interested party by virtue of section 76 of the Law of Succession Act.³¹¹

310 See also *In the Matter of the Estate of Wilson Wamagata (deceased)* Nairobi High Court succession cause number 261 of 1998 (Waweru J).

311 See *In Re Estate of Naftali (Deceased)* [2002] 2 KLR 684 (Waki J).

(a) Reasons for revocation of a grant

Revocation can be on any of the following grounds: the proceedings to obtain a grant being defective in substance; the grant having been obtained by reliance on false statements, non-disclosure or concealment of important matter or information; the person to whom grant was made having failed to apply for confirmation within the prescribed time or having failed to diligently administer the estate or having failed to produce to the court within the prescribed time any inventory or account of administration as required in law or produces an inventory or account which is false; and the grant having become useless and inoperative through subsequent circumstances.³¹² The application for revocation of grant should be based on the grounds set out in section 76 otherwise, it fails.³¹³

(i) Defective proceedings

The proceedings to obtain grant are considered defective in substance where the will, which is the basis of the application, is invalid, or on account of certain procedural defects in the application for or the making of the grant. In *Mwathi v Mwathi and another* [1995–1998] 1 EA 229 (Gicheru, Kwach and Shah JJA) an application for revocation was made under section 76 of the Act on the ground that the will, the basis of the grant was not genuine. It was held that the will was invalid, as it had been procured by fraud and undue influence. The grant, made based on the invalid will, was held to have been irregularly obtained and was revoked.

The grant of letters of administration issued and confirmed in the case of *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 (Kamau J) was revoked because the grantee had failed to notify the applicant of the petition and to obtain his consent.³¹⁴ In *In the Matter of the Estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased)* Nairobi High Court succession cause number 783 of 1993 (Koome J), the court found that the applicants who were equally entitled to apply for grant of letters of administration were not notified of the petitioner's intention to apply for the grant, their consent to the petitioner applying alone were

312 See section 76 of the Succession Act.

313 See *In the Matter of the Estate of Patrick Mbugua Njoroge (deceased)* Nairobi High Court probate and administration number 659 of 1989 (Waweru J).

314 See also *In the Matter of the Estate of Mutambu Ndekei* Nairobi High Court succession cause number 2688 of 2002 (Koome J) and *In the Matter of the Estate of Njoroge Njiu (deceased)* Nairobi High Court succession cause number 3005 of 2002 (Kamau J).

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not obtained nor were citations served upon them. The grant was revoked on the ground that it had been obtained through an improper procedure.³¹⁵ One grant of letters of administration was issued in respect of the estates of two deceased persons in the case of *In the Matter of the Estate of James Kiarie Muiruri (deceased)* Nairobi High Court succession cause number, 2413 of 2003. The procedure of obtaining a single grant for two estates was found by Koome J to have been totally irregular and defective: the grant was revoked. In *Musa v Musa* [2002]1 EA 182 (Ringera J), the applicant's claim was that the making of the grant was attended by defects in that the letter from the assistant chief did not disclose all the survivors of the deceased, the petitioner failed to produce the requisite number of sureties and the petitioner did not obtain the consent of the other beneficiaries before filing the petition. The court declined to revoke the grant on these grounds. It was held that the letter from the chief and the sureties are not mandatory requirements whose absence would affect the status of a grant. Regarding the consent of other survivors, the court held that the widow, who was the petitioner, had priority under section 66 of the Law of Succession Act to apply for the grant and she did not need the consent of any other person. The grant, however, was revoked on the ground that it was defective in substance in that it was made to the applicant alone contrary to section 58(1) of the Law of Succession Act, which requires that where a continuing trust arises from the fact that some of the beneficiaries are minors the grant should not be made to less than two people. In *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684 (Waki J), the estate of a deceased Congolese, who died in Kenya his domicile being in either Congo or Rwanda, comprised of movables only. The grant made by a Kenyan court was revoked on the ground that the process of obtaining the same was defective. Under section 4(1)(b) of the Law of Succession Act, the law of succession that applies with regard to movable property is the law of the country where the deceased is domiciled.

In *In the Matter of the Estate of Karanja Gikonyo Mwaniki (deceased)* Nakuru High Court Miscellaneous 245 of 1998 (Ondeyo J), the court on its own motion,

315 See also *In the Matter of the Estate of Muriranja Mboro Njiri* Nairobi High Court succession cause number 890 (Kamau AgJ). See also *In the Matter of the Estate of Muriranja Mboro Njiri* Nairobi High Court succession cause number 890 (Kamau AgJ) Where the court found several defects in the petition for the grant: the applicant being a person who had equal right did not consent to the filing of the petition by the grantee, she was served with a citation and in view of the anticipated continuing trust, it was necessary that there be two petitioners in the application for grant. In *In the Matter of the Estate of Dorcas Njeri Githuku (deceased)* Nairobi High Court succession cause number 1968 of 2002 (Koome J) the grant obtained by the stepchildren of the deceased was revoked on the grounds that the grant had been obtained without the consent and involvement of the sole survivor of the deceased (a married daughter).

in keeping with section 76, of the Law of Succession Act, revoked a grant, because the proceedings to obtain it were defective. The grant had been issued by a Resident Magistrate in respect of an estate whose value was KShs 240 000.00. Ondeyo J held that the Resident Magistrate had not jurisdiction to make the grant since his jurisdiction was limited to an estate whose value did not exceed KShs 100 000.00. In *In the Matter of the Estate of Dr Arvinder Singh Dhingra (deceased)* Nairobi High Court succession cause number 2572 of 1996 (Aluoch J), a grant made to the advocates for the parties who had not applied for it was revoked by the court on its own motion because it was made through a defective process.

(ii) *False statements or concealment of material information*

Most of the applications are founded on the grounds that the grant was obtained fraudulently by the making of a false statement or untrue allegation of a fact, or by the concealment from the court of material information. In *Samwel Wafula Wasike v Hudson Simiyu Wafula* (1993) LLR (CAK) (Kwach, Omollo and Tunoi JJA)³¹⁶ it was alleged that the appellant had deceived the court when he stated in his petition that he was a grandson of the deceased. The deceased was in fact not his grandmother, but a sister of his grandmother. The persons who had prior right to the grant had not given their consent. It was held that the grant had been obtained fraudulently by the making of a false statement and it was revoked.³¹⁷ In *In the Matter of the Estate of Benjamin Ndumba Gachanja* Nairobi High Court succession cause number 2172 of 1994 and *In the Matter of the Estate of Robert Napunyi Wangila* Nairobi High Court succession cause number 2203 of 1999, it transpired that there had been fraudulent concealment in the petitions for grants of letters of administration of the fact that the deceased persons had died testate, the grants were revoked. In *In the Estate of Peter Minik (deceased)* Machakos High Court Probate and Administration 13 of 1998 (Mwera J), a grant was revoked because the petitioner had not disclosed some of the survivors of the deceased in

316 See also *Richard Katiwa Muli v John Kisalu Nguli* Machakos High Court civil case number 21 of 1998 (OS) (Mwera J).

317 See also *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 (Kamau J), *Willington Muchigi Kimari v Rahab Wanjiru Mugo* Nairobi Court of Appeal civil appeal number of 168 of 1990 (Gachuhi, Muli and Akiwumi JJA) *In the Matter of the Estate of Rahab Kabui Ruiitha (deceased)* Nairobi High Court succession cause number 1815 of 1997 (Visram J), *Geoffrey Ndungu Kinuthia and another v Mary Njoki Karanja* Nairobi Court of Appeal civil number 270 of 1997 (Gicheru, Tunoi and Pall JJA), *In the Matter of the Estate of Basen Chepkwony (deceased)* Nairobi High Court succession cause number 842 of 1991 (Koome J) and *In the Matter of the Estate of Silas Ngamithi Kathei (deceased)* Nairobi High Court succession cause number 2766 of 2001 (Koome J).

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her petition.³¹⁸ The grant in *In the Estate of Kinungi Kimani (deceased)* Machakos High Court probate and administration number 228 of 1995 (Mwera J) was revoked on the ground of concealment of matter from the court, which would have assisted in determining to who it should make the grant. The concealed matter was the fact that the deceased had sold a portion of the land making up the estate to the applicant, which fact the petitioner was aware of at the time of filing the petition.

(iii) *Grant has become inoperative or useless*

The courts may also revoke grants on the grounds that the same has become inoperative or useless. In *In the Matter of the Estate of Njau Ndungi (deceased)* Nairobi High Court probate and administration number 863 of 1991, Aluoch J revoked a grant because it was meant for the subdivision of a certain parcel of land, which had already been subdivided and transferred by the time the grant was obtained. In *In the Matter of the Estate of Mwangi Mugwe alias Elieza Ngware (deceased)* Nairobi High Court succession cause number 2018 of 2001, the application before the court was for the substitution of a deceased administrator. Khamoni J found that the procedure adopted was improper and held that the appropriate procedure should be an application under section 76 of the Law of Succession Act for the revocation of the grant on the ground that it had become useless and inoperative following the demise of its holder. In *In the Matter of the Estate of Elizabeth Wamaiha Ngaruiya (deceased)* Nairobi High Court succession cause number 2499 of 2001, the only asset quoted as making up the estate of the deceased was a parcel of land with respect to which the deceased had a registered overriding interest. Waweru J found that the overriding interest died with the deceased and the grant made for the administration of the asset was therefore useless and had to be revoked.

(iv) *Lack of diligence in administration*

Lack of diligence in administering the estate, failure to apply for confirmation of the grant within one year and failure to produce into court accounts or inventories as may be required of them are the other ground for revoking a grant.

³¹⁸ See *In the Estate of Ezekiel Muland a Masai Eldoret* High Court Probate and Administration 4 of 1992 (Etyang J), *In the Matter of the Estate of Basen Chepkwony (deceased)* Nairobi High Court succession cause number 842 of 1991 (Kooome J), *In the Matter of the Estate of David Kamethu alias David Maina Kinyanjui (deceased)* Nairobi High Court succession cause number 1301 of 2002 (Kooome J), *In the Matter of the Estate of Gladwell Mumbi Njoroge (deceased)* Nairobi High Court succession cause number 158 of 1998 (Kooome J) *In the Matter of the Estate of Yusuf Mohamed- deceased* Mombasa High Court Probate and Administration 434 of 1995 (Waki J) and *In the Matter of the Estate of Evanson Kiragu Mureithi (deceased)* Nakuru High Court succession cause number 163 of 1995 (Ondeyo J).

In *In the Matter of the Estate of Mohamed Mussa (deceased)* Mombasa High Court succession cause number 9 of 1997 (Khaminwa J), the grant was revoked because the administrators had not kept any records of accounts of their administration and one of the administrators was not capable of discharging her duties on grounds of poor mental health and old age. In *In the Matter of the Estate of Lydia Karuru Ahmed (deceased)* Mombasa High Court Probate and Administration 122 of 2001, Khaminwa J revoked a limited grant as the two administrators were engaged in disputes over the utilisation of income from the estate. They had also failed to render any account of the affairs of the estate, although it is not clear if the court had required them to do so. Where there are several administrators in respect of the same estate the expectation is that they would always work together and generally act jointly. If it becomes apparent that they cannot act jointly the way out should be to apply for revocation of the grant.³¹⁹

(b) Procedure for revocation of a grant

(i) The procedure

Rule 44 of the Probate and Administration Rules sets out the procedure for the revocation of a grant. Any person seeking to have a grant revoked or annulled should apply to the High Court for the relief by way of summons for revocation.³²⁰ Where the grant was issued through the High Court, the application should be made through the registry and in the cause in which the grant was issued. Where the grant was issued by a resident magistrate, the application should be through the High Court registry situated nearest to that resident magistrate's registry. In *In Re Estate of Murimi (Deceased)* (2002) 2 KLR 158 Khamoni J stated that if the grant sought to be revoked was made by a resident magistrate, the directions given by the High Court, for the hearing of the application, should include an order that the relevant case file from the resident magistrate's court be brought to the High Court. According to Kamau AgJ in *In the Matter of the Estate of Muriranja Mboro Njiri* Nairobi High Court succession cause number 890 of 2003, the gazettelement of the making of the application for grant does not operate as a bar to an application for revocation under section 76 of the Act.

Ang'awa J in *In the Matter of the Estate of Ruth Wamucii (deceased)* Nairobi High Court Probate and Administration 1012 of 1992, sets out in detail the various stages of and steps that should be taken between the filing of an application for

319 See *In the Matter of the Estate of Joseph Muchoki Muriuki (deceased)* Nyeri High Court succession cause number 396 of 1999 (Khamoni J).

320 See also *In the Matter of the Estate of Makali Nzyoka Machakos* High Court probate and administration number 60 of 1997 (Wendoh J) and *In Re Estate of Murimi (Deceased)* [2002] 2 KLR 158 (Khamoni J).

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revocation and its hearing. Upon the filing of the application, the probate registry sends out a notice to the applicant to appear before the judge for directions. The directions are given *ex-parte*, mainly on who should be served with the summons and the supporting affidavit and the manner of effecting service. Thereafter a notice issues for service upon all the persons who ought to be served as directed by the judge. The persons served are required to file an affidavit indicating whether they support or oppose the application and on what grounds. The matter is then listed for hearing after notifying all the parties concerned. No party should file any papers before being served with the requisite notices under the Probate and Administration Rules. The Court of Appeal in *Florence Okutu Nandwa and another v John Atemba Kojwa* Kisumu Court of Appeal civil appeal number 306 of 1998 (Kwach, Shah and O’Kubasu JJA) emphasised the importance of all interested parties during the revocation proceedings being notified of the proceedings.

Where the revocation is by the court on its own motion, the same must be founded on the grounds set out in section 76 of the Law of Succession Act. In *Matheka and another v Matheka* Nairobi [2005] 1 EA 251 (Omolo, O’Kubasu and Onyango Otieno JJA), the Court of Appeal of Kenya held that even where revocation is by the court on its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making false statement or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate or failed to produce to court such inventory or account of administration as may be required. In that case, the High Court had, during the confirmation proceedings, revoked on its own motion the grant made to the widow and daughter of the deceased after making a finding that the protestor to the confirmation was a son of the deceased by another woman, and ordered that a new grant be issued to the three of them. The High Court often goes round this position by seeking refuge behind the inherent powers provisions; especially rule 73 of the Probate and Administration Rules, as Rimita J did in *In the Matter of the Estate of Amos Kimondo Ngotho (deceased)* Nakuru High Court succession cause number 287 of 1998.

(ii) *Who may apply for revocation*

The revocation order may be sought, according to section 76 of the Law of Succession Act and rule 44 of the Probate and Administration Rules, by any person interested in the estate of the deceased person. There is no agreement in the High Court on who is competent to bring the application. A section of the

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High Court is of the view that the person must have *locus standi* to bring the application. Koome J, for example, stated in *In the Matter of the Estate of Gichia Kabiti (deceased)* Nairobi High Court succession cause number 2559 of 2002 that the persons who have priority in law to apply for grant of representation are those set out in section 66 of the Law of Succession Act and the order of preference is as set out in the provision³²¹ and so are the person who qualify to bring applications for revocation of grant. The surviving spouse takes preference over everybody else, followed by blood relatives entitled upon intestacy. Trust corporations and creditors rank last in the list. Kamau AgJ, on the other hand, in *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996 took the view that section 76 is open to any person who may be interested in the estate of the deceased person, and not just to the class of persons mentioned in section 66. In his opinion section 76 and rule 44 are intended to determine greater fundamental legal issues with a view to ensuring the proper administration and finalisation of the estate. According to Koome J, a person coming to court not as an heir of the deceased, or at any rate as one of the persons mentioned in section 66, but as a claimant in constructive or implied trust has no standing to bring the revocation application.³²² To Kamau AgJ in *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996 such an applicant would have the requisite *locus standi*.

The wording of section 76(a), (b) and (c) of the Law of Succession Act limits these provisions to the making of grants. Proceedings founded on these provisions naturally raise the question who should the grant be made to, bringing into consideration section 66 of the Law of Succession Act. It is only the persons listed in section 66 who can legitimately bring applications under section 76(a), (b) and (c) of the Law of Succession Act challenging the propriety of the grant making process. Persons who are not qualified to apply for grant would have no basis for challenging the making of the grant. On the other hand, section 76(d) and (e) of

321 The Court of Appeal of Kenya has not had occasion to deal squarely with the issue. Its closest decision so far is in *Isabella Gichugu Matheka and another v Eric Muthui Matheka* Nairobi Court of Appeal civil appeal number 304 of 2002 (Omolo, O'Kubasu and Onyango Otieno JJA).

322 See also *In the Matter of the Estate of Gathara Gathunguri alias Simeon Gathara Gathunguri (deceased)* Nairobi High Court succession cause number 1980 of 1998 (Koome J), *In the Matter of the Estate of Chege Njuguna (deceased)* Nairobi High Court succession cause number 832 of 1993 (Koome J) and *In the Estate of Murathe Mwarua (deceased)* Nairobi High Court succession cause number 825 of 2003. The Court of Appeal of Kenya has not had occasion to deal squarely with the issue. Its closest decision so far is in *Isabella Gichugu Matheka and another v Eric Muthui Matheka* Nairobi Court of Appeal civil appeal number 304 of 2002 (Omolo, O'Kubasu and Onyango Otieno JJA).

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the Law of Succession Act are concerned with the administration of the estate. Any person interested in the estate has a stake in its administration and it would appear that such a person would have sufficient standing to seek revocation of the grant under section 76(d) and (e) of the Law of Succession Act.

(iii) *Revocation and reasonable provision*

A person who is not really challenging the propriety of the grant or the process under which it was obtained or the manner the estate is being administered, but has other concerns or worries should not seek the order. Mulwa J in *In the Matter of the Estate of Fatuma binti Mwanzi Umri (deceased)* Nairobi High Court Probate and Administration 21 of 1994 dismissed an application by a brother of the deceased who wanted a grant made to a son of the deceased revoked. His complaint appeared to be that as a brother of the deceased he was entitled to be the administrator of the deceased's estate. The court's view was that he ought to have brought an application under section 26 for reasonable provision.

(iv) *Revocation and the confirmation process*

In *In Re Estate of Ngugi (deceased)* [2002] 2 KLR 434, Khamoni J pointed out that where the complaint of the person applying for revocation relates to what happened during the confirmation process, revocation or annulment of the grant should not be sought as the certificate of confirmation of a grant can be dealt with without having to cancel the grant of representation. The court said that it should always be borne in mind that there are two grants, the original grant and the confirmed grant. Where the applicant's complaint is that the confirmation process was flawed, only the certificate of confirmation issued thereafter or the order made during the confirmation hearing should be revoked or set aside. In *In Re Estate of Gitau (deceased)* [2002] 2 KLR 430, Khamoni J dismissed the revocation application brought on the ground of fraud and concealment of important matter, because the applicants were complaining about the distribution of the estate. The court pointed out that it is not proper to use section 76 where the applicant is challenging the distribution only, since the section deals with revocation of a grant. In *In the Matter of the Estate of Justus Wangai Muthiru (deceased)* Nairobi High Court succession cause number 1949 of 2001, Waweru J opted to cancel the certificate of confirmation rather than revoke the grant because the applicant appeared to be complaining about the propriety of the confirmation proceeding.³²³ Similarly, Githinji J in *In the Matter of the Estate of Maria Wanja Njaungiri alias Wakahu Muthara (deceased)* Nairobi High Court succession cause

³²³ See also Waweru J's decision in *In the Matter of the Estate of Laban King'ori Macharia (deceased)* Nairobi High Court probate and administration number 16 of 1988.

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number 2422 of 1995, rather than revoke the grant as prayed elected to cancel the confirmation instead since the applicant was complaining about the confirmation process. It was stated by the defunct Court of Appeal for East Africa in *Saleh bin Mohamed bin Omar Bakor v Noor binti Sheikh Mohamed bin Omar Bakor* (1951) 18 EACA 30 (Sir Barclay Nihill P, Sir Newnham Worley VP and Lockhart-Smith JA), that a beneficiary is entitled to follow the assets, under the equitable doctrine of tracing, into the hands of the person wrongly receiving them without necessarily revoking the grant of representation.

At the other end of the spectrum, Aluoch J in a number of decisions revoked grants under section 76 where the applicants were complaining about distribution and the confirmation process. In *In the Matter of the Estate of Isaac Kireru Njuguna (deceased)* Nairobi High Court succession cause number 1064 of 1994, the applicants were unhappy with the distribution of the assets as proposed during the confirmation process. Their complaint was that not all the assets were taken into account. It was also established that the adult survivors of the deceased had not consented to the mode of distribution. Aluoch J revoked the grant under section 76, saying it was up to the deceased's family to either retain the previous administrators or pick new ones. In *In the Matter of the Estate of Gitau Chege Kibera (deceased)* Nairobi High Court succession cause number 1463 of 1991, the application was founded on fraud and concealment of material information. Although Aluoch J was satisfied that the grant had been obtained properly, the grant was revoked on the ground that the confirmation process was flawed. The court directed that a fresh grant be issued to the holders of the revoked grant. Koome J, in *In the Matter of Joseph Kimemia Gichuhi (deceased)* Nairobi High Court succession cause number 1072 of 2002, similarly revoked a grant, that had been made properly, on the ground that its confirmation was contrary to the provisions of the law. It would be improper to revoke a grant because of problems with the confirmation process; the Law of Succession Act has clear provisions for addressing flaws in the confirmation process. Needless to say that the revocation provisions give the court discretion on the matter.

(v) *Revocation or annulment*

The revocation provisions provide for revocation or annulment of the grant. This means that the application brought before the court should be either for revocation or for annulment. Waki J in *In the Matter of the Estate of Yusuf Mohamed (deceased)* Nairobi High Court Probate and Administration 434 of 1995 said that there is a difference between annulment and revocation and the applicant must choose the

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one or the other depending on the nature of the complaint. Annulment entails a declaration that the document never existed and had no legal effect, and it is usually ordered where the grant making proceedings were defective while revocation simply means cancellation or withdrawal and is allowed in all other cases: where grant is obtained through false statements, grant has become useless and maladministration. Both probate law practitioners and probate courts use the terms interchangeably.³²⁴ Ondeyo J in *In the Matter of the Estate of Karanja Gikonyo Mwaniki (deceased)* Nakuru High Court Miscellaneous number 245 of 1998 quite properly annulled the grant made by the Resident Magistrate because it was a nullity made by a court in excess of its jurisdiction.

(vi) *The court's discretionary power*

A court faced with an application for revocation of grant may make such orders, as it deems fit and just given the circumstances of the case. Rawal J in *In the Matter of the Estate of Esther Wanjiru Mucheru (deceased)* Nairobi High Court succession cause number 1417 of 1992 and Khamoni J in *In the Matter of the Estate of Thareki Wangunyu also known as Thareka Wangunyo* Nairobi High Court succession cause number 1996 of 1999 stated that section 76 of the Law of Succession Act is discretionary; it gives the court discretion to revoke or annul a grant. The court is not bound to revoke the grant even where a case is made out under section 76. In *Kipkurgat arap Chepsiror and others v Kisugut arap Chepsiror* Court of Appeal civil appeal number 24 of 1991, the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries. They had sought an order of revocation on the ground that their names had been omitted from the list of the survivors of the deceased. In *In the Matter of the Estate of Jonathan Mutua Misi (deceased)* Machakos High Court Probate and Administration 95 of 1995 (Mwera J), the applicant sought revocation of grant on the grounds that the grant had been obtained on false statements and on concealment of important matter from the court, to wit that the applicant was a survivor and heir of the deceased. The court found that the applicant was indeed a survivor and heir of the deceased, but instead of ordering the revocation of the grant directed that the applicant's name be included in the list of heirs and survivors. In *In the Matter of the Estate of Thareki Wangunyu also known as Thareka Wangunyo* Nairobi High Court succession cause number 1996 of 1999, Khamoni J found that the name of the applicant had been omitted from the list of those

324 See the ruling of Mwera J in *In the Matter of Kinungi Kimani (deceased)* Machakos High Court probate and administration number 228 of 1995.

who had survived the deceased. Rather than revoke the grant, the court ordered that the applicant's name be included in the list of beneficiaries.

In *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996 (Kamau J), the court found that the applicants, the married daughters of the deceased, had been excluded from the proceedings for the grant and the distribution of the estate in contravention of sections 35, 38, 40 and 41 of the Law of Succession Act, and rules 26 and 40(8) of the Probate and Administration Rules. However, the court declined to revoke the main grant, but instead cancelled the confirmed grant and ordered the parties to commence fresh proceedings for the confirmation of the grant. In *In the Matter of the Estate of John Kamau Gichuhi (deceased)* Nairobi High Court succession cause number 833 of 2003, Waweru J, although convinced that the grant had been procured by concealment from the court of a material fact, to wit that the applicants were also survivors of the deceased, decided not to revoke the grant. Instead, he set aside the order confirming the grant and cancelled the certificate of confirmation of grant, thus reopening the issue of the distribution of the estate to enable the applicants make their case for a share of the estate. In *In the Matter of the Estate of Wilson Wamagata (deceased)* Nairobi High Court succession cause number 261 of 1998, Githinji J, in an application for revocation of grant for failure to seek confirmation within a year of its making, declined to revoke the same, but cancelled the confirmation of the grant.³²⁵

(vii) *Time limit for the application*

There is no time limitation for bringing revocation proceedings. Kamau AgJ in *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996 and the Court of Appeal in *Elizabeth Kamene Ndolo v George Matata Ndolo* Nairobi Court of Appeal civil appeal 128 of 1995 (Gicheru, Omolo and Tunoi JJA) stated that there is no statutory time limit for commencing the application for revocation. In *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996, Kamau J added that the revocation proceedings may be commenced long after the estate of the deceased has been distributed, the consequences notwithstanding. This however should be subject to the test of reasonable time.

325 See also *In the Matter of the Estate of Gathima Chege (deceased)* Nairobi High Court succession cause number 1955 of 1996 (Kamau J).

(c) Effect of revocation of grant

The effect of revocation of a grant is mainly felt by personal representatives, debtors of the estate, and purchasers of the assets of the estate, and beneficiaries who have received assets from the estate.

Section 92 of the Law of Succession Act protects the original personal representatives. In the event of the revocation of grant, the personal representative will not be personally liable, provided his acts, whether they are payment of debts or of legacies, are in good faith. Section 92(2) of the Law of Succession Act allows personal representatives to re-imburse themselves for payments that have been made out of their own funds in the course of the administration of the estate, provided that such payments might properly be made by a subsequent grantee. The personal representative may be required to compile and ensure an appropriate and satisfactory account of the administration prior to the revocation of the grant for the benefit of the in-coming personal representative as was the case in *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 (Kamau AgJ),³²⁶ and in *In the Matter of the Estate of Yusuf Mohamed (deceased)* Mombasa High Court probate and administration number 434 of 1995 (Waki J).

Section 92(2) of the Law of Succession Act also protects debtors of the estate who in good faith made payments or dispositions to the personal representative. Section 93(1) of the Law of Succession Act provides that transfer of any interest in property, whether real or personal, by the original personal representative remains unaffected by the revocation of the grant, even where the purchaser has notice that all the debts, liabilities, expenses which take priority, duties and legacies of the deceased have not been discharged or provided for as was ordered in *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court civil appeal number 935 of 2003 (Kamau J) and in *In the Matter of the Estate of Yusuf Mohamed (deceased)* Mombasa High Court probate and administration number 434 of 1995 (Waki J). In *In the Matter of the Estate of Eunice Wanjeri Kibia (deceased)* Nairobi High Court succession cause number 926 of 1997 (Osiemo J), after the revocation of the grant the applicant sought to have the deceased's property, which had been sold under the revoked grant, revert

³²⁶ See also *In the Matter of the Estate of Yusuf Mohamed (deceased)* Mombasa High Court Probate and Administration 434 of 1995 (Waki J), *In the Matter of the Estate of Lydia Karuru Ahmed (deceased)* Mombasa High Court Probate and Administration 122 of 2001 (Khaminwa J) and *In the Matter of the Estate of Eunice Wanjeri Kibia (deceased)* Nairobi High Court succession cause number 926 of 1997 (Osiemo J).

to her name. It was held that section 93 protects the interest of a purchaser of immovable property in the event the grant is revoked. In the circumstances, the property which had been sold and transferred to lawful purchasers could not revert back to the estate of the deceased. Nambuye J has stated in *In the Matter of the Estate of Anthony Gichigi Wairire (deceased)* Eldoret High Court probate and administration number 32 of 1932, that although section 93 does provide protection for transfers by personal representatives the provision does not make such transfers absolute as they can still be challenged by beneficiaries.

The Law of Succession Act, however, does not protect beneficiaries who have received assets from the estate prior to the revocation of the grant. It would appear that the common law position applies to require that such beneficiaries, who have been over paid or wrongly paid, return the property or refund the estate, even if they have dissipated the property.

14.5 APPLICATIONS FOR REVIEW OF PROBATE ORDERS AND DECREES

For applications brought under order XLIV of the Civil Procedure Rules,³²⁷ it was held by Koome J in *In the Matter of the Estate of Waruru Kairu* Nairobi High Court succession cause number 2525 of 1997 that the party applying for review of a decree or order issued by the probate court has to draw up the decree or order that is sought to be reviewed and attach it to the application.³²⁸ The application must also meet the substantive requirements of an application brought under order XLIV of the Civil Procedure Rules. In *In the Matter of the Estate of Gerishon John Mbogoh* Nairobi High Court succession cause number 989 of 1999, Visram J declined to review his orders dismissing objection proceedings. The party seeking review had moved the court on the ground of discovery of new evidence, being the decree absolute and proceedings in the matrimonial proceedings, which she had been unable to produce during the objection proceedings. The court found that what the applicant sought to place before the court was not new evidence; the party was in fact attempting to produce supplemental evidence.³²⁹ Ang'awa J in *In the Matter of the Estate of Late Simon Timaiyo Mokosio also known as Simon Nemokoosio*

327 It is one of the provisions of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules.

328 See also *In the Matter of the Estate of Gerishon John Mbogoh* Nairobi High Court succession cause number 989 of 1999 (Visram J).

329 See also *Saira Begum Mohamed Arshad Syed v Ilal Syed* Nairobi High Court succession cause number 518 of 1997 (Kamau AgJ).

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(deceased) Nairobi High Court succession cause number 1063 of 1987, stated that order XLIV of the Civil Procedure Rules can be used for the purpose of getting a grant rectified or errors in it corrected. In *In the Matter of the Estate of Hannah Nyangahu Mwenja (deceased)* Nairobi High Court probate and administration number 901 of 1996 (Kooome J), it was stated that a court's decision cannot be reviewed to change its character and to take away a party's right of inheritance. Where the result of a review is likely to amount to a major departure from the original decision, it would be more prudent to bring an appeal instead.

14.6 APPLICATIONS FOR APPOINTMENT UNDER SECTION 35(3) OF THE LAW OF SUCCESSION ACT

A child who is aggrieved by the exercise of the power of appointment by a surviving spouse is allowed by section 35(3) of the Law of Succession Act to move to court for the appointment of his share. Under rule 46 of the Probate and Administration Rules, the application takes the form of a summons supported by an affidavit setting out the facts and the particulars required in section 35(4) of the Law of Succession Act. In deciding whether to make the appointment, the court should have regard to the matters set out in section 35(4). Section 35(4) is on all fours with section 28 of the Law of Succession Act which sets out the guidelines to be followed by the court in deciding whether to make reasonable provision or not. The principles that the courts have developed for the purpose of section 28 should more or less be of equal application for the purpose of section 35(3)(4) of the Law of Succession Act.³³⁰

14.7 APPLICATIONS UNDER SECTION 61 OR SECTION 75 OF THE LAW OF SUCCESSION ACT

The applications brought pursuant to sections 61 and 75 of the Law of Succession Act, under rules 47 and 48 of the Probate and Administration Rules, following the discovery of a codicil and seeking the incorporation of the same in the grant already issued or confirmed by the court are often contentious. Particularly, where any of the persons beneficially interested in the estate challenges the validity of the codicil.

³³⁰ See Chapter 19 section 19.6 here below.

14.8 APPLICATIONS FOR REASONABLE PROVISION

Under section 26 of the Law of Succession Act, persons claiming to be beneficially entitled and who are totally disinherited or inadequately provided for, whether under the terms of a will or in intestacy, may move the High Court appropriately for reasonable provision out of the estate. This is discussed exhaustively elsewhere.³³¹

14.9 APPLICATIONS NOT OTHERWISE PROVIDED FOR

Rule 49 of the Probate and Administration Rules allows the filing of applications relating to the estate of a deceased person for which no provision is made under the Probate and Administration Rules. Such applications take the form of a summons supported by an affidavit. Applications brought under this rule would, in most cases, be premised on section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, which save the court's general and inherent power.

14.10 APPLICATIONS UNDER THE PUBLIC TRUSTEE ACT

Any person, to whom the court may have committed the administration of the estate of a deceased person, if no grant had been made to the Public Trustee, may apply to the court under section 9(1) of the Public Trustee Act, for the revocation of the grant made to the Public Trustee and for a grant to himself. The courts may, following such an application, revoke the grant and issue another to the applicant.³³²

Another application under section 9 of the Public Trustee Act is one asking the court to decide a dispute as to the succession of a deceased person's estate.³³³

14.11 VIVA VOCE OR ORAL EVIDENCE

The hearing of the objection proceedings and the applications mentioned above may be by oral submissions or by both submissions and *viva-voce* evidence. Shah JA in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997, stated there is a golden rule

³³¹ See Chapter 19.

³³² See *In the Matter of the Estate of Basen Chepkwony (deceased)* Nairobi High Court succession cause number 842 of 1991 (Koome J).

³³³ See *Anastacia Muthu Benjamin v Lakeli Benjamin and another* Nairobi Court of Appeal civil appeal number 6 of 1979 (Madan, Law and Potter JJAs).

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that evidence given *viva voce* and fully tested on cross-examination places the court in a better position to evaluate the same. In *In the Matter of Estate of Gerald Kuria Thiara* Nakuru High Court succession cause number 127 of 1995, Lessit J, after considering the submissions made before her and the affidavits, decided that certain issues needed deeper exercitation and testing which can only be achieved by way of oral evidence. Oral evidence is usually subjected to cross-examination, during which the demeanour of the witnesses is scrutinised.³³⁴ In *In the Matter of the Estate of Ndegwa Kariuki (deceased)* Nairobi High Court succession cause number 2799 of 1999, after scrutinising the affidavit filed in support of the revocation application, Ang'awa J decided that since the affidavit contained considerable allegations of fraud the facts required to determine the issue necessitated the taking of *viva voce* or oral evidence. In *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998, Ondeyo J directed that the matter be determined on *viva voce* evidence to establish certain issues, which could not be disposed off through an application. In *In the Matter of the Estate of David Wahinya Mathene (deceased)* Nairobi High Court civil number 1670 of 2004, Koome J declined to allow *viva voce* evidence in objection proceedings on the grounds that the same is necessary only where the validity of a will is being challenged on the grounds of fraud or coercion or even incompetence.

14.12 COSTS

(a) The general rule

Rule 69 of the Probate and Administration Rules gives the probate court discretion on costs in all the proceedings brought under the Rules. As a rule, the costs of the action follow the event, that is, they are to be borne by the losing party. It was stated by the Court of Appeal in *Abdulla Rehemtulla Waljee v Alibhai Hajj and another* (1943) 10 EACA 6 (Sir Norman Whitley CJ, Wilson ACJ and Hayden J) that to protect estates from being frittered away by protracted and unnecessary litigation by trustees and administrator the court should always consider saddling the losing party with the costs.³³⁵

³³⁴ See also *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998 (Ondeyo J), and *In the Estate of Peter Minik (deceased)* Machakos High Court probate and administration number 13 of 1998 (Mwera J).

³³⁵ Compare with *Latif Sulciman Mohamed v K J Pand ya and others* [1963] EA 416 (Sir Ronald Sinclair P, Sir Trevor Gould, AV-P and Newbold JA).

(b) Court's discretion

The court, however, has an unfettered discretion under rule 69 of the Probate and Administration Rules as to the source from which costs should be paid. In *In the Matter of the Estate of Sadhu Singh Hunjan (deceased)* Nairobi High Court succession cause number 107 of 1994, Kuloba J took into account the relationship between the grantees and the applicants in deciding that each party bear their own costs. Koome J in *In the Matter of the Estate of Francis Kiarie Ndirangu (deceased)* Nairobi High Court succession cause number 82 of 2002, held that since the matter was a family dispute each party bear their own costs of the litigation.³³⁶ In *In the Matter of Evanson Kiragu Mureithi (deceased)* Nakuru High Court succession cause number 163 of 1995, Ondeyo J in an effort to promote a spirit of reconciliation and forgiveness ordered that each party bear its own costs.³³⁷

In *Rustomji Kersasji Khursedji Sidhwa v Dinshaw Ruttonji Mehta and others* (1934) 1 EACA 38 (Abrahams CJ, Lucie-Smith ACJ and Horne J) it was considered appropriate to order payment of costs of an appeal from the portion of the estate which formed the subject matter of the appeal.³³⁸ In *In the Matter of the Estate of Amos Kiprono Sirma (deceased)* Nakuru High Court succession cause number 231 of 1994, Rimita J, in an effort to avoid further ill-feelings in the family of the deceased, ordered that the taxed costs of the cause be paid from the part of the estate which was not subject to the deceased's oral will, which was the subject of the litigation.

(c) Where litigation is caused by acts of the deceased

Where the litigation is in effect caused by the actions of the deceased, it is likely that the costs will be borne by the estate. In *Rashida Begum v Administrator General and another* (1951) 18 EACA 102 (Sir Barclay Nihill P, Sir Newnham Worley VP and Pearson ACJ), the former Court of Appeal for Eastern Africa held that the testator himself was responsible for the litigation by the manner he elected to

336 See also *In the Matter of the Estate of Joseph Kimemia Gichuhi (deceased)* Nairobi High Court succession cause number 1072 of 2002 (Koome J) and *In the Matter of the Estate of Patrick Mungai Kugega (deceased)* Nairobi High Court succession cause number 1374 of 2000 (Koome J).

337 These were objection proceedings where the court found that the objector was a widow of the deceased. It would have been more appropriate to order that costs be paid out of the estate, considering that the deceased himself created the situation which necessitated resolution by way of the litigation. See also *In the Matter of the Estate of Joseph Muchiri Komu (deceased)* Nakuru High Court succession cause number 441 of 1998 (Ondeyo J).

338 See *In the Matter of the Estate of Patrick Mungai Kugega (deceased)* Nairobi High Court succession cause number 1374 of 2000 (Koome J).

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dispose of his estate and awarded all the parties costs out of the general estate. In *Anastacia Mutheu Benjamin v Lakeli Benjamin and another* Nairobi Court of Appeal civil appeal number 6 of 1979 (Madan, Law and Potter JJA), the appellant married the deceased under Kamba customary before first getting her previous statutory marriage dissolved or annulled and it was held that she, by virtue of section 4 of the African Christian Marriage and Divorce Act and section 37 of the Marriage Act, had not capacity to contract another marriage with the deceased, and she was therefore not entitled to inherit his estate. With regard to costs the Court of Appeal found that the appellant had cohabited with the deceased for many years as his reputed wife and that she had also contributed substantial sums of money towards the cost of acquiring some of the assets making up the estate, and directed that the appellant's costs of the appeal and at the High Court be borne by the estate. Butler-Sloss J in *In the Matter of the Estate of John G. Kinyanjui (deceased)* Nairobi High Court probate and administration number 317 of 1984, made no order for costs against an objector since it was considered that the deceased had by his long association with the objector helped create the dispute that had to be resolved through the litigation.

(d) Where litigation is needlessly brought by the applicants

Where the litigation is needlessly brought by the objector or applicant, the estate should not be burdened with the said objector or applicant's costs. In *Karanja and another v Karanja* [2002] 2 KLR 22 (Githinji J), in ordering that the objector bear her own costs, the court considered that the objector had been the cause of the long and protracted litigation, she had no genuine reason for the objection, she had the benefit of a very able and experienced counsel and at the very early stages of the matter, the court had given directions on the valid grounds for challenging the validity of wills and codicils (which directions the objector ignored). Law JA in *Raphael Jacob Samuel v The Public Trustee and others* Nairobi Court of Appeal civil appeal number 16 of 1980 declined to award costs in favour of one of the successful parties on the grounds that they were responsible for the dispute in the first place. It was they who opposed the appellant's petition for grant and who lodged caveats against it forcing the Public Trustee to apply for a limited grant, which sparked the litigation culminating in the appeal before the court. In *In the Matter of the Estate of Riitho Mahira (deceased)* Nairobi High Court probate and administration number 320 of 1991 costs were awarded against the protestor personally because in the opinion of the court, he had caused the other beneficiaries to incur unnecessary costs.

(e) Where litigation is not occasioned by either the deceased or the parties to the dispute

Where the circumstances leading to or triggering the litigation or appeal are not caused by any of the parties, the court would order that each party bear their own costs. In *Thumbi Weru and others v John Wachira Mwaniki* Nyeri Court of Appeal civil appeal number 191 of 1998 (Kwach, Akiwumi and Shah JJA), the Court of Appeal took into account that neither of the parties to the appeal had contributed to the woeful decision of the judge, which sparked off the appeal, and ordered each party to bear their own costs.

(f) The application of Order XXV of the Civil Procedure Rules

Order XXV, which deals with security for costs, is one of the provisions of the Civil Procedure Rules which have been adopted into probate practice by rule 63 of the Probate and Administration Rules, and the probate court may on occasion order security for costs. Khamoni J in *Re Estate of Karanja* [2002] 2 KLR 34 said that for the purpose of Order XXV of the Civil Procedure Rules the petitioner may be regarded as a plaintiff while objectors, protestors, applicants seeking revocation of grant and reasonable provision may be regarded as defendants.

14.13 ENFORCEMENT OF ORDERS AND DECREES ISSUED BY THE PROBATE COURT

The Law of Succession Act, and the rules made under it, does not have provisions for the enforcement of orders and decrees issued by the probate court in exercise of its jurisdiction under the Act. A party wishing to obtain a court order or decree on probate or administration matters capable of enforcement by the court must bring action under the provisions of the Civil Procedure Act and the Civil Procedure Rules.³³⁹

Contempt of court is the only plausible mode of enforcing the orders and decrees issued by the probate court under the Law of Succession Act, specifically what is known as civil contempt.³⁴⁰ Under section 5 of the Judicature Act, only the High Court and the Court of Appeal can punish for civil contempt, the resident

³³⁹ See Chapter 12 section 12.6(c) here above.

³⁴⁰ See *Githu Muigai and Ongoya Z Elisha*: "The Law of Contempt in Kenya" in (2005) 2(1) The Law Society of Kenya Journal, 56.

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magistrates' courts have no jurisdiction. Disobedience of probate orders made by the resident magistrate can only be dealt with by the High Court. The power exercisable by the Kenyan courts is the same as is for the time being possessed by the High Court of Justice in England. Currently, the English law on civil contempt is contained in Orders 45 and 52 of the Rules of the Supreme Court of England.³⁴¹ The procedural rules are, however, extremely stringent and it is usually difficult to prove contempt in the circumstances.

A personal representative and any other party to the proceedings are liable for contempt of court for disobeying an order made by a probate court. The contempt proceedings can be commenced by a beneficiary or any other person beneficially interested in the estate and the same have to comply with the general law of contempt of court.³⁴² In *John Muthama Kiarie and another v Apolonia Wanjiku Kiarie* Nairobi High Court succession cause number 1358 of 1998, Kubo J considered the effect of disobeying a court order against the right of the disobedient party to a hearing before the court. The court was of the view that disobedience of court orders amounts to contempt of court and the same should not be countenanced by the court. The party in contempt should not be heard until he has surrendered to the jurisdiction of the court whose orders he has disobeyed or was in contempt of.³⁴³

341 See Sir Richard Scott (ed.) *The Supreme Court Practice*, 1997, Volume 1. Part 1, London, Sweet and Maxwell, 1996 at 736–762 and 829–843.

342 See *Loise Margaret Waweru v Stephen Njuguna Githuri* Nairobi Court of Appeal civil appeal number 198 of 1998 (Gicheru, Kwach and Shah JJA).

343 See *Hadkinson v Hadkinson* [1952] 2 All ER 567 (Denning LJ).

PART SIX

ADMINISTRATION OF ESTATES

CHAPTER FIFTEEN

COLLECTION, REALISATION AND MANAGEMENT OF ESTATES

15.1 INTRODUCTION

The administration of an estate entails collection and preservation of the estate; payment of the deceased's funeral, testamentary and administration expenses and all the deceased's debts and other liabilities; and the distribution of the estate among the beneficiaries. Apaloo JA in *Stephens and another v Stephens and another* [1987] KLR 125 stated that a personal representative of the deceased owes a duty to pay all the debts of the intestate and thereafter distribute the rest of the estate to the beneficiaries. The administration of an estate is the responsibility of the personal representatives of the deceased, whether the deceased died testate or intestate. The provisions relating to the administration of estates are in Part VIII of the Law of Succession Act, that is sections 44 to 95. These provisions are, however, not exhaustive. Administration of estates is also dependent on the Trustee Act, the Public Trustee Act, the Trusts for Land Act and the Civil Procedure Act and Rules.

15.2 POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

Under section, 79 of the Law of Succession Act, the executor or administrator who has received a grant of representation should represent the deceased or be the personal representative of the deceased for all purposes of the grant, and all the property of the deceased should vest in him as the personal representative.³⁴⁴ In exercise of their powers and in the discharge of their duties personal representatives should, according to Kamau AgJ in *In the Matter of the Estate of David Murage Muchina (deceased)* Nairobi High Court succession cause number 2077 of 2002 be afforded a freehand. In *In the Matter of the Estate of the late James Shiraku Inyundo (deceased)* Nairobi High Court probate and administration number 920 of 1986, Kuloba J stated that administrators must be left to administer the estate in the best interests of estate and beneficiaries, unless the administrators were committing wrongs to the estate.

344 See *In the Matter of the Estate of Hemed Abdullah Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996 (Kamau AgJ).

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The powers of the personal representatives are set out in section 82 of the Law of Succession Act. These include the power to enforce all causes of action that survive the deceased or arise out of his death for his estate, to sell all or any part of the assets vested in them, to the vesting of property in the beneficiaries, and to appropriate (after confirmation of grant) any of the assets of the estate vested in them.

The duties are set out in section 83 of the Law of Succession Act, and they are: to provide and pay out of the estate expenses of a reasonable funeral for the deceased; to get in or collect all free property of deceased, inclusive of debts owing to him and moneys payable to his personal representatives by reason of his death; to pay out, of the estate, all expenses of obtaining the grant and all other reasonable expenses of administration; to ascertain and pay out of the estate all the debts of the deceased; to apply for confirmation of grant within six (6) months from date of grant- the representative must produce to court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of the dealings in respect of the estate; distribute or retain in trust (for the minor beneficiaries) all assets remaining; and to complete the administration of the estate, after the date of confirmation of grant, in respect of all matters other than continuing trusts.

15.3 COLLECTION AND PRESERVATION OF THE ESTATE

(a) Duty to collect and preserve the assets

Section 83(b) of the Law of Succession Act provides that it is the duty of personal representatives to collect in the assets of the deceased's estate after a grant has been made to them.³⁴⁵ Waki J in *In the Matter of the Estate of Yusuf Mohamed (deceased)* Mombasa High Court probate and administration number 434 of 1995 (Waki J), pointed out that under section 83 the personal representative has a duty to get in all the free property of the deceased and is at liberty to reasonably exercise the powers conferred by law in pursuit of such property. Waki J made similar remarks in *In the Matter of the Estate of Huseinbhai Karimbhai Anjarwalla* (Mombasa High Court probate and administration number 118 of 1989), where it was emphasised that it is an offence under section 95 of the Law of Succession Act to wilfully or recklessly neglect to get in any asset forming part of the estate. Free property is defined in section 2 of the Law of Succession Act to mean the property which the

³⁴⁵ See *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996.

deceased was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death. In *Shital Bimal Shah and two others v Akiba Bank Limited and four others* [2005] KLR, Emukule J stated that the expression ‘free estate’, as used in section 2 of the Law of Succession Act, is not synonymous with the expression ‘unencumbered’ in the sense of the property being subject to a charge or lien, or other encumbrance.

Collection of assets involves the personal representatives having the deceased’s property vested in their names. Kamau AgJ in *In the Matter of the Estate of David Murage Muchina (deceased)* Nairobi High Court succession cause number 2077 of 2002, said that it is imperative that there be at all times a personal representative on record for any estate of a deceased person so as to prevent or arrest any wastage of or damage to the estate pending distribution; the estate should not at any time be in a state of limbo. Sections 94 and 95 of the Act make it an offence for a personal representative to neglect to get in any asset forming part of the estate or misapply any such asset or subjects it to loss or damage. Khamoni J in *Public Trustee v Jotham Kinoti and another* Nairobi High Court civil case number 3111 of 1985, stated that a grant of letters of administration gives authority to the grantee which only covers the property disclosed in the succession cause. This is for reasons of specificity. The grantee does not have authority to recover or collect assets, which are not the subject of the succession cause, especially property which had been sold by the family before the appointment of the grantee as the administrator.³⁴⁶

(b) Duty to act with due diligence

Personal representatives must act with due diligence in the administration of the estate. This requires that they collect in the assets of the estate as soon as is practically possible, and take reasonable steps to collect all debts due to the deceased. This often entails commencing legal action against the debtors. The duty of personal representatives to collect in the deceased’s debts has to be read subject to the wide powers given by the Trustee Act, to compromise, settle or abandon debts. Personal representatives are also under a duty to take reasonable steps to safeguard or preserve the deceased’s estate. Valuables of the deceased should be removed for safekeeping. Kamau AgJ in *In the Matter of the Estate of Hemed Abdullah Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996, stated that until he is legally discharged, the personal representative is duty bound to take all

³⁴⁶ See also *In the Matter of the Estate of Elizabeth Wamaita Ngaruiya (deceased)* Nairobi High Court succession cause number 2499 of 2001 (Waweru J).

reasonable and necessary steps and protect the estate of a deceased person from waste and damage so as to avoid an action in *devastavit*.

15.4 DEVOLUTION OF ASSETS ON PERSONAL REPRESENTATIVES

The assets forming part of the estate of the deceased vest in the deceased's personal representatives according to 79 of the Law of Succession Act.³⁴⁷

Under section 119(1) of the Registered Land Act, if the sole proprietor of land or a proprietor in common dies, his personal representative becomes entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words 'as executor of the will of deceased or 'as administrator of the estate of deceased'. It is further provided in section 119(2) that on the production of grant the registrar of title may register a transfer by the personal representative and any surrender of a lease or discharge of a charge by the personal representative without requiring the personal representative to be registered as proprietor in place of the deceased. By virtue of section 122(1) of the Registered Land Act the personal representative enjoys the same powers as the deceased proprietor enjoyed, save for such restrictions on his powers as personal representative as may be contained in his appointment. The registration of the personal representative as proprietor relates back to and takes effect from the date of the death of the proprietor.³⁴⁸

Githinji J in *In the Matter of the Estate of Kahi Kibunyi (deceased)* Nairobi High Court succession cause number 467 of 1986 and Waweru J in *In the Matter of the Estate of Elizabeth Wamaita Ngaruiya (deceased)* Nairobi High Court civil number 2499 of 2001 stated that overriding interests under section 30 of the Registered Land Act, which amount to mere occupation rights, do not vest in the personal representatives since they terminate upon the deceased's demise. In *Public Trustee v Jotham Kinoti and another* Nairobi High Court civil court number 3111 of 1985 (Khamoni J), it was stated that property which is not included in the petition or even sold before the grant was made does not vest in the personal representative.

Section 52 of the Registration of Titles Act³⁴⁹ requires that whenever the proprietor of land dies, his personal representative should apply to be registered as proprietor of the subject land and should produce to the registrar the grant of probate or of letters of administration in respect of the estate. The registrar should thereafter register the personal representative of the deceased proprietor as

347 See *In the Matter of the Estate of David Murage Muchina (deceased)* Nairobi High Court succession cause number 2077 of 2002 (Kamau J).

348 Section 122(2) of the Registered Land Act.

349 Chapter 281 Laws of Kenya.

representative of the deceased, who should thereafter be deemed to be the proprietor of the subject property.³⁵⁰ The personal representative's title of the representative of the land relates back and takes effect as from the date of the deceased's death. There is a similar provision in section 53 with respect to the death of the proprietor of a charge or lease.

The Land Titles Act,³⁵¹ at section 62, provides that on the death of a person possessed of or entitled to immovable property under the Land Titles Act, the person to whom probate of the will or letters of administration has been granted should apply to the registrar for the registration of the will or letters. At the same time he should transmit to the registrar a document setting out the names of the persons on whom the immovable property of the estate of the testator or intestate have devolved, which in the context of the Law of Succession Act should be the confirmed grant.

Under the Pensions Act,³⁵² the personal representatives of an officer dying in service or after retirement are entitled to receive a gratuity and annual pensionable emoluments on his behalf. This is provided for under sections 18 and 19 of the Pensions Act. Section 220(1) of the Armed Forces Act states that where a member of the armed forces dies testate, the paymaster or any officer in control of any terminal dues or other movable property belonging to the deceased member should pay or deliver the same to the executor of the deceased. Where the deceased member of the armed forces dies intestate, under section 220(2) of the Armed Forces Act, his terminal dues or other property belonging to him should be released to the Public Trustee for administration and distribution. The Public Trustee may subsequently surrender the administration of estate to another person under section 9(1) of the Public Trustee Act.

Some types of assets do not vest in the deceased's personal representatives, including: property held by the deceased as a joint tenant, sums payable under a discretionary pension scheme and assets of the deceased which are the subject matter of a statutory nomination made by the deceased, the subject matter of a *donatio mortis causa*, among others. Property registered in the name of the deceased vests in the personal representatives.

350 See also section 54 of the Registration of Titles Act.

351 Chapter 282 Laws of Kenya.

352 Chapter 189 Laws of Kenya.

15.5 PROPERTY WHICH DOES NOT DEVOLVE UPON PERSONAL REPRESENTATIVES.

(a) Property held by the deceased as a joint tenant

This is because property held under a joint tenancy is subject to the rule of survivorship. Under the rule the deceased ceases to be entitled to the property on death where he or she is survived by one or more joint tenants, and the surviving joint tenant takes the deceased's share by virtue of their surviving the deceased. The property would only form part of the estate where the deceased is the only surviving joint tenant.³⁵³

(b) Money payable under a discretionary pension scheme

Discretionary pension schemes may allow the contributor to nominate a third party to receive benefits on the contributor's death. Such nominations are not binding on the trustees of the scheme, with the consequence that they give no property rights to the deceased that can form part of the deceased's estate. Where the trustees do exercise their discretion in favour of the nominated person, they pay the lump sum or pension directly to the third party.³⁵⁴

(c) Assets the subject of a nomination

Property, which forms the subject matter of a statutory nomination, does not pass to the estate; the assets pass directly to the nominee and do not vest in the nominator's personal representatives. Under section 39(1)(a) of the Cooperative Societies Act of 2001, for example, upon the death of a member, the cooperative society should transfer the share or interest of the deceased member to the person nominated by the deceased in accordance with the Act. The share or interest of the deceased member should only be paid to the personal representative of the deceased member where no nomination has been made under the Act.³⁵⁵

(d) The subject matter of a donatio mortis causa

The assets the subject of a donatio mortis causa do not form part of the estate of the deceased, such assets pass directly to the donee.³⁵⁶

353 See Chapter 4 section 4.5(a) here above.

354 *Ibid* section 4.5(b).

355 *Ibid*.

356 *Ibid* section 4.5(c).

(e) Insurance policies written expressly in trust or falling within section 11 of the Married Women's Property Act of 1882

Where the deceased has a life assurance policy, upon his death the insurance company will normally pay the sum assured to the deceased's personal representatives. This will then form part of his estate and will be distributed by the personal representatives in accordance with the deceased's will or the rules of intestacy. However, by making use of section 11 of the Married Women's Property Act of 1882, or by expressly assigning or writing the policy in trust for a person, the assured can ensure that the proceeds of the policy are paid directly to the intended beneficiary, without first becoming vested in their personal representatives.

Under section 11 of the Married Women's Property Act of 1882, where the assured expressly provides that the policy is for the benefit of his or her spouse and children, this effects a trust in favour of the spouse and the children. On the death of the assured, the proceeds of the assurance policy are then payable directly to the trustees of the policy for the benefit of the named beneficiaries. If the assured wishes to benefit someone other than the spouse and children, the same effect can be achieved if the policy is expressly written in trust for the intended beneficiary or otherwise expressly assigned to him or her.

15.6 POWER TO ENFORCE CAUSES OF ACTION

There is the power, under section 82(a) of the Law of Succession Act, to enforce all causes of action that, by virtue of the Law Reform Act,³⁵⁷ the Fatal Accidents Act,³⁵⁸ the Workmen's Compensation Act,³⁵⁹ or any other law, survive the deceased or arise out of his death for his estate. The Law Reform Act, at section 2, deals with the circumstances under which causes of action subsisting against or vested in the deceased survive against or for the benefit of his estate. Under section 3 of the Fatal Accidents Act, an action is maintainable against the person causing the death of the deceased through a wrongful act. Under section 9 of the Fatal Accidents Act, in the event of death some actions are maintainable against the estate.

³⁵⁷ Section 2(6).

³⁵⁸ Chapter 32 Laws of Kenya

³⁵⁹ Chapter 236 Laws of Kenya

(a) Suits by administrators

The Court of Appeal, in *Wambugi w/o Gatimu v Stephen Nyaga Kimani* [1992] 2 KAR 292 (Hancox CJ, Masime and Kwach JJA), pointed out that the power to enforce causes of action is by virtue of section 80 subject to any limitation in the grant of letters of administration which becomes effective only after the date it is issued. Case law shows that no person has a right to enforce any cause of action, or defend any suit, which survives the deceased or arises out of his death, without a grant of letters of administration.³⁶⁰ The Court of Appeal in *Virginia Edith Wambui Otieno v Joash Ougo and another* (1982-88) 1 KAR 1048 stated that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, so the action is incompetent at the date of inception. In *Mary Mbeke Ngovu and another v Benard Mutinda Mutisya* Machakos High Court succession cause number 352 of 1998, Mwera J held that the plaintiffs in that matter ought to have procured a grant of letters to administer the estate of the deceased before suing for trespass. Mwera J in *John Kasyoki Kieti v Tabitha Nzivulu Kieti and another* Machakos High Court civil case number 95 of 2001 held that the plaintiff in that matter had no capacity to sue in matters relating to his father's property without first obtaining a grant of letters of administration. In the circumstances, his suit was incompetent for lack of capacity.

(b) Suits by executors

With respect to grants of probate, the will speaks from the date of death, and the plaintiff does not need to have the grant to commence action. Kasango J in *Lalitaben Kantilal Shah v Southern Credit Banking Corporation Ltd* Nairobi Milimani High Court civil case number 543 of 2005, stated that under section 80(1) of the Law of Succession Act the executor derives his title from the will and the estate vests in him on the testator's death and he can do any act before probate, which is a mere authentication of his title.

(c) Suits where intestate is survived by a minor

Where the deceased is survived by minors, a person seeking to file suit on behalf of the intestate estate must comply with section 58 of the Law of Succession Act by applying for the grant, whether full or limited, jointly with other persons. In

³⁶⁰ See also *In the Matter of the Estate of Kahi Kibunyi (deceased)* Nairobi High Court succession cause number 467 of 1986 (Githinji J, *Trustik Union International and another v Mrs Jane Mbeyu and another* Nairobi Court of Appeal civil appeal civil number 145 of 1990 (Apaloo CJ, Kwach, Cockar, Omolo and Tunoi JJA) and *Coast Bus Service Ltd v Samuel Mbuvi Lai* Nairobi Court of Appeal civil appeal number 8 of 1998 (Gicheru, Tunoi and Shah JJA).

Veronica Mwikali Mwangangi v Daniel Kyalo Musyoka [2005] KLR (Ang'awa J), a suit commenced by a single legal representative in respect of an intestate survived by minor children was struck out because the limited grant giving him the authority to act for the estate did not comply with section 58 of the Act, which requires that the grant in those circumstances should be made to more than one personal representative.

(d) The Civil Procedure Act and suits by and against third parties

Suits to recover from third parties property belonging to the estate are brought under the provisions of the Civil Procedure Act and the Rules, which deal with civil suits generally, as such claims, are really civil actions against the debtors of the deceased. Such suits are, however, subject to the general limitation law set out in the Limitation of Actions Act.³⁶¹ Such property is not recoverable under the provisions of the Law of Succession Act, as the said law does not have provisions governing recovery of the estate's property from third parties. It was, in the circumstances, wrongful for the court in *In the Matter of the Estate of Sammy Gidraf Mugo (deceased)* Nairobi High Court succession cause number 3152 of 2003 (Rawal J) to have made orders in succession proceedings directed at a third party. In the matter, an administrator of the estate of a deceased person asked the probate court to compel the former employer of the deceased to release to the administrator all the benefits due to the deceased and all the proceeds on insurance policies that the deceased had taken out. The proper course of action should have been the filing of an ordinary suit by the administrator against the former employer of the deceased. Furthermore, orders made in proceedings brought under the Law of Succession Act against third parties cannot be enforced since the Act lacks enforcement provisions.³⁶²

Under Order XXIII, rule 3(1) of the Civil Procedure Rules where a plaintiff dies and the cause of action survives or continues, the court, on the application made in that behalf, should cause the legal representative of the deceased plaintiff to be made a party and should proceed with the suit. A similar provision on the death of a defendant is made in Order XXIII, rule 4. Where no application is made in that

361 Chapter 22 Laws of Kenya

362 See *In the Matter of Joram Waweru Mogundu (deceased)* Nairobi High Court succession cause number 2721 of 2002 (Koome J), *In the Matter of the Estate of Joseph Mwinga Mwangi (deceased)* Nairobi High Court civil suit number 1814 of 1996 (Khamoni J) and *Kangwana and Company Advocates v Solomon I. Kisili* Nakuru Court of Appeal civil appeal number 41 of 1984 (Platt, Apaloo JJA and Masime AgJA).

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behalf within one year the suit abates. In *Peter Maundu Mua v Leonard Mutunga and another* Machakos High Court civil case number 305 of 1995, Mwera J held that where a party to a suit dies and the cause of action survives, Order XXIII, rule 3(1) of the Civil Procedure Rules requires that the legal representative of the deceased party be made a party in his place: such legal representative should be a person who has obtained a grant of representation making him the personal representative of the deceased. The court found that the wife and son of the deceased were not competent to continue with a suit commenced by the deceased, as they could not be considered the legal representatives of the deceased without first obtaining a grant of representation.³⁶³ Legal representative is defined in section 2 of the Civil Procedure Act to mean the personal representative of a deceased person.³⁶⁴

The position taken by Mwera J in *Peter Maundu Mua v Leonard Mutunga and another* Machakos High Court civil case number 305 of 1995 contrasts with that of Tuiyot J in *Ann Kathanga v Mohamed Mjahid t/a C-Line Company and another* Meru High Court Civil case number 74 of 1998. In *Ann Kathanga v Mohamed Mjahid t/a C-Line Company and another* Meru High Court civil case number 74 of 1998, a decision whose correctness is doubtful, Tuiyot J held that the applicant could be joined as a co-plaintiff to a suit, brought to recover damages arising from her husband's death, without a grant of representation so long as she was a widow of the deceased. In the opinion of the court, the deceased's widow has got an interest in the deceased's estate and on this ground alone, she has a right to be added as a co-plaintiff to a suit without first obtaining a grant of representation.

Under Order VII, rule 4(1) of the Civil Procedure Rules where a suit is commenced by a personal representative in his representative capacity, the plaintiff should state the capacity in which he sues and where the defendant is a personal representative the plaintiff should state the capacity in which he is sued, and in both cases it should be stated how that capacity arises. According to Order VIII, rule 4 if any party to a suit wishes to deny the right of any other party to claim as executor or personal representative, he should deny the same specifically. Under Order II, rule 4, a claim by or against an executor or administrator, as such, should not be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the

363 See also *Francis Kamau Mbugua and another v James Kinyanjui Mbugua* Nairobi High Court civil case number 111 of 2004 (OS) (Nyamu J).

364 See also *Pim v Morton* [1978] KLR 196 (Harris J).

party sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents. According to the former Court of Appeal for East Africa in *Sargent v Gautama* (1968) EA 338 (Sir Clement de Lestang VP, Duffus and Spry JJA), any suit filed by or against personal representatives must name all the personal representatives as parties, in keeping with Order XXX, rule 2 of the Civil Procedure Rules.

Under Order XXI, rule 18(b) of the Civil Procedure Rules where a decree is obtained against a personal representative of a party to the proceedings the court should issue a notice to the person against whom the execution is applied for requiring him to show cause why the decree should not be executed against him. Section 37(1) of the Civil Procedure Act states that where a judgement debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the personal representative of the deceased or against any person who has intermeddled with the estate of the deceased. Such a personal representative is liable only to the extent of the property of the deceased, which has come into hands and has not been duly disposed of. For the purpose of ascertaining the liability of such personal representative the court may compel the personal representative, to produce such accounts as it thinks fit. Under section 39 of the Civil Procedure Act, where a money decree is passed against a party as the personal representative of a deceased person to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property. Where no property of the deceased remains in the possession of the personal representative, and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the property of the personal representative to the extent of the property in respect of which he has failed to satisfy the court in the same manner as if the decree had been against him personally.

(e) Instances of possible suits against third parties

Enforceable causes of action include claims arising from the death of the deceased. It includes claims under the Workmen's Compensation Act. Section 5(1) of the Act makes employers liable to pay compensation for the death of their employees resulting from an accident arising out of or in the course of their employment. Such compensation may be paid, by virtue of section 2(3) of the Act, to the legal personal representative of the deceased workman, among others. Similar claims can

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be brought under the Fatal Accidents Act against the person causing the death of the deceased through a wrongful act. Under section 4(1) of the Act, action may be brought on behalf of the family of the deceased by the executor or administrator of the deceased person. The court may, in addition to assessing compensation for the death and loss of dependency, award damages in respect of the funeral expenses of the deceased person. In the event of death of the person against whom an action would be maintainable, under the Fatal Accidents Act the action is maintainable against his estate.³⁶⁵ The Law Reform Act³⁶⁶ provides for the survival of certain causes of action, which subsist against or for the benefit of the estate of a deceased person. Both the Fatal Accidents Act³⁶⁷ and the Law Reform Act provide that in the event of the insolvency of an estate against which proceedings are maintainable any judgment obtained against the estate is a debt provable in the administration of the said estate. Under sections 18 and 19 of the Pensions Act³⁶⁸ gratuity for public officers who die in service and pensions for officers killed in service are payable to the personal representative.

In *The Public Trustee and Mrs Beatrice Muthoni v Kamau Wanduru* (1982–1988) 1 KAR 498 (Madan, Kneller JJA and Chesoni AgJA), the Public Trustee, as administrator of the deceased's estate, applied to the High Court for a declaration that one of the heirs in intestacy had become entitled by adverse possession for twelve years to be registered as the sole proprietor of a piece of land of the defendant in the matter.

15.7 POWERS OF SALE, MORTGAGE AND LEASING

(a) Sale

According to section 82(d) of the Law of Succession Act, one of the main functions of personal representatives is to pay debts and liabilities. To discharge the same, it is often necessary for the personal representatives to realise some or all the assets of the estate. In addition, legacies may be payable to the beneficiaries under the terms of the will and this may also require the liquidation of some or all of the assets to settle the legacies. It is for the purpose of meeting these objectives that section 82(b) of the Law of Succession Act gives wide powers to personal representatives of sale or otherwise turning into account all or any part of the assets vested in them.

³⁶⁵ Section 9.

³⁶⁶ Chapter 26 Laws of Kenya.

³⁶⁷ Section 9(4).

³⁶⁸ Chapter 189 Laws of Kenya.

In the event of intestacy, a statutory trust will arise under section 41 of the Law of Succession Act. It does not impose upon the personal representatives a duty to sell, but to facilitate the distribution of the requisite shares to the beneficiaries the personal representatives may have to liquidate the assets in exercise of the powers given under section 82(b) of the Law of Succession Act. The assets may be sold or retained at the discretion of the personal representatives (*In the Matter of the Estate of Anthony Gichigi Wairire (deceased)* Eldoret High Court probate and administration number 32 of 1983 (Nambuye JJ)). According to Khamoni J in *In the Matter of the Estate of Erastus Njoroge Gitau (deceased)* Nairobi High Court succession cause number 1930 of 1997 immovable property cannot be sold before the confirmation of grant; to assent, after confirmation of grant, to the vesting of property in the beneficiaries; and to appropriate, after confirmation of grant, any of the assets of the estate vested in them.

In *In the matter of an application by Ebrahimji Gulamhusein Anjarwala as an Administrator of the estate of Hussenabai Musajee, deceased* (1946) 22(1) EACA 3, Horne J stated that although an administrator is a trustee for sale, he is, under the succession legislation, having control of property which is subject to various rules of distribution to various classes and it may be necessary to obtain the consent of the court to sell the property as a safeguard to both creditors and beneficiaries. This means that whatever the powers given to trustees under the Trustee Act and the Trusts of Land Act, the administrator of an estate is subject to the provisions of the Law of Succession Act.

Section 13 of the Trustee Act empowers personal representatives vested with trust for sale or a power of sale to sell or concur with any other person in the selling of any property by public auction or private treaty. There is also the power to vary any contract of sale, buy in at any auction and rescind any contract for sale and to re-sell. The issuance of a receipt by personal representatives for any money, securities or property transferable to him under any trust or power is sufficient discharge to the person paying or transferring or delivering. The method of sale must be one which is to the best advantage of the estate. There is power under section 17 to raise money required for any purpose by sale, conversion or mortgage. Where there is doubt as to whether there is authority under the will to sell, the personal representative would exercise statutory authority or in the alternative apply to court for an order approving the sale.

Similar provisions are found in the Trusts of Land Act. The powers exercisable

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by a personal representative with respect to sale of land are set out in section 17 of the Act. He may sell the land or any part of it or any right or privilege over or in connection with the land, and he may make an exchange of the land or any part of it or any right or privilege over or in connection with the land. Under section 4 of the Act, where a trust for sale arises, it is deemed as subsisting until the land is conveyed to or under the direction of the person beneficially interested in the proceeds of sale. There is power to postpone sale under section 3 of the Act, and personal representatives may concur with persons beneficially interested in the trust for sale to the execution of the trust for sale. Similarly, under section 50, issuance of receipts or direction in writing for any money or securities paid to or transferred to or by the direction of the personal representatives is effective discharge to the personal making the payment or the transfer. Under section 55 of the Trusts for Land Act, if the personal representative refuses to sell or exercise any of the powers conferred by the Trusts for Land Act or any necessary consents cannot be obtained, any person beneficially interested in the estate may seek a vesting order or other order to give effect to the proposed transaction or an order directing the personal representatives to give effect to the transaction and the court may give such orders as it may deem fit.

In most cases where the deceased dies testate, the will provides for an express trust for sale of the residuary estate. This is usually for providing a fund for the payment of the deceased's debts, and other liabilities, and legacies given under the will. Where the will does not expressly provide for a trust of sale, then the trustees will be bound to sell all the assets of the residuary estate before distributing it to the residuary beneficiary or beneficiaries.

Where a testator directs that money be used to purchase land and land be sold and turned into money that amounts to a conversion, and the doctrine of conversion will apply. According to Sewell MR in *Fletcher v Ashburner* (1779) 1 Bro CC. 499, if there is a direction to convert in a will, in equity the property is treated as converted from the testator's death. The direction to convert should be absolute; the intention must be actual change or conversion of property from one form to another. A direction, therefore, that land is to be treated or considered, as money is not effective.³⁶⁹

Section 12(1) of the Public Trustee Act empowers the Public Trustee to convert into money movable property of an estate which he administers under the Public Trustee Act, and may, with the consent of the court, convert into money all or any part of immovable property of the estate. The consent of the court will not be necessary where all the parties consent in writing to the conversion or the value

³⁶⁹ See *AG v Mangles* (1839) 5 M and W 120 and *Edwards v Tuck* (1853) 23 B 268, 3 DM and G 40.

of the property does not exceed KShs 20 000.00.

(b) Mortgage

There is also the power under section 7 of the Trustee Act to invest in freehold securities and to accept security in form of legal charges and also in mortgages. Under sections 9, 10 and 11 of the Trustee Act, personal representatives may lend money on the security of any property on which they can properly lend. Under section 32 of the Trusts for Land Act, personal representatives have power to raise money by mortgage or charge for the purpose of discharging an encumbrance on land held on trust, for paying for improvements and for payment of any authorised costs.

(c) Leasing

Personal representatives have powers to lease the land the subject of a trust for land, under section 18 of the Trusts for Land Act, for any purpose whatsoever. By virtue of section 23 of the Act, personal representatives may accept a surrender of any lease of land or a regrant of any granted in fee simple. Under section 24 of the Act they may accept leases of any land, mines and minerals, easement or privilege convenient to be held in enjoyment of the land held on trust for sale for such periods and on such terms and conditions as the personal representative thinks fit. There is power in section 26 to vary leases and to give licences and consents. Rents reserved or created by a lease or grant may be apportioned by the personal representative in the terms set out in section 26 of the Act.

15.8 POWER OF APPROPRIATION

Under section 82(d) of the Law of Succession Act, the personal representatives can appropriate assets of the estate in or towards the satisfaction of a legacy, interest or share in an estate, if no specific gift is prejudiced and that the beneficiary gives their consent to the appropriation. Appropriation should be after confirmation of the grant. It may take the form of deciding that a legatee should take some specific asset, instead of paying for it in cash, in full or partial satisfaction of the legacy.

Where there is a continuing trust, no appropriation should be made without the consent of the trustees (excluding the personal representatives themselves) or of the person entitled to income from the property. Where the person whose

consent is required is a minor or of unsound mind, consent should be obtained from his parent, guardian, or manager of his estate or the court.

15.9 PERSONAL REPRESENTATIVES ACTING AS TRUSTEES IN SOME CASES

Where the administration of the estate of the deceased involves a continuing trust, section 84 of the Law of Succession Act makes the personal representatives the trustees of such trusts whether they are in respect of a life interest or for minor beneficiaries or otherwise. This section does not apply where trustees for that purpose have been appointed by a will. However, the court has the discretion, regarding the estate of a polygamist whose death has resulted in the creation of several houses, to appoint at the time of the confirmation of the grant separate trustees of the property passing to each or any of the houses.

It was stated by Aluoch J in *In the Matter of the Estate of Johana Olishorua Leseya (deceased)* Nairobi High Court succession cause number 3084 of 2002, that section 35, read together with section 58(1) of the Act where there are minor children, makes the surviving spouse a trustee as the surviving spouse only enjoys a life interest in the net intestate estate as he or she holds the property for the benefit of the minor children.

15.10 POWERS TO INSURE ASSETS

The Trustee Act, in section 20, gives personal representatives power to insure assets of the estate. This power is, however, limited. The personal representatives may only insure against loss or damage by fire, and for only up to three-quarters of the value of the property. Under the said provisions, premiums on the insurance policy have to be paid out of the income of the estate, rather than from the capital.

15.11 POWERS OF DELEGATION

Generally, the office of personal representative is one of trust and the powers exercised by the personal representative can be delegated. The power of delegation is of importance where a person wishes to take up their entitlement to a grant of probate or letters of administration, but does not have the time or the expertise to complete all aspects of the administration of the estate themselves. The extent to which personal representatives can delegate their duties is the same as for trustees and is governed by the Trustee Act. Under the said Act, personal representatives may employ an agent to transact any business or do any act in the administration

of the estate and may remunerate such agent out of the estate.

Under section 24 of the Trustee Act, the personal representative can engage an advocate or bank to arrange the collection of the assets of the estate, discharge of debts and other liabilities, and distribution of the estate. It can also be used to employ an estate agent to sell land forming part of the estate, or to engage a stockbroker to value or sell shares. The provision does not allow personal representatives to delegate any discretion in matters relating to the administration of the estate. The decision-making power over the estate remains with the personal representatives and not the appointed agent. The creation of a power of attorney may lead to a delegation of decision-making power. Similar delegation of powers by personal representatives is allowed by section 35(1) of the Trusts of Land Act.

The personal representative is liable for the acts of the agents appointed under the Trustee Act by virtue of section 24, but will not be liable where the agents are appointed in good faith by virtue of section 31 of the Trustee Act.

15.12 POWERS OF INVESTMENT

Professionally drawn wills usually give personal representatives wide powers of investment. This is intended to avoid the limited powers of investment given under section 90 of the Law of Succession Act and in land legislation. In intestacy, only the statutory powers are available to the personal representatives.

The Trustee Act, however, gives personal representatives extensive powers of investment. Under section 4, personal representatives are authorised to invest the estate's funds in their hands in securities, unit trusts, shares of a building society and immovable property. Section 7 allows investment on mortgage of leasehold property, acceptance of legal charges under the Registration of Titles Act³⁷⁰ and debenture stock. The personal representative may, under section 11, lend money on the security of any property on which he can lawfully lend. Under section 12, there is power, pending the negotiation and preparation of any mortgage or charge or during any other time when investment is being sought, to deposit money at a bank, where any interest earned should be applied as income. Similarly, the Trusts of Land Act gives personal representatives extensive powers of investment of capital money arising from the exercise of a trust of sale, as directed in Part V of the Act. Under section 38, such moneys may be invested in securities or other property as may be allowed by the instrument creating the trust of sale, with power to vary the investment or any of the other modes of investment or application set out in that section and other provisions of Part V of the Act.

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Under rule 6 of the Public Trustee Rules, the Public Trustee enjoys powers of investment similar to those given under the Trustee Act and the Trusts of Land Act. Where the administration of an estate of which the Public Trustee is the personal representative cannot be completed at once, under rule 6(1) the Public Trustee has power to retain any investment in its then present state. Moneys belonging to the estate which are not immediately required for administration may, under rule 6(2), (3) and (4), be invested in the manner authorised in law for investment of trust funds, in mortgages and charges of immovable property in Kenya and in deposits in a bank or financial institution.

The courts, however, can also direct that funds be invested particularly in favour of a minor. In *In the Matter of the Estate of Clement Albert Etyang, (deceased)* Nairobi High Court civil number 1099 of 2002, Koome J directed that funds awarded to a minor as reasonable provision be invested in a trust account to be used only for the welfare of the minor. In *In the Matter of the Estate of Charles Odhiambo Odiawo deceased* Nairobi High Court succession cause number 1525 of 1999 (Koome J), directed that funds held in one bank be transferred to another to be held to the account of a minor beneficiary, and to be utilised for the upkeep and education of the minor.

15.13 POWER TO CARRY ON THE DECEASED'S BUSINESS

As a rule, personal representatives do not have power to carry on the deceased's business, whatever form the business may take. If the deceased was a partner in a partnership, the personal representative should call in the deceased's share in the business. If the deceased was a sole proprietor, the personal representatives have implied authority to carry on the deceased's business, but only with a view to the proper realisation of the deceased's estate. They may, as was stated in *Marshall v Broadhurst* (1831) 1 criminal J and 403, carry out the deceased's obligations under a contract made before his or her death or carry on the business so as to enable it to be sold as a going concern, as was stated in so long as this is a proper method of realisation. It was said in *Re Crowther* [1895] 1 Ch 56, that a testator may give the executors of the will either express or implied authority to carry on the business.

If the personal representatives carry on any business of the deceased, whether or not they have authority to do so, they will be personally liable on all debts and contracts.³⁷¹ In *Rohit C Nawaz v Nawaz Transport Company* (1982-88) 1 KAR 75 (Madan and Law JJA and Hancox AgJA), the deceased had carried on a transport business for some time under a business name. After his death, his administrators

371 See *Owen v Delamere* [1872] LR 15 Eq. 134.

continued to carry on the business. It was held that the administrators were liable for the debts of the business. They could not say that the firm did not exist nor they were not personally carrying on the business under the firm name. It was further held that it would be wrong in principle to allow the administrators, who were continuing to carry on the business under the same name, to claim protection from the legal process.

However, the personal representatives are entitled to be indemnified out of the estate, where they have express or implied authority to act³⁷² or where the creditors agree to the indemnity. If the deceased's will gives authority to carry on the business, the right of indemnity may be exercised in priority to the beneficiaries but not the creditors unless the creditors have expressly assented to the carrying on of the business.³⁷³ This is because the creditors are not bound by the will. Where the business is carried on with a view to its proper realisation under the power implied under the common law, the right of indemnity may be exercised in priority to the creditors of the deceased and the beneficiaries.

15.14 POWER TO COMPROMISE AND SETTLE DISPUTES

Under section 25 of the Trusts for Land Act, the personal representatives may compromise, abandon, submit to arbitration or settle any claim, dispute or question relating to land, including any claims, disputes or questions as to boundaries and other matters, and enter into such agreements and give such assurances releases and other things as may be necessary and proper.

15.15 POWER TO EFFECT ANY TRANSACTION UNDER ORDER OF COURT

Personal representatives may effect any transaction ordered by the court. Under section 36 of the Trusts for Land Act, personal representatives may seek the orders of the court to carry out transactions affecting or concerning land held in trust for sale, which are not authorised by the Act or the will creating the trust for sale, where the transaction would benefit the land or the persons beneficially interested under the trust for sale.

372 See *Dowse v Gorton* [1891] AC 190.

373 See *Re Oxley* (1914) 1 Chapter 604.

CHAPTER SIXTEEN

PAYMENT OF EXPENSES, DEBTS AND PECUNIARY LEGACIES

16.1 INTRODUCTION

The payment of debts and other priority liabilities and expenses follow the collection, realisation and preservation of assets.

16.2 DUTY TO PAY DEBTS AND DISCHARGE OTHER LIABILITIES

The duty on personal representatives to settle the deceased's debts arises whether the deceased died testate or intestate.³⁷⁴ Under section 38 of the Cooperative Societies Act of 1997 the estate of a deceased member is liable for the debts of the cooperative society as they existed at the time of his death, and proceedings in respect of such debt should be commenced within one year of the death. The personal representative, however, is not liable except in respect of assets in his possession or under his control.

The duty to pay debts and other liabilities does not depend on the personal representatives being aware of a particular debt or liability. They will be liable even if they distribute an estate in total ignorance of the existence of a particular debt owed by the deceased. Personal representatives, who take certain steps can, protect themselves from liability of which they were not aware. Under section 12(2) of the Public Trustee Act, the Public Trustee should cause advertisements to be published in the official gazette and in any other manner, he considers expedient inviting creditors of the person whose estate he is administering to come in and prove their debts before him within a specified period of time. Upon the expiry of the notice, the Public Trustee should pay the debts proved or a part of it if it cannot be paid in full.

16.3 PERSONAL REPRESENTATIVES' POWERS IN RESPECT OF DEBTS

Section 16 of the Trustee Act gives personal representatives the power: to allow time for the payment of any debt; to accept any compensation or any real or personal security for any debt; and to compromise, settle or abandon any debt or

374 See *Re Tankard* [1942] Ch 69.

claim. So long as the powers are exercised in good faith, the personal representatives will not be liable for any loss that arises out of the way in which they have chosen to exercise their power.

16.4 FUNERAL EXPENSES

Section 83(a) imposes a duty on the personal representatives to provide and pay out of the estate of the deceased expenses for a reasonable funeral for him. This entitles the personal representatives to take possession of the deceased's body until such time that the body is buried. The personal representatives have the primary obligation of arranging the deceased's funeral.³⁷⁵ This position stated by section 83(a) is reflection of the English Law on the role of personal representatives in the disposal of the remains of the deceased. In practice, relatives arrange for the disposal of the deceased's remains. If the funeral is ordered by a person other than the personal representatives, that person is liable in contract for the payment of the funeral expenses, but they can claim an indemnity for reasonable funeral expenses from the deceased's estate. If it is the personal representatives who ordered the funeral they are liable personally in contract for the funeral expenses, but they can claim reimbursement or indemnity out of the estate for reasonable funeral expenses.³⁷⁶ As to what are reasonable expenses, this depends on the deceased's circumstances, including whether or not he died insolvent and his station in life. Funeral expenses are payable out of the estate before any other debt.³⁷⁷ This is even so, where the estate is insolvent.³⁷⁸

The Kenyan position on the matter is a little unclear. The Court of Appeal in *Pauline Ndeti Kinyota Maingi v Rael Kinyota Maingi* Nairobi Court of Appeal civil appeal number 66 of 1984 (Nyarangi, Platt and Kwach JJA)) appeared to hold the position that on matters of burials the personal law of the deceased should be the key determinant, that is to say the customary law and practices of the deceased's tribal community. According to Nyarangi JA, Kenyan Africans like to have real connection with the burial of a deceased person, more especially a family member. There are individual, family and clan interests in the burial of a Kenyan African. Departure from this is unacceptable. Under these circumstances before the wishes of an African in Kenya, regarding the disposal of his body, can be given effect, the executor of his will would be obliged to prove that the African customary law

375 See *Rees v Hughes* [1946] KB 517

376 See *Brice v Wilson* (1834) 8 Ad and E 349

377 See *R v Wade* (1818) 5 Price 621.

378 See *Re Walter* [1929] 1 Ch 647.

providing that the burial ceremony and the burial place are the sole responsibility of his living family is impracticable, inapplicable, inconsistent with the written law or repugnant to justice and morality. In *James Apeli and another v Prisca Buluku (Mrs)* Kisumu Court of Appeal civil appeal number 12 of 1979 Law JA took the view that whether looked at from a customary law point of view or the general law of Kenya, the wishes of the deceased, though not binding, must, so far as possible be given effect to. Where those wishes are not contrary to custom nor contrary to the general law or public policy or safety, the High Court has a general discretion to make orders on the removal of the body from one place to another.

16.5 PAYMENT OF TESTAMENTARY AND ADMINISTRATION EXPENSES

Under section 83(c) of the Law of Succession Act, the personal representative has a duty to pay out of the estate all the expenses of obtaining the grant of representation and all other reasonable expenses of administration. In *Re Taylor's Estate* [1969] 2 Ch 1245 it was suggested that there is no real difference between testamentary and administration expenses. They come after funeral expenses, but in priority over debts and other liabilities of the estate. These include expenses incurred by the administrator in the usual course of administration. These expenses generally relate to costs of obtaining a grant to administer and relating to administration generally.

In *Re Marquardt, deceased, ex-parte Administrator General* (1913-14) 5 EALR 162 (Hamilton CJ), the administrator of the estate of the deceased acting in conjunction with the lawyers for the mortgagees of a farm belonging to the deceased decided to subdivide the farm and sell it by auction in an effort to obtain a better price. The step was taken on expert advice and was expected to benefit the estate. The expectations of a better price were not realised. The court was asked to decide whether the expenses should be borne by the general estate or come out of the price paid for the property by the mortgagees. It was held that the expense incurred by an administrator for the better realisation of mortgaged property, though with approval and joint action of the mortgagees, being for the benefit of the estate generally, must come out of the estate.

Under section 13 of the Public Trustee Act, the fees payable to the Public Trustee under the Public Trustee Act and any court fees and realisation expenses

and other charges incurred by the Public Trustee in collecting and realising the estate of the deceased, rank for payment after any funeral expenses and deathbed charges of the deceased. They take priority over all other expenses and debts for which the deceased was liable.

16.6 PAYMENT OF DEBTS AND SOLVENT ESTATES

An estate is solvent if there are sufficient assets to pay all expenses and all debts in full. An estate is not insolvent simply because there are insufficient assets in the estate to enable any legacies given by the deceased to be paid. If there are insufficient assets to pay all legacies in full, the legacies will abate in accordance with section 88 of the Law of Succession Act and the provisions of the 6th Schedule. Where the estate is solvent, the creditors will not be concerned with which part of the estate the debts are paid from, because they will be paid in full. Nevertheless, it will be a matter of concern to the beneficiaries, who may find that their share of the estate is made subject to the payment of specific debts or the deceased's debts generally. The provisions of the Law of Succession Act do not give priority to any class of debts.

In *Kamrudin Mohamed and another v Hilda Mary Coelho and others* [1965] EA 336, Sir Udo Udoma CJ stated that where a testator deposited with the bank the title deed to leasehold property together with other properties, real or personal, by way of security for advances made to him by the bank, then that was an expression of desire that all the property so charged should be subject to the payment of the debt owed to the bank. In the circumstances, the leasehold property although not primarily charged with the payment of the debt could be used to make contribution towards the payment of the debt.

16.7 DOCTRINE OF MARSHALLING

As far as creditors are concerned, all the assets of the estate are available for the payment of the debts. The personal representatives should try to ensure that the right assets are used. The doctrine of Marshalling involves compensating a beneficiary who has lost out; from the fund, that was the proper fund for the payment of the debts.

16.8 DEBTS AND INSOLVENT ESTATES

An estate is insolvent if the assets are not sufficient to pay all debts and liabilities, and all funeral, testamentary and administration expenses. If the estate is insolvent, not all the creditors will be paid in full, and the beneficiaries under the estate will

receive nothing. The disposition made in a will and the application of the rules of intestacy will be irrelevant in the circumstances. The personal representatives will only be concerned with the payment of the deceased's creditors.

Section 89(1) of the Law of Succession Act requires the court, where the inventory in an application for a grant shows that after payment of funeral and other expenses the estate will be insolvent, on its own motion to order the administration of the estate in bankruptcy in accordance with section 121 of the Bankruptcy Act.³⁷⁹ Under section 89(2), if a personal representative establishes that the estate he is administering is insolvent, he should apply for its administration in bankruptcy. Section 121 of the Bankruptcy Act provides that, on petition by a personal representative or by a creditor whose debt would have justified a bankruptcy notice under the Act, the court may make an order for administration of the deceased's estate in bankruptcy: in which case the estate vests in the Official Receiver, and is administered by him as otherwise provided by that Act for administration of bankrupt estates.

16.9 INCIDENCE OF PECUNIARY LEGACIES

The incidence of pecuniary legacies is concerned with which part of a testator's estate is to be used for the payment of any pecuniary legacies that have been given by the deceased's will. If a will expressly provides which part of the estate is to be used for the payment of pecuniary legacies, they should be paid out of that part of the estate. Normally, a will expressly provides for pecuniary legacies to be paid out of the residuary estate, but it is possible for a will to expressly provide that they are payable from some other part of the estate.

Where there is no express provision as to which part of the estate, pecuniary legacies are to be paid from, statutory or common law principles will apply.

CHAPTER SEVENTEEN

DISTRIBUTION OF THE ESTATE

17.1 INTRODUCTION

Once the personal representatives have paid all the deceased's debts and other liabilities, they will be in a position to consider the distribution of the estate. Distribution of the estate should not be done during the pendency of any contentious probate proceedings or before the person making the distribution has obtained a grant as stated by the Court of Appeal in *Okoyana v Musi and another* [1987] KLR 103 (Platt, Gachuhi JJA and Masime J). Emukule J in *Shital Bimal Shah and others v Akiba Bank Limited and four others* [2005] KLR stated that, by virtue of section 55 of the Law of Succession Act, capital assets constituting the net estate cannot be distributed or any property converted unless and until a grant has been confirmed as provided by section 71 of the Act. Generally, if the personal representatives distribute the estate to the wrong beneficiaries they will be personally liable. In intestacy, distribution follows Part V of the Law of Succession Act while in testate succession it is done in accordance with the will of the deceased, depending of course on the availability of the assets.

17.2 TIME FOR DISTRIBUTION

The period of one year from the death of the deceased is known as the executor's year. Within the period, the personal representatives should collect the assets of the deceased's estate, ascertain and discharge all liabilities of the estate to be in a position to distribute the estate among the beneficiaries. In many cases, the process takes longer than a year and it is usually not possible to complete the administration within a year.

Section 12(4) of the Public Trustee Act requires that after payment of all debts, fees and expenses incident to the collection, management and administration of the estate, the Public Trustee should pay over the residue to the persons beneficiary entitled to it. Where the persons entitled are outside Kenya, payment may be made to their agents or representatives in Kenya.

Under section 12(5) of the Public Trustee Act, the estate under the charge of the Public Trustee should be distributed according to the ordinary rules of law

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within a period not exceeding twelve years from the date of the final completion of the account, and on expiry of that period, the estate or part of it in respect of which no claims have been lodged with the Public Trustee lapses and escheats to the state. However, the minister has power to distribute the estate or any part of it among any relatives of the deceased or any other person who, although not having legal claim to the estate, can show a reasonable claim to it in equity.

Section 14 of the Public Trustee Act enables any person beneficially interested in any immovable property vested in the Public Trustee to apply by petition to the court for the partitioning of such property.

17.3 POSITION OF THE BENEFICIARIES DURING THE ADMINISTRATION PERIOD

Prior to the distribution of the estate, the personal representatives hold both the legal and equitable title to the assets of the estate, subject to their duties to collect in and preserve the estate, and to discharge the debts and other liabilities of the deceased. Lord Radcliff in *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694 said of the personal representative:

whatever property came to the executor *virtute officii* came to him with full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the function and duties of administration, not for his own benefit

It was held that the executor takes both legal and equitable title subject to the fiduciary duties to the beneficiaries and creditors of the testator for whose benefit he is to administer the estate. In *Re Leigh's wills Trust* (1970) Ch 227 it was held that the nature of the interest of the beneficiary under a will is a right to require the estate to be duly administered.

Personal representatives are not trustees. An essential characteristic of a trust is that only the legal title vests in the trustee, while the beneficiary has the equitable title. However, by virtue of his position, the personal representative often discharges the functions of a trustee. He is in a fiduciary position with regard to the assets that come to him in the right of his office, and for certain purposes and aspects, he is a trustee.³⁸⁰ In *In the Matter of the Estate of Anthony*

³⁸⁰ See *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694, *In the Matter of the Estate of Charles Odhiambo Odiawo, deceased* (Nairobi High Court succession cause number 1525 of 1999 (Kooome J) and *Stephens and six others v Stephens and another* [1987] KLR 125).

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Gichigi Wairire (deceased) Eldoret High Court probate and administration number 32 of 1983 (Nambuye J), it was stated that sections 82 and 83 of the Act require accountability of personal representatives to the beneficiaries, which in essence makes the personal representative trustees.

In their capacity, personal representatives cannot enjoy the benefits of the estate for themselves. The position of beneficiaries with respect to the estate during administration is not clear. The preponderant view is that the beneficiary has no beneficial interest in the estate during administration. He only has a right to ensure that the estate is properly administered. In *In the Estate of the late James Shiraku Inyundo (deceased)* Nairobi High Court succession cause number 920 of 1986, Kuloba J stated that a beneficiary has no right to compel administrators to dance to his tune. The will of a beneficiary cannot overshadow the greater interests of the estate and the rest of the body of beneficiaries and administrators. According to the court where administrators are not committing any wrong to the estate, they should be able to administer the estate in the best interests of the estate and the beneficiaries. It is not the business of a beneficiary, for example, to move around looking for bills payable by the estate but which are not yet addressed to the estate and demand that the administrators settle them. It is wrong for a beneficiary to demand payment of unproven liabilities.

This approach has often caused hardship. It is quite wrong to hold that beneficiaries generally have nothing more than a mere right to compel the due administration of the estate, taking into account the principle that as long as a beneficiary survives the deceased they will acquire a transmissible right and the doctrine of lapse will not apply.³⁸¹

17.4 ASCERTAINING THE BENEFICIARIES AND CREDITORS

Personal representatives are under a duty to discharge all the deceased's debts. As a rule, personal representatives are personally liable for unpaid debts even if they are unaware of the creditors' existence or are unable to locate him. Similarly, the personal representatives are under a duty to distribute the estate, after payment of debts and other liabilities, to the correct beneficiaries according to the deceased's will or the rules of intestacy where the latter apply. If they fail in this duty and distribute the estate to the wrong beneficiary, they will be personally liable, even if they could not locate the beneficiary or were not even aware of the existence

381 Catherine Rendell *Law of Succession* Macmillan London 1997 at 207, 208.

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of a particular beneficiary or they believed the beneficiary to have predeceased the deceased so that their gift lapsed.

The personal representatives can take steps to guarantee themselves protection from personal liability, either to a creditor or to a beneficiary of the estate whose existence they are not aware of, or whom they simply cannot find. The main way in which personal representatives can protect themselves from personal liability to unknown creditors or beneficiaries is by advertising in accordance with section 27 of the Trustee Act and section 12(2) of the Public Trustee Act. Under section 12(4)(i) of the Public Trustee Act in the event of the Public Trustee being unable to trace the persons beneficially entitled to the residue of the estate, he should transfer the residue or a proportionate part of it to an unclaimed property account.

References to children made in a will and under the rules of intestacy, include illegitimate children and adopted children, unless in the case of a will there is an express contrary intention. This may make it difficult for the personal representatives to ascertain the deceased's children. Personal representatives have no special protection from overlooking the claims of an illegitimate child.

When the distribution is done by the court, the interests of all the beneficiaries are taken into consideration, including the interests of those beneficiaries under disability. The fact of mental instability does not disentitle one to benefit. In *In the Estate of Muniu Kamau (deceased)* Eldoret High Court succession cause number 7 of 1998, Nambuye J ordered that a mentally unstable person who had been excluded from the list of the heirs of his late father's estate be included as a beneficiary.

17.5 INCOME AND INTEREST ON GIFTS

These are governed by the common law. It is not possible for the personal representatives to distribute the estate immediately upon the death of the deceased and they are not bound to distribute the estate before the expiry of one year from the date of the deceased's death. During the administration period, it is likely that some property will be producing income.

(a) Specific gifts

Immediate specific gifts carry all income and profits that have accrued from the date of the testator's death.³⁸² The right to income carries with it the burden of costs and expenses that will be deducted from the actual income. In the case of

³⁸² See *Re West* [1909] 2 Ch 180.

rent, for example, costs of repairs, insurance and so on have to be deducted from the rent before it is paid to the beneficiary. The beneficiary of a specific gift has to meet the costs and expenses from their own resources if the actual income is insufficient.³⁸³

(b) General legacies

Since the beneficiary is not entitled to a particular asset of the estate, they cannot be entitled to any particular part of the income of the estate. However, if the payment of the legacy is delayed beyond the end of the executor's year, the beneficiary will normally be entitled to interest to compensate for the delay in distribution.

In some circumstances, interest is payable on the legacy from the date of the testator's death:

1. where the testator expressly provides that the legacy should be paid immediately upon their death.³⁸⁴
2. where the legacy is given in satisfaction of a debt, unless the will specifies some later date after the testator's death for payment of the debt.³⁸⁵
3. where the legacy is charged on real property, rather than both real and personal property.³⁸⁶
4. where the legacy is payable to a minor child of the testator or some other minor child whom he is in loco parentis, but only if the will contains no other provision for the maintenance of the minor.³⁸⁷
5. where a legacy given to a minor shows an intention to provide for the maintenance of the minor.³⁸⁸

(c) Residuary gifts

Residuary gifts carry income from the testator's death.³⁸⁹

17.6 POWER OF APPROPRIATION

Section 82(d) of the Law of Succession Act gives a statutory power to personal representatives to appropriate any part of a deceased's estate in or towards the satisfaction of a legacy or other interest in the estate, provided that the consent of

383 See *Re Rooke* [1933] Ch 970.

384 See *Re Pollock* [1943] Ch 338.

385 See *Re Rattenberry* [1906] 1 Ch 667

386 See *Pearson v Pearson* (1802) 1 Sch and Lef 10.

387 See *Re Boulby* [1904] 2 Ch 685.

388 See *Re Jones* [1932] 1 Ch 642.

389 See *Barrington v Tristram* (1801) 6 Ves 845.

the beneficiary is obtained and so long as the appropriation does not prejudice a specific gift made by the deceased. It may take the form of deciding that a legatee should take some specific asset, instead of paying for it in cash, in full or partial satisfaction of the legacy.

17.7 ASSENTS

Beneficiaries under a will or in intestacy have no legal or equitable title to any asset comprised in the estate during the course of the administration process, but merely a right to see that the estate is properly managed. Beneficiaries acquire rights to a particular asset when personal representatives indicate by means of an assent that the particular asset is no longer needed for the purpose of the administration of the estate.

Assents are dealt with in sections 82 and 85 of the Law of Succession Act. Personal representatives are empowered under section 82(c) to assent, after the confirmation of grant, to the vesting of a specific legacy in the beneficiary named in the will. Under section 85(1), the assent of the executor is a mandatory requirement for the completion of the beneficiary's title. By virtue of section 85(2), the assent may be made orally or it may be inferred from the conduct of the executor, and it is, under section 85(4), effective from the date of the testator's death.

It is not clear whether an administrator in intestacy has power to give assent to the passing of property under the rules of intestacy. The wording of sections 82 and 85 is apparently limited to executors; the sections refer only to assents in testate succession. The position is equally unclear under the common law. Williams in his text *Law Relating to Assents*³⁹⁰ says that an administrator cannot assent on intestacy, but cites no authority.

The personal representatives must make it clear that the subject matter of the gift is no longer required for the purpose of administration. Although an assent may be oral, in some cases, special formalities are needed to pass the legal title to the beneficiary. For example, where the personal representatives have been registered in the registry of motor vehicles as the equitable owners of a motor vehicle, they will need to complete a transfer form for the registration of the vehicle in the beneficiary's name.

390 1947 at 96.

17.8 TRANSITION FROM PERSONAL REPRESENTATIVE TO TRUSTEE

Where the deceased dies testate, the will may appoint executors, who are also appointed trustees of any trusts created under the will, or the executors may not be appointed trustees, but property may be left on trust by the will, or a trust may arise because a beneficiary under the will is a minor at the date of the deceased's death. On intestacy, a statutory trust arises and administrators are trustees of any trusts. This means that the roles of personal representatives and trustee overlap. The personal representatives hold the real and personal property for the benefit of the beneficiaries and creditors, and not their own, and they are therefore trustees for the beneficiaries and creditors. The Trustee Act defines a trustee to include a personal representative.

Masime J in *Stephens and six others v Stephens and another* [1987] KLR 125 stated that an administrator of the estate of a deceased person pursuant to a grant of letters of administration is a trustee and stands in a fiduciary relationship to all those who are beneficially interested in the estate. His duties as such trustee continue until he distributes the estate when his undertakings to court are discharged. Nambuye J in *In the Matter of the Estate of Anthony Gichigi Wairire (deceased)* Eldoret High Court probate and administration number 32 of 1983, said that the personal representative is placed in a position where he has to account to the beneficiaries and this makes the personal representative a trustee. Aluoch J said in *In the Matter of the Estate of Johana Olishorua Leseya (deceased)* Nairobi High Court succession cause number 3084 of 2002, that section 35, read together with section 58(1) of the Act where there are minor children, makes the surviving spouse a trustee as the surviving spouse only enjoys a life interest in the net intestate estate as he or she holds the property for the benefit of the minor children.

According to Emukule J in *Shital Bimal Shah and others v Akiba Bank Limited and four others* [2005], KLR where upon the confirmation of grant, the personal representatives have not paid out the specific legacies they constitute themselves into trustees for those legacies. Apart from the specific legacies, the personal representatives upon confirmation become trustees of the residuary estate. Where the estate in question is realty, in addition to the powers and duties under sections 82 and 83 of the Law of Succession Act, the personal representatives are bound by the powers and duties that devolve upon trustees of trusts of land under the Trusts of Land Act.

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The overlap occasions difficulty because of the principle that the office of a personal representative is for life. The distribution of all the deceased's assets does not change the position, which is independent of the property he manages. There is always the possibility that claims may arise against the estate or unexpected property may accrue to the estate after distribution.

There are key differences between personal representatives and trustees. The function of a personal representative is to collect in the deceased's assets, discharge debts and other liabilities, and distribute the estate as soon as possible, to wind up the estate. In contrast, the function of a trustee is to hold and manage the trust property. Personal representatives owe a duty to the estate as a whole, while trustees have a duty to balance the competing interests of individual beneficiaries. Trustees are required in law to always act jointly. Conversely, executors have joint and several authority to act in relation to personality, but not land. They can act either together or separately in their dealing with personality. A personal representative has no power to appoint additional personal representatives, but trustees have power to appoint additional trustees. At some point, personal representatives act both as personal representatives and trustees and at some point cease to be personal representatives and become trustees. It is important to know the point at which a personal representative holds property as such or as a trustee.

In *Stephens and six others v Stephens and another* [1987] KLR 125, Masime JA stated that in intestacy where there is no express trust, a statutory trust arises. It is not clear whether the personal representatives ever become trustees. Under the rules of intestacy, a surviving spouse acquires a life interest in the estate, apart from the household and personal items, and minor beneficiaries are entitled contingent upon attaining eighteen years or, if female, upon getting married before that age. Older English cases suggest that where minority interests or life interest arise on intestacy, once the administration of the estate is complete in the sense that the personal representatives have discharged debts and distributed the estate to beneficiaries, the personal representatives then become trustees.³⁹¹ This position contrasts with the decision of the Court of Appeal in *Harvell v Forster* [1954] 2 QB 367, where the court took the view that personal representatives do not become trustees once they complete administration because they are unable to distribute to a minor.

Where no trustees are appointed by will but a trust arises, it was suggested

391 *Re Ponder* [1921] 2 Ch 59 and *Re Yerburgh* (1928) WN 208.

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in *Grosvenor* [1926] 2 Ch 375 that in the case of a specific gift where personal representatives have indicated by means of an assent that the subject matter of a specific gift is not required for the payment of debts, thereafter the asset is held on trust for the beneficiary of the specific gift until the legal title is transferred to them. In *Harvell v Foster*, the Court of Appeal indicated that personal representatives remain liable in their capacity as personal representatives until the estate is vested in the beneficiaries entitled to it, even if the vesting was delayed because of the minority of the beneficiary.

Where the personal representatives are also the trustees of the residuary estate, the decision in *Re Cockburn's Trusts* [1957] Ch 438 suggests that as soon as the debts and other liabilities have been discharged and the residue of the estate is ascertained, the personal representatives start to hold the property in their capacity as trustees. In *Attenborough v Solomon* [1913] AC 76, it was stated that the change does not take place automatically, but only when personal representatives have assented the property to themselves in their capacity as trustees, complying with the necessary formalities.

Where the will appoints trustees but not personal representatives, the personal representatives do not become trustees at any stage. In the circumstances, the personal representatives will be under an obligation to transfer the assets that form part of the trust to the trustees as part of the process of administering the estate.

CHAPTER EIGHTEEN

REMEDIES OF THE BENEFICIARIES AND CREDITORS

18.1 INTRODUCTION

Sometimes things go wrong with administration. When this happens the beneficiaries and creditors look up to the personal representatives for a remedy. The law provides avenues for remedies for beneficiaries and creditors who are aggrieved by the conduct of personal representatives.³⁹²

18.2 CRIMINAL LIABILITY OF PERSONAL REPRESENTATIVES

Section 95 of the Law of Succession Act creates a number of offences by personal representatives with respect to administration. They include wilful or reckless neglect to get in any asset forming part of the estate, misapplying any such asset or subjecting any such asset to loss or damage. It is also an offence to wilfully fail to produce to the court any inventory or account as is required by the section 83 of the Act, or to wilfully or recklessly produce an inventory or account, which is false in any material particular. Waki J in *In the Matter of the Estate of Huseinbhai Karimbhai Anjarwalla* Mombasa High Court probate and administration number 118 of 1989 pointed out that this offence can only be committed where accounts or an inventory have been called for by the court under section 83. It is also an offence to continue to administer an estate, knowing or having reason to believe that the same is insolvent, without petitioning for its administration in bankruptcy.

18.3 REMEDIES THROUGH ADMINISTRATION PROCEEDINGS

Administrative proceedings are brought under the Civil Procedure Rules. Administration proceedings are intended to ensure that the administration of an estate is properly done. Administration proceedings arise out of disputes over the conduct of the personal representatives in administering the estate. The proceedings may be commenced by the beneficiaries or creditors unhappy with the personal representatives' conduct over the administration of the estate. They may also be started by personal representatives who encounter difficulties in the administration

392 See *In the Matter of the Estate of the late James Shiraku Inyundo (deceased)* Nairobi High Court probate and administration number 920 of 1986.

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of the estate, particularly where they are unsure of their legal position, and wish to protect themselves from liability.

(a) Action for specific relief

(i) Issues for determination

The issues for determination under Order XXXVI, rule 1 are questions affecting the rights or interests of any person claiming to be a creditor or beneficiary, ascertainment of any class of creditors or beneficiaries, furnishing of any particular accounts by personal representatives and the vouching of such accounts, the payment into court of any money in the hands of personal representatives, directions to the personal representatives to do or abstain from doing any particular act in their character as personal representatives, the approval of sale purchase compromise or any other transaction, and the determination of any question arising directly out of the administration of an estate. Under Order XXXVI, rule 5, any person interested under a will may take out an originating summons for the determination of any question of construction arising under the will, and for a declaration of the rights of the person interested.

In *Official Receiver v Sukhdev* [1970] EA 243 (Madan J), the Official Receiver sought orders against the executor of a will that he transfers land to a beneficiary (who was a bankrupt), that he administer the estate and that he renders accounts to the court. In *Anarali Museraza (a minor suing by his next friend) Mohamedtaki A P Champsai v Mohamedali Nazerali Jiwa and others* [1966] EA 117 (Wicks J), the beneficiary of a bequest, in a codicil, for his maintenance and education brought an action against the executors after the latter refused to pay the bequest to him. In *Gurdial Singh Dhillon v Sham Kaur and others* [1960] EA 795 (Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Craw Shaw JA) the eldest son of the deceased by his first marriage brought the action against his step-mother, the administratrix of the deceased, and his step-brothers, seeking the determination of the rights and interests of the parties to the estate of the deceased, and that the administratrix furnish accounts of the estate and that the respondents make retribution to the estate in respect of funds or other benefits received by them from the estate. In *In the Matter of the Estate of Clement Albert Etyang (deceased)* Nairobi High Court succession cause number 1099 of 2002 (Koome J) the proceedings were brought by the administrators for the determination of the apportionment of the estate of the deceased with reference to the share due to a minor grandchild who was

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wholly dependent on the deceased. The administrators could not agree on the percentage of the share to be apportioned to the minor.

In *In the matter of an application by Ebrahimji Gulamhusein Anjarwala as an Administrator of the estate of Hussenabai Musajee, deceased* (1946) 22(1) EACA 3 (Horne J), the court was asked to determine whether an administrator of an estate was a trustee for sale of the immovable property and whether he was bound by the provisions of the succession legislation which appoints him as administrator. In *Latif Suleiman Mohamed v K J Pand ya and others* [1963] EA 416 (Sir Ronald Sinclair P, Sir Trevor Gould AgVP and Newbold JA), the executor took out an originating summons for determination of questions who was entitled, and to what shares, to two plots and how the property of the deceased was to be divided. In *Gitau and two others v Wandai and five others* [1989] KLR 231 (Tanui J) the issues for determination included the ascertainment of the shares of a deceased person in a specified property. In *In the Matter of the Estate of Huseinbhai Karimbhai Anjarwalla* Mombasa High Court probate and administration number 118 of 1989 the originating summons was by an executrix against persons, who held the property of the estate but had refused to release it or details of it to her, seeking to force them to release the information and the property of the estate to enable her to carry out her duties as the executrix.³⁹³

In *John Njau v Gladys Gachambi Njoroge and others* Nairobi High Court civil case number 2003 (OS) (Koome J), the application was brought against the administrators of the estate of the deceased, seeking the distribution of the estate, declaration of trust property and injunctive orders. In *Njoki v Muthuru* [1985] KLR 871 (Madan, Kneller and Nyarangi JJA), the applicants sought orders to permit the Public Trustee to apply for grant of letters of administration alone to the estate of the deceased to the exclusion of the woman who was cohabiting with the deceased and a further order that she be declared no beneficiary of the deceased's estate. In *Esther Mbatha Ngumbi v Mbithi Muloli and others*, Nairobi Court of Appeal civil appeal number 207 of 1995 (Gicheru, Tunoi and Shah JJA), the application was to determine heirs and whether or not they were entitled to a share of the estate. In *Kamrudin Mohamed and another v Hilda Mary Coelho and others* [1965] EA 336 (Sir Udo Udoma CJ), the court was called upon to determine whether a beneficiary under the will of the deceased was entitled to receive certain premises belonging to the deceased. In *Rebecca Nyakeru Nyongo and others v Simon*

393 See also *The Public Trustee and another v Kamau Wanduru* (1982-1988) 1 KAR 498 (Madan, Kneller JJA and Chesoni AgJA).

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Kamau Gitau Mombasa Court of Appeal civil appeal number 245 of 1996 (Gicheru, Omolo JJA and Bosire AgJA), the applicants sought to recover money or property owed to the estate, the dissolution of a partnership to which the deceased was a member, the taking of the accounts of the partnership and the transfer of the partnership shares. In *In the Matter of the Estate of Charles Odhiambo Odiaowo, deceased* Nairobi High Court succession cause number 1525 of 1999 (Koome J), the court was asked to give directions on the investment of the proceeds of moneys held in a bank account in the name of a minor. In *In the Matter of the Estate of the late Mzee Almasi Mukira (deceased)* Mombasa High Court civil case number 426 of 2002 (Tutui COA), the applicants sought an injunction to restrain one of the beneficiaries under the said will. In *Re Rufus Ngethe Munyua (deceased) Public Trustee v Wambui* [1977] KLR 137 (Harris J) the Public Trustee sought an order that an instrument written in Kikuyu language with an English translation annexed should be treated as the last will and testament of the deceased.

(ii) Procedure

Any person interested in the estate of the deceased may commence administration proceedings. The action is initiated by way of originating summons under Order XXXVI, rules 1, 2 and 5 of the Civil Procedure Rules³⁹⁴ or by ordinary suit under the general procedures of the Civil Procedure Act and Civil Procedure Rules.³⁹⁵ Where the action is brought by creditors or beneficiaries against the personal representatives on grounds of wrongdoing by the latter, the court will normally, under Order XX, rule 13(1) of the Civil Procedure Rules, make an order directing that accounts be drawn up and certain enquiries be made. These could cover accounts of property which forms part of the residue of the estate and which came to the possession of the personal representatives or any other person on behalf of the personal representatives; accounts of the deceased's debts, funeral and testamentary expenses; accounts of any legacies or annuities; and an inquiry as to which part of the estate has not been collected or disposed of, and whether such property is subject to any encumbrances. Once the accounts and inquiries have been completed, the court will order payment of any debts, distribution of the assets to the beneficiaries, and other relevant orders.

Personal representatives often seek specific relief to shield them from liability.

³⁹⁴ *In the Estate of Sheikh Mohamed bin Ali bin Saad El-Mand iry (deceased)* [1938] 18(1) KLR 124 (Lucie-Smith J).

³⁹⁵ See *Daniel v Public Trustee* [1977] KLR 62 (Wambuzi P, Law VP and Musoke JA).

It is sought in most cases where the personal representatives are able to carry out administration of the estate overall, but have one or more specific difficulties. The specific relief's may cover construction of wills; determination of beneficiaries; orders directed at personal representatives requiring the making of accounts, where there is a dispute as to whether they acted in the transaction for the benefit of the estate; and orders directing the personal representative to perform, or refrain from performing a particular act. Under rule 4(3) of the Probate and Administration Rules, where at the hearing of a summons for confirmation of a grant an issue arises, which cannot be conveniently determined by the court at that stage, relating to the identity, share or estate of a person claiming to be beneficially interested in such share or estate, or which relates to any condition or qualification attaching to such share or estate, the court may appropriate and set aside the particular share or estate pending the determination of the issue under Order XXXVI, rule 1 of the Civil Procedure Rules. In *Charles Murithi Kungu v Anne Njoki Njenga* Nairobi High Court civil case number 19 of 2004 (OS) Koome J ordered, under rule 43(3), that a dispute as to whether a particular asset formed part of the estate of the deceased or belonged to the applicant be dealt with through an originating summons brought under Order XXXVI, rule 1. In *In the Matter of the Estate of Mary Gachuru Kabogo (deceased)* Nairobi High Court succession cause number 2830 of 2001, Ang'awa J said that during the confirmation process, the properties that are not disputed should be confirmed, but those that are disputed should be subjected to a hearing under Order XXXVI as a separate cause.³⁹⁶ Ang'awa J in *In the Matter of the Estate of Mariko Marumbi Kiuru (deceased)* Nairobi High Court succession cause number 201 of 1997 similarly stated that an issue relating to the rights of widows to the property of their deceased husband should be dealt with separately under Order XXXVI instead of the confirmation proceedings in a probate or succession cause.

All the persons likely to be affected by an order in these proceedings should be made a party to the originating summons. An adjudication upon an originating summons brought under Order XXXVI is an 'order' and not a 'decree' according to the former Court of Appeal for East Africa in *In the Matter of the Trusts of the Will of the Late Harry Edward Watts* (1955) 22 EACA 177 (Sir Newham Worley VP, Sir Kenneth O'Connor CJ and Sir Enoch Jenkins JA) and *Gurdial Singh Dhillon v Sham Kaur and others* [1960] EA 795 (Sir Kenneth O'Connor P, Sir Alistair Forbes VP and Crawshaw JA). According to Nyamu J in *Francis Kamau Mbugua and another*

396 To enable an appeal to the Court of Appeal.

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v James Kinyanjui Mbugua Nairobi High Court civil case number 111 of 2004 (OS), although a beneficiary is technically entitled to commence legal proceedings under Order XXXVI, rule 1, he is only entitled to do so where he is claiming under a deed or instrument in order to have any question affecting his rights or interest in law determined. With respect, this is not a correct interpretation of order XXXVI, rule 1. It is not required for persons claiming relief under order XXXVI, rule 1 as either creditors, devisees, legatees, heirs or personal representatives of the deceased, have to found their claim on a deed or instrument, rather it is a *cestui que* trust only who should claim under a deed or instrument.

In *In the Estate of Sheikh Fazal Ilahi* [1957], EA 697 Connell J expressed the opinion that where the validity of a will is contested, an originating summons under Order XXXVI would not be the appropriate procedure for dealing with the matter. The correct procedure is by an action to which the parties prejudiced by the will have been made parties. In *James Njoro Kibutiri v Eliud Njau Kibutiri* [1982-88] 1 KLR 60 (Law and Potter JJA, and Hancox AgJA), the Court of Appeal held that an originating summons is inappropriate when the issues raise complex and contentious questions of fact. Law JA stated that the procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters that involve a serious question.³⁹⁷

The court may invoke inherent jurisdiction to make orders under Order XXXVI of the Civil Procedure as may be necessary for the ends of justice, even when the matter before it is not brought under that order XXXVI of the Civil Procedure Rules.³⁹⁸

According to Khamoni J in *Re Estate of Karanja* [2002] 2 KLR 34, Order XXXVI, rule 1 is not applied by rule 63 of the Probate and Administration Rules, but by virtue of rule 41(3) of the Probate and Administration Rules. This approach appears to limit the application of order XXXVI, rule 1 to the situations envisaged

³⁹⁷ See also *Kulsumbai v Abduhusein* [1957] EA 699, *Re Giles* (2) [1890] 43 ChD 391, *Bhag Bhari v Mehdi Khan* [1965] EA 94 (Newbold AVP, Duffus and Spry JJA), *Kenya Commercial Bank Ltd v James Osebe* (1982-88) 1 KAR 48 (Law and Potter JJA, and Hancox AgJA), *Industrial and Development Corporation v Kariuki and Gatheca* [1977] KLR 52 (Law VP, Mustafa and Musoke JJA) *Boyes v Gathure* [1969] EA 385 (Sir Charles Newbold P, Sir Clement de Lestang VP and Spry JA), *Official Receiver v Sukhdev* [1970] EA 243 (Madan J) and *Wakf Commissioners v Mohamed bin Umea bin Abdulmajid bin Muwjabu and another* (1984) 2 KAR 12 (Kneller, Hancox JJA and Nyarangi AgJA).

³⁹⁸ See *In the Matter of Peter Gicheru Kagotho (deceased)* Nairobi High Court succession cause number 376 of 1983 (Githinji J).

by rule 41(3) of the Probate and Administration Rules. The Court's position is not tenable as an Originating Summons brought under order XXXVI, rule 1 is a separate suit independent of any proceedings pending before the probate court, dealing with issues different and separate from those before the probate court. Order XXXVI, rule 1 is broad enough to tackle all the issues envisaged under the provision, which cannot be properly dealt with by the probate court under the powers given to it and the procedures prescribed by the Law of Succession Act. Rule 41(3) merely refers to Order XXXVI, rule 1 as one of the modes of handling disputes relating to ownership of property, it does not exclude it from touching on other matters. Rule 41(3) does not limit the application of Order XXXVI, rule 1 to disputes over property, Order XXXVI, rule 1 applies to the matters set out in the Order in spite of rule 41(3). Koome J, while handling a different application in the same matter, that is to say *In the Matter of the Estate of James Karanja Kioi (deceased)* Nairobi High Court succession cause number 1366 of 1995, implied that a person claiming to be a widow of the deceased can bring an application under Order XXXVI, premised on the Married Women's Property Act, seeking a determination of her share in the matrimonial property left behind by the deceased.

(b) Order for administration by the court

Under Order XXXVI, rule 2 of the Civil Procedure Rules, any person interested in the estate of the deceased may seek orders for the administration of the estate of the deceased by the court. Order XXXVI, rule 2 envisages the taking out of an originating summons for the administration of either the personal estate or real estate of the deceased by the court. The action can also be by plaint if there is a dispute of fact, allegation of fraud or a claim for damages for breach of duty- such as where the personal representatives are guilty of breach of trust or a *devastavit*. The originating summons is used where the issue leading to the application arises out of a matter of law.

Where the action for the administration of the estate by the court is brought by the creditors or beneficiaries against the personal representatives on the grounds of wrongdoing by the personal representatives, under Order XX, rule 13(1) of the Civil Procedure Rules the court makes an order directing that certain accounts be drawn up and certain inquiries made. The accounts may cover property which forms part of the residue of the estate and which has come into the hands of the personal representatives, the deceased's debts, funeral and testamentary expenses

and any legacies or annuities. The inquiry would be as to what part of the deceased's property has not been collected or disposed of, and whether such property is subject to any encumbrances. Once the accounts and inquiry have been completed, the court gives the necessary directions, which include payment of debts and the distribution of the estate to the beneficiaries.

18.4 ACTION AGAINST THE PERSONAL REPRESENTATIVES

The personal representatives must preserve and administer an estate with diligence.³⁹⁹ They must also administer an estate in accordance with the law. If a personal representative, in his office as personal representative, commits a breach of duty that results in a loss to the beneficiaries or creditors of the estate, he commits a *devastavit* (wasting of the assets) for which he will be personally liable. It does not matter that the breach of duty is committed innocently, negligently or fraudulently. Under section 94 when a personal representative neglects to get in any assets forming an estate in respect of which representation has been granted to him, or he misapplies any such assets or subjects it to loss or damage, he shall be liable to make good any loss or damage arising from such neglect or misapplication.

It has already been explained that there are important differences between personal representatives and trustees but that it is sometimes difficult to distinguish between when a personal representative is acting as a personal representative and when he is acting as a trustee. It is important to distinguish between a breach of trust and a *devastavit*. Consequently, where the executors are appointed trustees of trusts arising from a will, it may be important to know in which capacity they are acting.

Devastavit may be classified into three. Firstly, it relates to misappropriation of assets of the estate by a personal representative, such as where the personal representative uses the estate to pay personal debts⁴⁰⁰ or converts the assets for their own use. Secondly, maladministration of the assets of the estate, where the personal representatives distribute the estate to the wrong beneficiaries or pay the wrong creditors, where they incur unjustified expenses in the administration of the estate by selling them at under value or paying debts, they are not bound to pay. It will also apply in cases of failure by personal representatives to safeguard the assets of the estate so that they are lost or destroyed through carelessness.⁴⁰¹

399 See *Re Tankard* [1942] Ch 69.

400 See *Re Morgan* [1881] 18 ChD 93.

401 See *Job v Job* [1877] 6 ChD 562.

Where the personal representatives fail to settle amounts due to beneficiaries or at any rate fail to comply with court orders which require them to make certain payments to beneficiaries, the beneficiaries rely on section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, where the court can in exercise of its inherent powers compel compliance. Where there are no such court orders, the party interested or affected may bring administration suits and proceedings under the Civil Procedure Rules. According to Lowe J in *Panayotis Nicolaus Catravas v Khanubai Mohamed Ali Harji Bhanji* [1957] EA 234, an action can only be successfully maintained against an executor where such personal representative has taken out a grant of representation or intermeddled with the estate.

Koome J in *In the Estate of Joram Waweru Mogondu (deceased)* Nairobi High Court succession cause number 2721 of 2002, held that the enforcement of an order of the probate court cannot be compelled through Order XXI of the Civil Procedure Rules; as such matters of execution of orders under that the Law of Succession Act have not been imported into succession law. The beneficiary who desires to obtain binding and enforceable orders must commence a proper action. The Court of Appeal in *Kangwana and Company Advocates v Solomon I. Kisii* Nakuru Court of Appeal civil appeal number 41 of 1984 (Platt, Apalo JJA and Masime AgJA), stated that actions against executors and administrators can be brought under Order XXX, Order XXXVI and Order IV, rule 1 of the Civil Procedure Rules. The Court of Appeal, however, noted that only an action brought under Order IV, rule 1 by way of a plaint naming the personal representatives as defendants could lead to binding orders capable of enforcement or execution under the Civil Procedure Rules. In the suit, the beneficiary should state the nature of his interest, the capacity in which the defendants are sued and the nature of the relief sought against them. A full trial should ensue in which the differences between the parties have to be determined and pronounced in the normal way. It is after the full-scale trial that binding orders capable of being enforced against the personal representatives can be made.⁴⁰²

Connell J in *In the Estate of Sheikh Fazal Ilahi* [1957] EA 697, was of the opinion that an originating summons under Order XXXVI is not the appropriate procedure for dealing with highly contested matters, such as where the validity of a will is contested.⁴⁰³ The correct procedure is by an action to which the parties prejudiced

402 See *Tristram and Cootes Probate Practice*, [2 ed], at 617 Ch 29.

403 See also *Official Receiver v Sukhdev* [1970] EA 243 (Madan J).

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by the will have been made parties. According to the Court of Appeal in *Raphael Jacob Samuel v The Public Trustee and others*, Nairobi Court of Appeal civil appeal number 16 of 1980, the use of a wrong procedure does not necessarily invalidate proceedings, if it does not go to jurisdiction or cause undue prejudice.⁴⁰⁴ The Court of Appeal came to a similar finding in *Njenga Chogera (the Administrator ad Colligenda bona of the Estate of the Late Chogera Kimani) v Maria Wanjira Kimani and others* Nairobi Court of Appeal civil appeal number 322 of 2003 (O’Kubasu, Waki and Deverell JJA), where it was alleged that the plaintiff’s claim ought to have been brought by way of originating summons under Order XXXVI of the Civil Procedure Rules instead of by way of plaint.

In *Panayotis Nicolaus Catravas v Khanubai Mohamed Ali Harji Bhanji* [1957] EA 234, Lowe J held that where a person is sued in representative capacity, such as a personal representative, the plaint must specifically state so. It was further held that when suing an executor it is not necessary to plead specifically that he has taken out probate or has intermeddled provided it is alleged that he is sued as executor. It is a matter for proof whether an executor who has not taken out probate has so intermeddled with the estate as to become liable as executor *de son tort*.⁴⁰⁵

18.5 DEFENCES OF PERSONAL REPRESENTATIVES

Where a personal representative is personally liable for a *devastavit*, under section 94 of the Law of Succession Act, he must replace the loss caused to the estate unless he can avail himself a defence. There are several defences that may shield the personal representatives.

(a) Defence under section 60 of the Trustee Act and section 52 of the Trusts for Land Act

This provision allows the court discretion to relieve a personal representative wholly or partly, where they have acted honestly, reasonably and in good faith, and in the opinion of the court ought to be excused. Each case turns out on its own facts. A number of cases have been concerned with whether personal representatives have acted reasonably, when they have acted on the wrongful advice of a lawyer.⁴⁰⁶

404 See *Boyes v Guthure* [1967] EA 385 (Sir Charles New bold P, Sir Clement de Lestang VP and Spry JA).

405 See *Williams on Executors* (12 ed) Volume II at 1239

406 See *Perrins v Bellamy* (1899) 1 Chapter 797, *National Trustee Company of Australasia v General Finance Company* [1905] AC 373, *Re Pauling’s Settlement Trust* [1964] 1 Ch 303.

(b) Defence under section 61 of the Trustee Act

This provision gives the court discretion to indemnify the personal representative, where a beneficiary or creditor has instigated, requested, or consented in writing to a breach of duty on the part of the personal representative, by impounding all or part of the interest of that beneficiary or creditor. The court exercises its discretion under section 61 of the Trustee Act only if the beneficiary knew all the facts surrounding the matter.⁴⁰⁷

(c) Defence under section 29 of the Trustee Act

This provision protects personal representatives from liability to a beneficiary or creditor of whose existence they are not aware of, if the personal representatives have complied with the conditions set out in section 28 of the Trustee Act concerning the placing of certain statutory advertisements.

(d) Defence of acquiescence in *devastavit*

This is a common law defence. At common law, if a creditor or beneficiary acquiesces in *devastavit*, the personal representatives are not generally liable to him. The personal representatives, however, have the burden of proving that the beneficiary or creditor was of full age, had full knowledge of all the material facts, and was not under the undue influence of the personal representatives.⁴⁰⁸

It was stated in *Holder v Holder* (1968) Ch 353 that there is no fixed rule that the beneficiary should have knowledge of the legal consequences of the facts. Whether it is fair for the court to apply the defence depends on the facts of each case.

(e) Defences of *plene administravit* and *plene administravit praeter*

These are common law defences. *Plene administravit* literally means that the personal representatives have fully administered the estate and do not have any assets in their possession. The personal representatives' defence is that they do not have any assets that can be utilised to pay creditors. If the defence succeeds, the creditors may only obtain judgement against assets coming into the hand of the personal representatives (if at all) after the date of judgement.

407 See *Re Somerset* [1894] 1 Ch 231.

408 See *Re Marsden* [1884] 26 ChD 783.

Plene administravit praeter means that the personal representatives have fully administered all the assets of the estate, except for a specified sum in their hands. If the personal representatives succeed with the defence, the creditors would only be able to obtain judgement in respect of the specified sum or assets coming into the hands of the personal representatives after the date of the judgement.

(f) Defences under the Limitation of Actions Act (Chapter 22 Laws of Kenya)

(i) To a claim by a beneficiary

Apaloo JA in *Stephens and six others v Stephens and another* [1987] KLR 125 stated that the object of the Limitation of Actions Act is to prevent the agitation of stale claims which by reason of the lapse of time would be hard or inequitable to defend. The limitation period for breach of trust by administrators and trustees begin to run from the date of the commission of the breach and not from the date of the death of the deceased according to Masime J in *Stephens and others v Stephens and another* [1987] KLR 125.

Beneficiaries cannot bring any action against the personal representatives to recover land or in respect of a breach after the expiry of six years from the date on which the right to receive the share or interest accrued.⁴⁰⁹ The limitation period for recovering movable property or personality by a beneficiary is twelve years from the date when the cause of action accrued.⁴¹⁰ An action to recover arrears of interest in respect of a legacy or damages in respect of such arrears should be brought within six years from the date on which the interest became due. Although personal representatives are not bound to distribute the estate before the expiry of the executor's year, the time generally runs from the date of the deceased's death.⁴¹¹

The limitation period does not, however, apply to claims by beneficiaries where the personal representative has acted fraudulently⁴¹² or where the personal representative is in possession of the property or the proceeds of the property.⁴¹³ Apaloo JA in *Stephens and another v Stephens and another* [1987] KLR 125 stated that the philosophy underlying the Limitation of Actions Act seems to be that

409 See section 20(2) of the Limitation of Actions Act

410 See section 21 of the Limitation of Actions Act. This is a little curious, as the limitation period for claims in respect of land is usually longer than for personality. There is a possibility of errors in sections 20(2) and 21 of the Limitation of Actions Act.

411 See section 16 of the Limitation of Actions Act and *Waddell v Harshaw* (1905) 1 Ir R 416).

412 See section 20(1)(a) of the Limitation of Actions Act

413 See section 20(1)(b) of the Law of Succession Act.

where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar.⁴¹⁴ This, however, does not exclude the application of the equitable doctrine of laches.

(ii) *To a claim by a creditor*

The defence of limitation is available to a cause of action that accrued during the lifetime of the deceased, in the same way, as the deceased would have done had he been alive. Time continues to run against the claimant between the date of the deceased's death and the date when the grant of representation is obtained.⁴¹⁵

Section 21 of the Limitation of Actions Act covers actions for movable property of the deceased. If the deceased owed a creditor a simple contract debt, and he made provision in the will to charge a particular asset with the payment of the debt, the creditor's action founded on the simple contract is statute barred against the personal representatives after six years from the date when the cause of action accrued,⁴¹⁶ but the charge (whether on realty or personality) is only time barred after twelve years from the date when the right to receive payment under the charge accrued.⁴¹⁷ If the personal representative commits devastavit, by failing to pay or underpaying a creditor, a personal claim against the personal representatives is statute barred after six years from the date of distribution.

(iii) *Extension of limitation period*

The limitation period may be extended in some circumstances, whether the claim is by a beneficiary or a creditor. It may be extended under section 22 of the Limitation of Actions Act due to the disability of the claimant, under sections 23(3) and 25(7), (8) of the Limitation of Actions Act, where the personal representative has acknowledged the claim of a debt or other liquidated pecuniary claim or claim to movable property of a deceased person, and under section 26 of the Limitation of Actions Act in case of a mistake or fraud on the part of personal representatives.

414 See also *Mukindia Kimuru and another v Margaret Kanario Nyeri* Court of Appeal civil appeal number 19 of 1999 (Gicheru, Shah and Owuor JJA).

415 See section 16 of the Limitation of Actions Act and *Rhodes v Smethurst* (1838) 4 M and W 42.

416 See section 16 of the Limitation of Actions Act.

417 See section 21 of the Limitation of Actions Act.

18.6 SUBSTITUTION OR REMOVAL OF PERSONAL REPRESENTATIVES

The Law of Succession Act provides for two instances for the removal or substitution of personal representatives, under sections 71 and 76 of the Law of Succession Act.

Section 71 caters for confirmation of grants. Under section 71(2)(b) the court, at the hearing of the application for confirmation of a grant, if not satisfied that the grant was rightly made to the personal representative or that the personal representative was administering or would administer the estate according to the law, may decline to confirm the same and instead issue a confirmed grant of letters in respect of the estate or the unadministered part of the estate to someone else. Under section 71(2)(c) the court may order a personal representative to deliver or transfer all the assets of the estate under his control to the holder of a confirmed grant issued by another court. The court exercises its discretion under section 71 either on its own motion or upon prompting by a beneficiary or any person who objects to the confirmation of the grant.⁴¹⁸ Under rule 41(7) of the Probate and Administration Rules, beneficiaries and creditors have a right to appear and make representations before the court makes final orders relating to confirmation of the grant.

The revocation or annulment of a grant under section 76 of the Law of Succession Act usually results in the removal or substitution of the personal representative. Although the court may annul a grant on its own motion, in most cases, it acts on the prompting of either a beneficiary or creditor or any person interested in the estate.⁴¹⁹ The application for revocation may be founded on purely technical grounds⁴²⁰ or on grounds related to the misconduct of the personal representatives or general maladministration of the estate by the personal representative.⁴²¹ Upon ordering the revocation of the grant, the court may issue a confirmed grant to someone else.

The Trustee Act, which applies to both trustees and personal representatives, at section 42(1), empowers the court to appoint new trustees whenever expedient. This provision, however, does not apply to personal representatives by virtue of section 42(4) of the Trustee Act.

418 See rules 40(6), (7), (8) and 41(1) of the Probate and Administration Rules.

419 See rule 44(1) of the Probate and Administration Rules.

420 See section 76(a) (b) (c) and (e) of the Law of Succession Act

421 See section 76(d) of the Law of Succession Act.

18.7 ACTIONS AGAINST THE RECIPIENTS OF ASSETS

(a) Personal actions

Where the loss suffered by the beneficiary or creditor arises from a *devastavit* of the personal representative, the common law holds that the beneficiary or creditor should first seek to recover the loss from the personal representatives, before pursuing other creditors or beneficiaries who have received assets to which they are not entitled. According to the court in *Re Diplock* [1948] Ch 465, personal actions against other beneficiaries or creditors arise only where the claimant fails or is unable to recover from the personal representative.⁴²²

(b) Tracing

Tracing is the other remedy available against recipients of assets. It was stated in *Overseas Finance Corporation Limited v The Administrator General of Tanganyika Territory and another* (1942) 9 EACA 1 (Sir Joseph Sheridan CJ, Sir Norman Whitley CJ and Sir Henry Webb CJ), that tracing is an equitable proprietary remedy whereby a legal or equitable owner of property is able to assert title to a particular thing that has passed derivatively into the hands of another. It is in simple terms, the following of a person's property into the hands of another and asserting title to it. This will be possible even where the property has changed in form. The principles concerning tracing claims against innocent recipients were summarised in *Re Diplock* [1948] Ch 465. The general principle is that whenever there is an initial fiduciary relationship, the person beneficially entitled to the property can trace it into the hands of anyone holding the property, except a bona fide purchaser for value without notice. In *Saleh bin Mohamed bin Omar Bakor v Noor binti Sheikh Mohamed bin Omar Bakor* (1951) 18 EACA 30 (Sir Barclay Nihill P, Sir Newham Worley VP and Lockhart-Smith JA) it was stated that a beneficiary is entitled to follow the assets into the hands of a person who has wrongly received them without necessarily having to apply for the revocation of the grant of letters of administration.

The difference between a personal action and an action founded on tracing is that the true equitable owner of property may exercise the equitable right to trace without first exhausting their remedy against personal representatives. Where the true equitable owner has already recovered from the personal representative, they

422 See also *Ministry of Health v Simpson* [1951] AC 251.

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lose their right to trace.⁴²³ There is also a difference with relation to limitation. Some tracing claims are probably not affected by the statutory limitations in the Limitation of Actions Act. These are subject to the equitable doctrine of *laches*.⁴²⁴ Under this doctrine, a tracing claim will only be defeated by time if the plaintiff unreasonably delays in making their claim. However, section 21 of the Limitation of Actions Act appears to cover tracing claims in respect of movable property of a deceased person. They are barred after twelve years.

Under Order XXX, rule 1 of the Civil Procedure Rules, in all suits concerning assets vested in personal representatives, where the dispute is between beneficiaries and a third person, the personal representative should represent the beneficiaries, and it is not necessary to make them parties to the suit although they may be made parties to the suit by the court. Under Order XXX, rule 2 where there are several personal representatives they should all be made parties to a suit against one or more of them. The former Court of Appeal for East Africa in *Sargent v Gautama* [1968] EA 338 (Sir Clement de Lestang VP, Duffus and Spry JJA), stated that any suit filed by or against personal representatives must name all the personal representatives as parties. Executors who have not proved their testator's will need not be made parties.

423 See *Re Diplock* [1948] Ch 465.

424 See Goff and Jones, *The Law of Restitution*, 1978 at 541.

CHAPTER NINETEEN

ESTATE ACCOUNTS

19.1 INTRODUCTION

The keeping of estate accounts is an important aspect of administration of estates. Personal representatives are in a fiduciary position with relation to the estate and the beneficiaries. This naturally casts a duty on them to account for their administration of the estate to both the court and to the beneficiaries. It is a statutory requirement under the Law of Succession Act and the Public Trustee Act. There is an obligation on personal representatives and trustees to account to the beneficiaries for their trusteeship of administration.⁴²⁵

19.2 DUTIES OF PERSONAL REPRESENTATIVES REGARDING ACCOUNTS

Law and equity imposes on personal representatives a duty regarding the accounts of an estate, independent of any rules imposed by statute. The personal representatives are expected to keep proper, accurate and faithful accounts. If they themselves cannot keep accounts, they must engage an agent to keep proper accounts for them.⁴²⁶ The personal representative remains liable for any improper accounts rendered in his name and sanction. The estate funds must not be mixed with other accounts, including the personal accounts of the personal representative. The accounts must contain particulars of all the receipts and payments, which must be supported by vouchers and invoices.

The personal representatives should always have the accounts ready and up-dated. They should be in a position to render them when called upon to do so by either the court or the beneficiaries or any other persons interested in the estate. The personal representatives are only obliged to account to the true heirs and beneficiaries and they are therefore entitled to require proper identification by the persons seeking the information that they are indeed heirs and beneficiaries. Generally, the accounts and their supporting documents must be preserved even long after the completion of the administration.

425 See *In the Matter of the Estate of Anthony Ngugi Wairire (deceased)* Eldoret High Court probate and administration number 32 of 1983 (Nambuye J).

426 See *In the Matter of the Estate of John Ngugi Kimani (deceased)* Nairobi High Court succession cause number 1830 of 1999 (Koome J).

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It is good practice for personal representatives to give to the beneficiary a statement of what the beneficiary is entitled to receive even without a formal request from the beneficiary. Details of income, usually in form of rents, profits and dividends, should be given periodically. Details of capital assets should be rendered when the property comes under the control of the personal representative. There is also the duty to give proper information on the investment of the estate's funds. This duty carries with it the duty to allow the heirs and beneficiaries to inspect and investigate accounts and the supporting documents, and documents of title relating to the trust property. The inspection may be done by the beneficiary himself or his appointed agent. The person inspecting the accounts is entitled to copies of such relevant documents as he may request.

19.3 RIGHTS OF BENEFICIARIES TO AN ACCOUNT

The beneficiaries' right to information corresponds to the personal representative's duty to account and give information. The beneficiary is entitled to full and accurate information on the amount and state of the estate, how the estate has been dealt with, and how and where the estate funds are invested. The information sought and which the personal representative should give should be on matters relating to the estate which ought to be in the trustee's knowledge. The beneficiary is entitled to information on shares in a limited company where the same form part of the assets of the estate. The beneficiaries' rights are, however, subject to company's articles of association. Where the information sought can only be supplied at considerable expense, then the beneficiaries must bear the burden, unless the same can be properly paid out of the estate. It would be prudent in the circumstances for the personal representatives to ask for indemnity before taking any steps to supply the information.

In *In the Matter of the Estate of John Ngugi Kimani (deceased)* Nairobi High Court succession cause number 1830 of 1999, in a case where the administrators were not in agreement on a common approach on payment of allowances to beneficiaries and other matters, a beneficiary brought action for an account and for the appointment of an auditor to audit the estate account. Koome J directed the administrators to compile the accounts of the estate as well as a list of the assets and liabilities within a specified period of time, failure to which the applicant beneficiary was at liberty to engage an independent reputable firm of auditors to audit and compile the list and value of assets of the deceased.

19.4 ACCOUNTS UNDER THE LAW OF SUCCESSION ACT

Under section 83(e) of the Law of Succession Act, the personal representatives are under a duty to produce to court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of the administration of the estate up to the date of the account, if required to do so by the court on its own motion or on the application of any person interested in the estate.⁴²⁷ A similar provision is found in section 83(g) with respect to accounts of the completed administration. Under rule 25(5) of the Probate and Administration Rules the court may at any time and from time to time require the personal representative to render to the court a true account of the estate of the deceased and of his administration of it. Apaloo JA in *Stephens and others v Stephens and another* [1987] KLR 125, stated that upon being appointed as administrator one incurs the responsibility of honest, efficient and high minded dealing with regard to the estate. He incurs an obligation to account to the beneficiaries of his dealings in the property. On the facts of the case the Court of Appeal found that the survivors authorised the administrator to take a grant of representation and to vest the legal title in himself to enable him administer the estate. He was expected to render account of his administration to the other survivors. According to Ang'awa J in *In the Matter of Habakuk Ochieng Adede (deceased)* Nairobi High Court succession cause number 721 of 2000, accounts may be required under sections 76(d)(iii) and 83 of the Law of Succession Act. In *In the Matter of the Estate of David Murage Muchina (deceased)* Nairobi High Court succession cause number 2077 of 2002, Kamau AgJ stated that personal representatives are under a statutory duty to account to all the beneficiaries and other interested parties.

In *In the Matter of the Estate of Hemed Abdalla Kaniki (deceased)* Nairobi High Court succession cause number 1831 of 1996, Kamau AgJ directed all the tenants of the properties the subject of the estate, who were not paying rent as the dispute over the estate raged, to commence paying the monthly rent to the Registrar of the High Court and at the same time gave liberty to the administrators to initiate necessary recovery proceedings against any defaulting tenant. The court also ordered the administrators of the estate to compile an account of the income realised from the properties since the death of the deceased and file the same in court.⁴²⁸

427 See *In the Matter of the Estate of Anthony Gichigi Wairire (deceased)* Eldoret High Court probate and administration number 32 of 1983 (Nambuye J).

428 See also *In the Matter of the Estate of John Nguni Kimani (deceased)* Nairobi High Court succession cause number 1830 of 1999 (Koome J), *In the Estate of Lydia Karuru Ahmed (deceased)* Mombasa High Probate and Administration number 122 of 2001 (Khaminwa J), *In the Matter of the Estate of Yusuf Mohamed (deceased)* Mombasa High Court Probate and Administration number 434 of 1995 (Waki J) and *In the Matter of the Estate of Husseinbhai Karimbhai Anjarwalla* Mombasa High Court probate and administration number 118 of 1989 (Waki J).

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In *In the Matter of the Estate of Wilson Nzuki Nyolo* Machakos High Court probate and administration number 152 of 2000 (Mwera J), an intermeddler was ordered to vacate from premises belonging to the estate and to account to the proper administrator, while the tenants in properties of the estate were ordered to pay rent to the proper administrator.⁴²⁹ In *In the Matter of the Estate of Henry Ng'ang'a (deceased)* Nairobi High Court succession cause number 1330 of 1999, Koome J directed an agent appointed by the court to collect rents to furnish the court with a full and accurate account of the rents collected from the properties.⁴³⁰ In *Raphael Jacob Samuel v The Public Trustee and others*, Nairobi Court of Appeal civil appeal number 16 of 1980 the Court of Appeal stated that the Public Trustee who had been irregularly given a limited grant remained accountable to the subsequent personal representative for his stewardship under the limited grant while it was effective.

Neither the Law of Succession Act nor the Probate and Administration Rules give clear guidelines on what the account should contain and the format it should take. The Law of Succession Act of at section 76(iii) talks of an inventory or account of administration as required by section 83. Section 83(e) refers to a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings with the estate, while section 83(g) talks of a full and accurate account of the completed administration. Rule 25(5) of the Probate and Administration Rules merely talks of a true account of the estate of the deceased and of his administration of it.

19.5 ACCOUNTS UNDER THE PUBLIC TRUSTEE ACT

The Public Trustee Act is more elaborate. It gives, in the Public Trustee Rules, clear directions of the nature of accounts to be kept. Under rule 3, the Public Trustee is required to make a complete inventory of every estate of which he is the personal representative, keep an estates' cash book and a ledger account for each estate detailing all the monetary transactions, keep a file of all correspondence relating to the estate and keep in safe custody all the deeds and documents. Any person beneficially interested in the estate (such as a creditor, heir or beneficiary)

⁴²⁹ See also *In the Matter of the Estate of Dr John Muia Kalii (deceased)* Machakos High Court succession cause number 81 of 1996 and *The Estate of Elijah Ndambuki Kituku (deceased)* Machakos High Court probate and administration number 23 of 1993 (Mwera J).

⁴³⁰ See also *Irene Njoki Mucheru v Lillian Mucheru* Nairobi Court of Appeal civil appeal number 144 of 1989 (Gachuhi, Cockar JJA and Omolo Agl) and *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alis Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 (Kamau Agl).

is entitled to inspect and make copies of any deeds and other documents relating to the estate except the correspondence.

Upon the completion of the administration of an estate, rule 4 of the Public Trustee Rules requires the Public Trustee to file his account in the High Court and produce vouchers relating to the account and publish a notice in the official gazette and on notice boards at the High Court and at the office of the Public Trustee of the date appointed by the High Court for the passing of the account. The account is thereafter taxed by the taxing officer of the court after hearing any person interested in any of the property in the hands of the Public Trustee out of which the Public Trustee is liable to pay the account. The court after passing the accounts issues a certificate to the effect that the accounts have been examined and found to be correct. Where additional property is discovered after the certification of the accounts by the court, the Public Trustee may administer the estate in which event he must prepare and file a supplementary account in respect of the additional property.

Where the Public Trustee invests the funds under his control as allowed in rule 6 of the Public Trustee Rules, he is required to place the income earned from such investments in a Public Trustee Investment Income Account and deal with it as directed in rule 6(4) of the Public Trustee Rules.

19.6 FORM OF ACCOUNTS

The accounts should carry information and entries detailing all the transactions relating to the estate. They should not be in technical language since they are mainly intended for the consumption of beneficiaries and other interested persons who may not understand complex accounts. They also serve the purpose of informing the personal representatives themselves of the position of the estate at the material time.

The first step in setting up a proper accounting system is to ascertain the terms of the will of the deceased or, in intestacy, the relevant provisions of the Law of Succession Act. The will is usually the first document at the beginning of the estate book. The estate book is a collection of various documents and accounts, which are required for proper recording of the estate and the dealings in respect of it. It should contain an index, a copy of the will and or any observations, a memorandum, a schedule, a cash account, an income account, special income

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accounts, apportionment accounts and a distribution account. Only the last five items are necessary in cases where there is no life interest or minority.

(a) The memorandum

The information contained here is of a background nature. It should cover such matters as particulars of the deceased, his family, their respective domiciles, debtors and creditors, bankruptcy of companies in which the deceased held shares, deaths of beneficiaries, estate funds investment decisions, among others. The memorandum is an essential part of the accounting system, but it is itself not an account.

(b) The schedule

This is a record of the assets and liabilities as at the death of the deceased. It consists of two parts, one listing the assets while the other records the liabilities. It also has a remarks column in both parts where the events touching on any assets or liabilities are noted. It is a log of all the stages of the estate's existence. The recording of an asset in the assets column indicates the personal representative's acknowledgement of his awareness of its existence, not control over it. An entry of it in the liability column indicates the personal representative's awareness of a claim; it is not an admission of the claim's validity.

(c) The cash account

All the cash transactions of the estate are recorded here. Cash balances received by the personal representatives at the date of death or taking appointment are debited in the cash account, followed by cash receipts, whether from sale of assets or accrued income. Payments or expenses are recorded similarly on the credit side. The balances in the hands of the personal representatives at any particular time are ascertained by totalling the debits and credits and getting the difference between them. On the completion of administration, any cash balance is handed over to the residuary legatee and the entry of this event on the credit side automatically closes the cash account. The cash balance is however posted to the distribution account.

The recording of a debit in the cash account amounts to an acknowledgement of its receipt and is evidence of the personal representative's duty to account for it. For this reason, cash and bank balances should not be discharged and moved from

the schedule and entered into the cash account until such time that the personal representative is able to exercise control over them. Personal representatives only have control over cash in the bank upon the registration of the grant of representation with the bank. With respect to hard cash, control is attained when actual possession of the money is obtained. It is at this point that an appropriate entry should be made in the cash account.

(d) The income account

The income account records cash transactions affecting the property, the subject of a life interest, otherwise called a life tenancy. It is a specialised cash account limited to records of receipts that are of an income nature. It is supplemental to the cash account, and its format is therefore the same as that of the cash account.

(e) The special income account

This is in respect of specific income meant for a beneficiary other than the tenant for life. It applies in cases where a testator assigns the income from particular assets to specific person or class of persons, other than the tenant for life.

(f) The apportionment account

These are necessary where need arises to apportion income or expenditure between successive beneficiaries, say between a tenant for life and a remainder person.

(g) The distribution account

This is the final account, prepared at the completion of the administration. It facilitates the handing over of the estate to the beneficiaries or its distribution by the personal representatives in keeping with the terms of the will or the rules of intestacy. The preparation of the distribution account is often precipitated by some events, such as the termination of a life interest or coming of age of a legatee or remainderman. The distribution account brings to an end all other accounts, which are brought down and their details entered into the distribution account either as assets or liabilities. Where the cash account has a balance in its debit side the same will be transferred and brought down to the asset column of the distribution account. The same process applies to any balances in the income and special in-

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come accounts. Any winding up or legal costs are reflected in the liability column of the distribution accounts. The net estate, which is the difference, if any, between assets and the liabilities, is what is available for distribution among the beneficiaries. The next step is that the personal representatives ascertain the beneficiaries and determine the share of each of them either from the terms of the will or from the rules of intestacy. Money is easily apportioned and distributed, but real property and other forms of movable assets may have to be liquidated first to facilitate distribution.

19.7 ACCOUNTS MEANT FOR COURT PURPOSES

The accounts to be produced in court in a pending dispute should contain an inventory of all the assets owned by the deceased at the time of death, a list of all the debts owing by the deceased at the time of death, an account of the deceased's funeral and testamentary expenses, particulars of all receipts, particulars of all payments and transfers of assets, particulars of all assets vested in and held by the personal representatives at the time of the account and particulars of all outstanding liabilities at the date of the accounts.

Accounts may be required to be produced for court purposes either in probate and succession causes or in administration proceedings or in suits. In probate causes, production of an accounts may be ordered by the court under section 45 of the Law of Succession Act to be rendered by an alleged individual or executor de son tort at the confirmation of the grant or under section 71 of the Law of Succession Act and section 76 of the Law of Succession Act following the revocation of the grant. In administration proceedings, production of accounts may be ordered under sections 37(1) and 39 of the Civil Procedure Act and Order XXXVI, rules 1 and 2 and Order XX, rule 13(1) of the Civil Procedure Rules.

PART SEVEN

POST-MORTEM ALTERATIONS

CHAPTER TWENTY

DEPENDENCY AND FAMILY PROVISIONS

20.1 INTRODUCTION

Section 5(1) of the Law of Succession Act technically gives a testator total freedom to make a will disposing of any of his property by will to whomsoever he wishes.⁴³¹ This is called freedom of testation or testamentary freedom. The argument in favour of testamentary freedom is that the testator should be capable of doing what he likes with his property by will, just as he could have during lifetime. It is, however, not an absolute freedom, since after the testator's death the terms of the will may be altered by the court following an application under section 26 in Part III of the Law of Succession Act.⁴³² The argument against absolute freedom is to guard against the making of irresponsible wills by which members of the testator's family are deprived completely and the estate is given away to outsiders.

The dependency and family provisions of the Law of Succession Act deal with provision for persons who were dependent on the deceased prior to his death, but after his death find themselves inadequately provided for in his will or in intestacy or by gift in contemplation of death. These provisions act as a fetter to the operation of the doctrine of testamentary freedom. The provisions are designed to provide a measure of protection to a person's dependants. According to the Commission on the Law of Succession, the parallel with complete freedom to alienate *inter vivos* is not identical, since if a person were alive, their dependants could always seek the assistance of the courts in securing their rights to maintenance, and any irresponsible alienation of property during lifetime is always subject to family pressures which are non-existent after a person's death.⁴³³

431 See also *Irene Njoki Mucheru v Lillian Mucheru* Nairobi Court of Appeal civil appeal number 144 of 1989 (Gachuhi, Cockar JJA and Omolo AGJ) and *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alis Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 (Kamau AGJ).

432 The limitation of the freedom of testation goes back to 1938 when the Inheritance (Family Provisions) Act of the United Kingdom was passed empowering the court to interfere with freedom of testation at the instance of persons who had not been adequately provided for. Prior to that date testators in England enjoyed absolute freedom of testation. They could will away their property to persons of their own choice without making provision for persons who were dependent on them during their lifetime or who they were morally bound to provide for. This limitation, although introduced into English law in 1938, did not become law in Kenya until the Law of Succession Act came into force in 1981.

433 Report of the Commission at 31.

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The Court of Appeal in *Elizabeth Kamene Ndolo v George Matata Ndolo* (1995) LLR 390 (CAK) (Gicheru, Omolo and Tunoi JJA) stated that under the provisions of section 5 of the Law of Succession Act, every adult Kenyan has an unfettered freedom to dispose of his or her property by will in any manner he or she sees fit. This freedom, like all others, must be exercised responsibly and a testator exercising the freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. According to the court, the responsibility to the dependants is expressly recognised by section 26 of the Act. In the words of the Court of Appeal, section 26:

Clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependent on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family's only home and makes no reasonable provision for his children who were dependent on him during his lifetime, the court may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for.

Nambuye J in *In re estate of Ng'etich* [2003] KLR 84 and Koome J in *In the Matter of the Estate of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996 stated that although the testator has power to dispose of his property by will, the freedom is not absolute. Section 26 stipulates that a will is not absolute; where there is contention the court can interfere and make provision for a dependant left out of inheritance. Shah JA in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997, however, pointed out that in exercising the power given by section 26 the court should not re-write the wills of deceased persons. In the opinion of Shah JA section 26 provides only the power to make reasonable provision for a dependant who has not adequately been provided for in the will of the deceased.

Kuloba J in *In the Matter of the Estate of Sadhu Singh Hunjan (deceased)* Nairobi High Court succession cause number 107 of 1994 cautioned that the will of the departed must be honoured as much as is reasonably possible. Readjustments of the wishes of the dead by the living must be spared for the wills of eccentric and unreasonably harmful testators and, what he called 'weird wills'.

20.2 CATEGORIES OF APPLICANTS

Bosire JA in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997, stated that section 26 empowers a person who qualifies under section 29, called dependant, and who considers that a testator did not make reasonable provision for him in his will, to apply to court for an order making such reasonable provision for him as the court thinks fit. Akiwumi JJA in the same case pointed out that section 26 under which the application is brought, limits the right to bring such an application to a 'dependant' defined in section 29 of the Act. It, however, was emphasised by Waweru J in *In the Matter of the Estate of Ashford Njuguna Nduni (deceased)* Nairobi High Court succession cause number 1589 of 1994 that a dependant coming under section 26 is not in the same standing as a beneficiary under a will or an heir in intestacy. The term 'dependant' is a technical one, its utility is limited to Part III of the Law of Succession Act where the court is faced with an application brought under section 26 of the Act.

Section 29 gives three categories of persons who may take advantage of section 26 of the Act: the wife or wives, former wife or wives of the deceased; the children of the deceased; the deceased's parents, step-parents, grand parents, grand children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, half-brothers and half-sisters; and the husband, where the deceased is a woman.

Under the Law of Succession Act, the persons who can take advantage of the dependency or family provisions should be related to the deceased through either blood or marriage, and are limited to the categories of persons listed in section 29 of the Act. Persons who are not related to the deceased in any way or who are not members of his household cannot benefit under these provisions. The dependants in the first category, that is spouses and children, do not have to prove dependency. It would suffice for them to prove that they were either spouses or children of the deceased. The other categories of dependants have to prove dependency, which is that the deceased was maintaining them immediately prior to his or her demise.

The persons who would be applicants under the general law cannot succeed if they claim against an estate of a deceased Muslim so long as they fall within the classes of persons who are barred from benefit under Islamic law.⁴³⁴

434 See *Chelang'a v Juma* [2002] 1 KLR 339.

(a) Wife or wives of the deceased*(i) The persons entitled to apply*

Section 29(a) of the Law of Succession Act caters for wives married either under statute or under systems of marriage that allow polygamy. There is no requirement that the wife or wives prove that they were dependent on the deceased immediately before his death. All they have to do is to prove that they were validly married to the deceased. This category includes a judicially separated wife.⁴³⁵

A party to a voidable marriage, which has not been annulled prior to the deceased's death, should also benefit from section 26 of the Law of Succession Act. Such a party falls under the category of wife or wives of the deceased so long as she entered into the marriage in good faith, and during the deceased's lifetime the marriage was neither annulled nor dissolved nor did she enter into a later marriage. A woman married to another in the customary law woman-to-woman arrangement is a wife for the purpose of section 29(a) of the Law of Succession Act, and she is entitled to inherit the estate of the woman who had married her as was the case in *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001 (Kimaru J), *In re estate of Ng'etich* [2003] KLR 84 (Nambuye J) and *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)* Nairobi High Court civil number 1781 of 2001 (Koome J).

(ii) The position of a customary law wife married to a man with a wife married under statute

The position regarding women married under customary law by a man who had previously or subsequently contracted a statutory marriage initially presented a problem. Whereas the Law of Succession Act sought to recognise the children of the deceased regardless of the status of the children's mother's relationship with their father, the Act did not recognise the mothers of such children whose marriage to the deceased otherwise resulted in bigamy. The problem resulted from the failure by parliament to pass the Law of Matrimony Bill although the same was presented to parliament several times. The Law of Succession Act carries provisions whose operation were meant to be dependent on the proposed family law statute. Some of these provisions depart from the English law position embodied in the

435 See section 3(1) of the Law of Succession Act.

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current family law statutes. The proposed family law sought to harmonise the Law of Succession Act by changing Kenya's family legal regime to allow conversion of one's family law system from the statutory monogamous system to the potentially polygamous system.

Law of Succession Act specifically sought to address the plight of women who found themselves in the position of the customary law widows in the cases of *Re Ruenji's Estate* [1977] KLR 21 (Sachdeva J) and *Re Ogola's Estate* [1978] KLR 18 (Simpson J). In both matters, the deceased persons had previously contracted marriage under the African Christian Marriage and Divorce Act and subsequently purported to contract marriages to other women under customary law during the subsistence of the statutory marriage. The High Court held, in both cases, that by virtue of section 37 of the Marriage Act, the deceased lacked capacity to contract other marriages under any system of law, that the marriages so contracted were null and void, and that the women so married were not wives for any purpose (including succession). The position taken by the court in *Re Ruenji's Estate* [1977] KLR 21 (Sachdeva J) and *Re Ogola's Estate* [1978] KLR 18 (Simpson J), was considered unfair to both the women purportedly married under customary law and their children. It is often asserted that polygamy is allowed under African customary law and there is nothing inherently wrong for a man who had married under statute to contract other marriages under customary law during the subsistence of the statutory marriage. It is also argued that the concept of conversion of family law systems, which allows conversion from African customary law to English law and not vice versa, is unjust. It is also felt that the women and their children are innocent parties who should not be deprived of benefit from the estate of the person who maintained them during his lifetime.

The legislature sought to address the problem through an amendment of the Law of Succession Act, through the Statute Law (Repeals and Miscellaneous Amendments) Act of 1981, by introducing section 3(5), which provides as follows:

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

The amendment was intended to cater for the woman who contracts a marriage with a man who is already married to another woman under statute and, therefore, lacking capacity to contract another marriage under any other family law system.

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The provision cannot possibly be meant to protect the woman married under customary law to a man who seeks to contract a subsequent statutory marriage, since such a woman is adequately protected under the provisions of the Marriage Act, which make such a subsequent statutory marriage during the subsistence of the prior customary law marriage null and void as was held by the Court of Appeal *Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi* Nairobi Court of Appeal civil appeal number 66 of 1984 (Nyarangi, Platt and Kwach JJA). The provision clearly sought to circumvent section 37 of the Marriage Act and to reverse, through legislation, the decisions of the High Court in *Re Ruenji's Estate* [1977] KLR 21 (Sachdeva J) and *Re Ogola's Estate* [1978] KLR 18 (Simpson J), by recognising, as wives, women married to or by men who had no capacity to marry them by virtue of section 37 of the Marriage Act. The amendment gives primacy to the polygamous marriage at the expense of the statutory monogamous one and it treats the statutory monogamous marriage as secondary to the subsequent polygamous marriage. Some commentators have argued that section 3(5) sanctions adultery and bigamy, undermines the institution of marriage and encourages the breach of the marriage contract.⁴³⁶

This provision was a stopgap measure awaiting the passage into law of the Law of Matrimony Bill, which would have recognised such a woman married to or by a man who had contracted a previous statutory marriage. It is, however, not an ideal solution to the problem as it creates an untidy situation where the marriage statutes are in conflict with the Law of Succession Act. Whereas the woman married in contravention of section 37 of the Marriage Act is not a wife for any purpose, such a woman is recognised under section 3(5) of the Law of Succession Act as a wife and is entitled to inherit from the estate of the deceased in spite of section 37 of the Marriage Act.

Although the wording of section 3(5) has a very clear meaning, the initial judicial opinion gave the provision a contrary interpretation. In *In the Matter of the Estate of Reuben Nzioka Mutua (deceased)* Nairobi High Court probate and administration number 843 of 1986 (Aluoch J), the deceased had contracted a previous statutory marriage under the African Christian Marriage and Divorce Act and subsequently purported to contract another marriage under Kamba customary law during the currency of the statutory marriage. He died testate, leaving his entire estate to his statutory wife and her children. His will made no provision for the purported customary law wife and her children, who then moved the High Court under

436 See Patricia Kamari-Mbote (1995) at 30.

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section 26 of the Law of Succession Act for a reasonable provision for herself as a dependant and for the benefit of her children. The court, basing itself on section 37 of the Marriage Act and the High Court decisions in *Re Ruenji's Estate* and *Re Ogola's Estate*, found that the deceased lacked capacity to contract the customary law marriage and therefore the customary law 'wife' was neither a wife nor a dependant of the deceased.

The decision in the *Reuben Nzioka Mutua* case is not a correct application and interpretation of section 3(5). The court did not address its mind to the mischief in the law which section 3(5) sought to tackle, and the fact that the definition of wife in the provision covered a woman in exactly the position of the customary law wife in the matter. The decision was found by the Court of Appeal in *Irene Njeri Macharia v Margaret Wairimu Njomo and another* Nairobi Court of Appeal civil appeal number 139 of 1994 (Omolo and Tunoi JJA, and Bosire AgJA) to have been wrongly decided and not correctly stating the true position at law.⁴³⁷

(iii) *The position of a cohabitee*

In *In the Matter of the Estate of Stephen Ng'ang'a Gathiru (deceased)* Nairobi High Court succession cause number 500 of 1992 (Waweru J), the court adjudged that the applicant was not a wife or former wife of the deceased, as she did not fall within the definition of dependant in section 29 and therefore she could not bring an application under section 26 of the Law of Succession Act. Section 3(5) only covers the customary law wife; it does not aid a cohabitee. Whether the court finds in favour of the customary law wife depends on the evidence marshalled to prove the existence of a customary law marriage between the applicant and the deceased.⁴³⁸ (*Muigai v Muigai and another* [1995–1998] 1 EA 206 (Amin J) and *In the Matter of the Estate of Samuel Muchiru Githuka (deceased)* Nairobi High Court succession cause number 1903 of 1994 (Kamau JJ)). The proof of a customary law marriage for the purpose of section 26 should be as provided for under rule 64 of the Probate and Administration Rules.⁴³⁹

A cohabitee, however, can also bring an application under section 26 on the basis that she was a wife of the deceased by dint of prolonged cohabitation with the deceased. She has to convince the court that the said cohabitation gave rise to

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⁴³⁸ *Njoroge v Njoroge and another* [2004] 1 KLR 611 (Ojwang AgJ).

⁴³⁹ Proof of customary law and related matters is dealt with in Chapter 14 section 14.2(b)(ii) hereabove and Chapter 21 section 21.7

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a presumption of marriage between her and the deceased.⁴⁴⁰ The principles for determining a marriage out of cohabitation are clearly set out in a series of past decisions, prime among them being *Hortensiah Wanjiku Yawe v Public Trustee* Court of Appeal East Africa civil appeal number 13 of 1976 (Wambuzi P, Mustafa and Musoke JJA) and *Kisito Charles Machani v Rosemary Moraa* Nairobi High Court Miscellaneous civil case number 464 of 1981 (Porter J).⁴⁴¹

(b) Former wife or wives of the deceased

These fall under section 29(a) of Law of Succession Act and do not have to establish dependency. A former wife is a person whose marriage to the deceased was dissolved or annulled during the deceased's lifetime, either by a decree of divorce or annulment granted under Kenyan law or by an overseas divorce or annulment recognised in Kenyan law.⁴⁴² However, if the divorce court had granted an order for settlement under sections 27 and 28 of the Matrimonial Causes Act or the former wife had obtained a settlement under section 17 of the Married Women's Property Act of 1882, it would appear that she would not be entitled to relief under section 26 of the Law of Succession Act. Under section 28 of the Matrimonial Causes Act, the divorce court has power, upon pronouncing a decree of divorce, to make orders, founded on any ante-nuptial or post-nuptial agreements, as to the application of settled property.

(c) Children of the deceased

(i) The persons entitled to apply

These are covered under section 29(a) of the Law of Succession Act and they do not have to prove dependency. A child of the deceased includes a child *en ventre sa mere*, a child of a relationship outside marriage, a legitimated child⁴⁴³ and an adopted child.⁴⁴⁴ According to section 3(2) of the Law of Succession Act, it also includes a child whom the deceased has expressly recognised or accepted as his or for whom he has voluntarily assumed permanent responsibility.

440 See also *In the Matter of the Estate of Samuel Muchiru Githuka (deceased)* Nairobi High Court civil case number 1903 of 1994 (Kamau J).

441 See Chapter 14 section 14.2 (b)(ii) here above

442 See *In the Matter of the Estate of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996 (Koome J).

443 Section 5 of the Legitimacy Act (Chapter 145 Laws of Kenya).

444 Sections 174 and 175 of the Children Act (Act number 8 of 2001).

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The provision notably seeks to cater for all the children of the deceased. The definition of child under section 3(2) includes an unborn child, an illegitimate child, an adopted child or any child who had been recognised by the deceased as his own during his lifetime. Thus whereas questions might arise as to whether a woman is a wife or not for the purpose of succession, for example where bigamy has been committed, the children of such unions are protected under the Act. In *In the Estate of Reuben Nzioka Mutua (deceased)* Nairobi High Court Probate and Administration 843 of 1986 (Aluoch J), the applicant, a woman purportedly married under customary law to a man who had previously contracted a statutory marriage sought benefit under section 26 for herself and her children. The court held that she was not a wife. She produced certificates of birth, relying on section 3(2) of the Law of Succession Act, showing that the deceased was the father of her children and that he had recognised them as such. The court found that her children were children within the meaning of section 3(2) and therefore entitled to provision out of the estate of the deceased under section 26 of the Law of Succession Act. In *In the Matter of the Estate of James Ngengi Muigai* High Court succession cause number 523 of 1996 (Koome J) it was held that the children, whose paternity was contested, were children of the deceased since they had used his name during his lifetime and 'passed out' as his children under section 118 of the Evidence Act⁴⁴⁵ and section 12 of the Births and Deaths Registration Act.

Section 3(5) of the Law of Succession Act does not cover the children of a woman who is not able to bring herself within the cover of section 3(5). The decision by Nambuye J in *In Re Estate of Kittany* [2002] 2 KLR 720, where the woman claiming to be a customary wife within the meaning of section 3(5) was held not a wife under that provision, but her children were found to be children for the purpose of section 3(5), was obviously not properly made and it is not a true reflection of the law. Children can only be held to be children for the purpose of section 3(5) where their mother is found to be a wife under that provision. Children whose mother does not fall under section 3(5), nevertheless, are children of the deceased so long as they fall under section 3(2) of the Law of Succession Act.

(ii) *The position of adopted children*

Under section 171(1) of the Children Act upon an adoption order being made all the rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child are

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extinguished and all such rights, duties, obligations and liabilities vest in and are exercisable by and enforceable against the adopter inside marriage and the child stands to the adopter as a child inside marriage. Under sections 172, 174, 175 and 176 of the Act the child is entitled to a share from the estate of the adopter as if he were the natural or biological child of the deceased adopter. An adopted child cannot claim against the estate of their natural parent⁴⁴⁶ (Section 171(1) of the Children Act and *Re Collins deceased* (1990) 2 All ER 47). In *Re Callaghan* (1984) 3 All ER 790 it was observed by Booth J that the term 'child' referred to the relationship between the deceased and the applicant, and that it is not limited to a minor or dependant child. Age and marriage are not in themselves a bar to a claim.

(iii) *The position of the children of an adulterous union*

The Court of Appeal in *John Ndung'u Mubea v Milka Nyambura Mubea* Nairobi Court of Appeal civil appeal number 76 of 1990 (Gicheru, Kwach and Tunoi JJA) held that the children of an adulterous union are children for the purposes of succession. Waweru J in *In the Matter of the Estate of Stephen Ng'ang'a Gathiru (deceased)* Nairobi High Court succession cause number 500 of 1992, found that the applicant was not a wife of the deceased and that she and her child, sired by someone other than the deceased, were not dependants of the deceased. The court, however, held that the applicant's child with the deceased was a dependant for the purpose of section 26 of the Act.⁴⁴⁷ In *In the Matter of the Estate of Jonathan Mutua Misi (deceased)* Machakos High Court probate and administration number 95 of 1995, Mwera J found that a child the deceased had with a woman who was not married to him was a survivor and heir of the deceased, and was entitled to a share of the estate. Age is not a consideration. A dependant child does not have to be a minor to benefit under section 26 of the Act.⁴⁴⁸

The illegitimate children of a deceased Muslim man cannot rely on section 26 of the Act even if the deceased had recognised and accepted them as his own during his lifetime.⁴⁴⁹

446 Section 171(1) of the Children Act and *Re Collins deceased* (1990) 2 All ER 47.

447 The decision by Aluoch J in *In the Matter of the Estate of Reuben Nzioka Mutua (deceased)* Nairobi High Court probate and administration number 843 of 1986 was to the same effect

448 See *In the Matter of the Estate of Carey Kihagi Muriuki (deceased)* Nairobi High Court succession cause number 765 of 1994 (Koome J).

449 See *Chelang'a v Juma* [2002] 1 KLR 339.

Section 118 of the Evidence Act provides that it is conclusive proof of legitimacy where a child is born during the continuance of a valid marriage between the mother of the child and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried.

(d) Step-children and children whom the deceased had taken into his family

This category of children falls under section 29(b) of the Law of Succession Act and they are required to prove dependency on the deceased immediately prior to his death. A literal reading of section 29(a) and (b), however, appears to make it difficult to reconcile the placing of 'step-children' and 'children whom the deceased had taken into his family' in the category of persons who have to prove dependency with section 3(2) of the Law of Succession Act. Section 3(2) defines 'child' for the purpose of succession to include a child whom the deceased had expressly recognised as a child or accepted as a child of his own or over whom he voluntarily assumed permanent responsibility. This apparent overlap between section 29(a) and section 29(b) on the aspect of children can be explained thus: step-children, whom the deceased had not taken into his home or who were not under his care, have to prove dependency, but the step-children whom the deceased took under his wings fall under sections 3(2) and 29(a) and do not have to prove dependence.

Under Islamic law adopted and stepchildren have no right of inheritance from their 'father'.⁴⁵⁰ Such children cannot therefore benefit from section 26 of the Law of Succession Act.

(e) Other persons who were dependent on the deceased

This category falls under section 29(b) of the Law of Succession Act and includes the deceased's parents, step-parents, grandparents, grandchildren, brothers and sisters, and half-brothers and half-sisters. They all have to prove that they were being maintained by the deceased immediately before his death. This requires that the relatives establish that they were financially dependent on the deceased. It is considered that other persons may have maintenance obligations for such relatives. The provision embraces the traditional African practice under which a person is under an obligation to provide not only for members of his immediate family, but also for the extended

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family. There is an obligation, whether moral or legal, under customary law to maintain a very wide circle of relatives. This tradition is slowly dying out and the obligation to maintain a large body of relatives dies with the deceased. The rider in the family provisions is that such members of the extended family have to prove that they were being maintained by the deceased immediately prior to his death for them to benefit from section 26. The rider serves to cushion the estate from pressure by deceased's extended family.

Grandchildren are put in this category because under normal circumstances the primary responsibility over them falls on their own parents, not on the grandparents. If their own parents survive the grandchildren's deceased grandparents, the grandchildren would inherit through their own parents. The grandchildren would only be entitled to a share of their deceased grandparents' estate if their parents are dead or for some reason could not provide for them hence their dependence on the deceased grandparents. In *In the Matter of the Estate of Sadhu Singh Hunjan (deceased)* Nairobi High Court succession cause number 107 of 1994, Kuloba J held that the deceased had made reasonable provision for his late son and it was to be reasonably expected that his late son was to make reasonable provision for his wife and his own children just as his father had done for him and his sisters. The Court of Appeal in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997 (Akiwumi and Shah JJA, with Bosire JA dissenting) held that grandchildren are usually not direct dependants of the deceased, they have to prove dependency. So long as their parents are alive and take a benefit under a will or in intestacy, grand children are not considered as dependent on the deceased grandfather. They take through their own parents. They only become dependants where their parents predecease the grandfather or for some reason the parents are themselves dependent on the deceased. On the facts of the case, the grand children were not dependent on their deceased grand father but on their uncle, who was one of the respondents in the suit. In *In the Matter of the Estate of Clement Albert Etyang (deceased)* Nairobi High Court succession cause number 1099 of 2002 (Koome J) and *In the Matter of Nelson Kimotho Mbiti (deceased)* Nairobi High Court succession cause number 169 of 2000 (Koome J) the parents of grandchildren of the deceased persons were themselves dependent on their deceased father, meaning that the grandchildren were directly dependent on the grandfather. The court found that the grandchildren in both matters were dependants for the purpose of section 26 and made provision for them out of the estates.

In *In the Matter of the Estate of Benson Joseph Omondi Awinyo (deceased)* Nairobi High Court succession cause number 1183 of 2002, the application was by the father of the deceased. His claim was that his departed son was maintaining him immediately before the latter's demise. He adduced evidence to the effect that he was old and retired. The court directed that provision be made for him out of the estate.

(f) Husband of the deceased

Under section 29(c) of the Law of Succession Act where the deceased is a woman, her husband, if not adequately provided for in intestacy or under her will, will have to establish that he was dependent on her immediately before her death. This should be understood from the background of Kenyan family law, under which it is the duty of the husband to provide for the wife and not *vice versa*.

20.3 JURISDICTION AND PROCEDURE

(a) The procedure

A survivor, heir or beneficiary of the deceased who feels inadequately provided for under a will or in intestacy or through a gift in contemplation of death may move the court under section 26 of the Act for reasonable provision from the estate of the deceased. The application for the reasonable provision under section 26 of the Law of Succession Act should take the form of a petition⁴⁵¹ where no grant has been applied. Where a grant has been applied for or made but not confirmed it should be brought in that cause by a summons. In either case, it must be supported by an affidavit. The application may be made to either the principal registry or a High Court district registry or a resident magistrate's registry.

The application should be by the aggrieved person or someone on his behalf.⁴⁵² It would appear from the decisions of Akiwumi JA and Shah JA in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997 and Etyang J in *In the Matter of the Estate of Benjamin Ngumba Gachanja (deceased)* Nairobi High Court succession cause number 2172 of 1994 the person on whose behalf the application is brought is expected to swear and file affidavits in support of his case and also testify in court at the hearing of the application, unless if he is a minor.⁴⁵³ Bosire JA, in his dissenting judgement in

451 See rule 45(1) of the Probate and Administration Rules.

452 See section 26 of the Law of Succession Act.

453 See also *In the Matter of the Estate of Ashford Njuguna Ndumi (deceased)* Nairobi High Court succession cause number 1589 of 1995 (Waweru J).

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John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others Nairobi Court of Appeal civil case number 213 of 1997, took the position that that is unnecessary so long as there is ample evidence on dependency upon which the court can make a decision on the matter. Akiwumi JA in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997 stated that since an application for reasonable provision is likely to affect not only the executors but also the beneficiaries under the will and other beneficiaries, all those likely to be affected by the application should be made parties to the proceedings.

(b) Courts applying section 26 *suo moto*

Section 26 envisages a formal application by an aggrieved beneficiary or dependant. In the circumstances, the court should not apply section 26 of the Law of Succession Act on its own motion without there being an application by a party. The application of section 26 by the court *suo moto* in the cases of *In the Matter of the Estate of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996 (Koome J), *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001 (Kimaru J) and in *Re Estate of Ng'etich* [2003] KLR 84 (Nambuye J) was wrongful, and was done without authority. The inherent powers of the court cannot be used to confer jurisdiction where there is no application under section 26. It would appear in *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001 (Kimaru J) that the court, which was dealing with a revocation application, was not sure of the proceedings it was conducting. The court appears to have treated the proceedings as objection, revocation and family provisions proceedings all rolled up in one.

In a number of decisions, a section of the High Court has made decisions based on Part III of the Act in proceedings relating to objections to confirmation and revocation of grants of representation. Such decisions would be wrong if made in the absence of a formal application brought under section 26 of the Law of Succession Act⁴⁵⁴ In *In the Matter of the Estate of the Late Evanson Kiragu Mureithi (deceased)* Nakuru High Court succession cause number 163 of 1995, Ondeyo J, after conducting objection proceedings, made a finding that the objector was a

⁴⁵⁴ See also *In the Matter of the Estate of Serwenje Korko (deceased)* Eldoret High Court probate and administration number 31 of 1995 Nambuye J), *In Re Estate of Kittany* [2002] 2 KLR 720 (Nambuye J), *Muigai v Muigai and another* [1995–1998] 1 EA 206 (Amin J), *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 (Nambuye J), *In the Matter of the Estate of Chumo Arusei* Eldoret High Court probate and administration number 36 of 1998 (Nambuye J), *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court Probate and Administration number 157 of 2001 (Kimaru J) and *Re Estate of Ng'etich* [2003] KLR 84 (Nambuye J).

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dependant under section 29 of the Act. Etyang J in *In the Matter of the Estate of Benjamin Ngumba Gachanja (deceased)* Nairobi High Court succession cause number 2172 of 1994 while handling revocation proceedings made holdings founded on sections 26 and 29 of the Act in the absence of a formal application. The learned judge apparently went off tangent when he stated that where the deceased died testate the court has to decide whether the deceased had in his will reasonably distributed his property. This is not a correct exposition of the law. The court can only consider that when faced with an application under section 26.

In *In the Matter of the Estate of Samuel Muchiru Githuka (deceased)* Nairobi High Court succession cause number 1903 of 1994 Kamau J made certain findings on section 29 of the Act after hearing an objection application, and so did Aluoch J in *In the Matter of the Estate of James Mberi Muigai Kenyatta (deceased)* Nairobi High Court succession cause number 2269 of 1998. Etyang J in *In the Matter of the Estate of Morrison Muhika Njoroge and Loice Wamere Muhika (deceased)* Eldoret High Court succession cause numbers. 124 and 125 of 1996, while handling a confirmation application, got beneficiaries and dependants mixed up. He identified certain persons as beneficiaries and heirs. He went on to describe them as dependants under section 29 of the Act, when in fact there was no application for reasonable provision before him. In *In the Matter of the Estate of Peter Njenga Kinyara (deceased)* Nairobi High Court succession cause number 1610 of 2000, Koome J made findings on section 29 during revocation of grant proceedings in the absence of a formal application under section 26.

The correct position regarding section 29 appears to be that stated by Waweru J in *In the Matter of the Estate of Ashford Njuguna Nduni (deceased)* Nairobi High Court succession cause number 1589 of 1994, where he said that a dependant under section 26 and 29 of the Law of Succession Act is not in the same standing as a beneficiary under a will or an heir in intestacy. A dependant under section 29 does not refer to a general beneficiary or heir, but the one who moves or is entitled to move the court under section 26 of the Act. A clear distinction should be made between heirs and beneficiaries on the one hand, and dependants on the other hand. The term beneficiary is technically used to refer to the person who receives a gift in a will. An heir is the person entitled to inheritance in intestacy, and the categories of heirs are set out in sections 35, 36, 38, 39, 40 and 41 of the Law of Succession Act. Beneficiaries and heirs are not synonymous with dependants; they only become dependants upon being declared as such by the court following an application brought under section 26 of the Law of Succession Act.

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Objection proceedings turn on the issue of the entitlement to and the suitability of the petitioner to a grant of representation, and heirs and beneficiaries usually commence them. In intestacy, the persons who should file objection proceedings are those set out in sections 3(5), 35, 36, 38, 39, 40, 41 and 66 of the Law of Succession Act. In testate succession, the objectors should be those challenging the validity of the will. The qualification for bringing these proceedings is not dependency, but beneficial interest or heirship. In these proceedings, the only issue for determination should be whether the grant should be made to the petitioner. A court, which finds that the will, the subject of the application for grant, is valid, should not venture to determine whether the objectors are dependants. It should make a grant to the executors named in the will or if none are named to the persons entitled to the grant under sections 63, 64 and 65 of the Law of Succession Act. The issue of dependency should fall for determination in different proceedings. Likewise, confirmation and revocation proceedings are specific proceedings, designed to address specific issues and concerns. They are not suitable for addressing dependency matters. Needless to say, different principles guide the determination of these quite different and exclusive applications.

The practice by a section of the High Court of making findings based on Part III of the Act while handling confirmation, objection and revocation proceedings in the absence of a formal application for reasonable provision is a clear indication that the court, in such cases, is in fact handling the wrong application. The court's decision in the circumstances is an admission by the court that the applicant is only interested in or seeking for reasonable provision, but comes to court by the wrong procedure or files the wrong application. The best approach under those circumstances should be the dismissal of the objection, confirmation or revocation proceedings. The court, while dismissing the said proceedings, should advise the aggrieved party to bring the proper application under section 26 of the Act.

This was the approach adopted by Onyango Otieno J in *In the Matter of the Estate of Manibhai Kisabhai Patel (deceased)* Nairobi High Court civil suit (Milimani) number 2340 of 1996, Kasanga Mulwa J in *In the Matter of the Estate of Fatuma binti Mwanzi Umri (deceased)* Nairobi High Court probate and administration number 21 of 1994 and Kamau J in *In the Matter of the Estate of Syed Mohammed Arshad Shah Syed Hakamsh (deceased)* Nairobi High Court succession cause number 518 of 1997. In *In the Matter of the Estate of Abdehusein Ebrahimji Nurbhai alias Abdehusein Nurbhai Adamji (deceased)* Mombasa High Court succession cause number 91 of 2001, Khaminwa J in dismissing an application for revocation of grant, stated that

the applicant was apparently complaining about provision. The court pointed out provision is made for the dependants of the deceased under Part III of the Act. It was emphasised that the application for provision has to be made to court and the same does not involve the revocation of the grant. The court concluded that since such an application had not been made, the court could not make any orders under section 26 of the Act. Similarly, Koome J in *In the Matter of the Estate of David Wahinya Mathene (deceased)* Nairobi High Court succession cause number 1670 of 2004, while dismissing an objection to the making of a grant pointed out that where the claim is that the applicants were not provided for, the right course of action is to apply for reasonable provision out of the estate.

20.4 TIME LIMIT FOR APPLICATION

Under section 30 of the Law of Succession Act, the application may be made at any time before the confirmation of the grant.⁴⁵⁵ Rule 45(1) of the Probate and Administration Rules envisages two situations: where the application is brought before the petition for a grant is lodged, and where the application is brought after the filing of the petition for or the making of the grant but before the grant is confirmed. The estate is distributed after the confirmation of the grant. The application for reasonable provision should therefore be made before the distribution of the estate.⁴⁵⁶

The above position, however, makes the family provisions to be of utility mainly in testate succession cases because the contents of the will are made public before the making of the grant, and in intestacy where an heir is not listed in the application for grant among the survivors and persons entitled to benefit from the estate. It would be of little use to an heir in intestacy who is in the list of survivors but who is subsequently inadequately provided for during the confirmation process. Such an heir has a remedy, however, in revocation proceedings or in an application for a review of or setting aside of the confirmation order.

20.5 THE TEST OF REASONABLE PROVISION

The court may only order provision for an applicant falling within the categories set out in section 29 of the Law of Succession Act if it is satisfied that either the deceased's will, if any, or the rule of intestacy if the deceased died without leaving a valid will, or gift in contemplation of death, or a combination of all three or of

455 See *In the Matter of the Estate of James Karanja also known as James Kioi Karanja and also Known as James Karanja Kioi (deceased)* Nairobi High Court succession cause number 1366 of 1995 (A), (B) and (C) (Khamoni J).

456 See *In the Matter of the Estate of Syed Mohammed Arshad Shah Syed Hakamsh (deceased)* Nairobi High Court succession cause number 518 of 1997 (Kamau J).

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any two of them, do not make 'reasonable provision' for the applicant (section 26 of the Law of Succession Act). Section 28 of the Law of Succession Act sets down the standard of 'reasonable provision'.⁴⁵⁷

(a) Reasonable provision and African customary law

The majority of the bench in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997 (Akiwumi and Shah JJA) held that section 28 is in mandatory terms, the court should only consider the matters set out in the provision. The majority also stated that the provision does not allow the consideration of African customary law as suggested by Bosire JA and by the judge in the superior court. In their opinion the clear wording of section, 28 did not leave room for the consideration of African customary law. According to Bosire JA, in his dissenting judgement, what amounts to reasonable provision is not defined in the Act or the rules. All the Act does at section 28 is to set out the matters that the court may look at. In Bosire JA's opinion, section 28 of the Act does not limit the matters that the court may consider in making the order, as it is not exhaustive. He further expressed the opinion, with respect to the concept of reasonableness, that each case should be looked at in the context of its peculiar circumstances since what is reasonable in one case may not be in another. Reasonableness has to be considered in light of the applicant's circumstances as at the time of the hearing.

Visram J in *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased)* Nairobi High Court succession cause number 2322 of 1995, without referring to *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997, appeared to agree with the position taken by Bosire JA. Visram J considered Kikuyu customary law in deciding on the reasonableness of provision in that case, the point that an heir may be disinherited if he is cruel to his parents.

(b) Reasonable provision and fair or equal distribution

It was stated in *In the Estate of Cecil Henry Ethelwood Miller (deceased)* Nairobi High Court civil appeal number 1100 of 1991 (Githinji J) and in *In the Matter of the Estate of Ashford Njuguna Nduni (deceased)* Nairobi High Court civil appeal number 1589 of 1994 (Waweru J), that reasonable provision is not necessarily fair distribution

⁴⁵⁷ See *In the Matter of the Estate of Sadhu Singh Hunjan (deceased)* Nairobi High Court succession cause number 107 of (2002).

of the estate. Shah JA, in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court Appeal civil appeal number 213 of 1997, said that the question is whether the will or the disposition has made reasonable provision and not whether it was unreasonable on the part of the deceased to have made no larger provision for the applicant. It is not for the court to step into the shoes of the testator and substitute for the will with what it thinks the testator should have done.

(c) Reasonable provision and adequate provision

The Court of Appeal in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997, expressed conflicting opinions on whether reasonable provision also means adequate provision. Bosire JA considered the use of the term ‘adequate provision’ by the judge of the superior court as a slip on that judge’s part. In Bosire JA’s opinion, reasonable provision does not mean adequate provision. This contrasts with Shah JA’s opinion. He stated at one point that ‘sections 26, 27 and 28 of the Act cater for provision for dependants of the deceased not adequately provided for by will or in intestacy’. At another portion of his judgment, he said. Section 26 of the Act provides only the power to make reasonable provision for a dependant who has not adequately provided in the will of the deceased’. Apparently, a section of the judiciary interpret reasonable provision as being the same as adequate provision. Some judges, such as Kuloba J in *In the Matter of Sadhu Singh Hunjan (deceased)* Nairobi High Court succession cause number 107 of 1994, avoid the use of the word ‘adequate’ altogether.

The problem with the use of the term ‘adequate provision’ is a creation of the Act itself. The body of section 26 does not have the term. It simply provides for the making of reasonable provision where none has been made. The term ‘adequate’, however, appears in the marginal notes to section 26, which describe it as a ‘provision for dependants not adequately provided for’.

(d) Section 28 and disputes on distribution in intestacy

The provisions of section 28 are specific to applications brought under Part III of the Act. They are not for application where the court is called upon to deal with disputes relating to distribution of estates in intestacy. A section of the High Court

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treats section 28 as of general application,⁴⁵⁸ instead of limiting it to applications brought under section 26 of the Law of Succession Act. This approach is clearly wrong because section 28 clearly indicates that in considering whether any order should be made under Part III of the Act, the court should consider the matters set out in the section, it does not apply to applications brought under other Parts of the Act.

20.6 THE CIRCUMSTANCES TO BE CONSIDERED

Section 28 gives the guidelines that should assist the court in deciding whether the deceased has made 'reasonable provision' for the applicant, and whether to exercise its discretion under section 26 of the Act and make an order.

(a) The nature and amount of the deceased's property

The court should consider whether the estate has sufficient assets to meet the demands of the applicant. Visram J in *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased)* Nairobi High Court succession cause number 2322 of 1995, made the point that only the free estate of the deceased is available for the purposes of section 26 of the Act. In the instant case, the property, which the applicant was claiming, had been transferred to other people before the will was made. In *In the Matter of James Ngengi Muigai* Nairobi High Court succession cause number 523 of 1996, Koome J, before making the order for reasonable provision, considered the vastness of the estate of the deceased.

The court would be reluctant to interfere in the case of small estates.⁴⁵⁹ To discourage applications with respect to small estates where costs are likely to exhaust the estate the court should consider burdening the unsuccessful applicant with the costs.

(b) Any past, present or future capital or income from any source of the dependant

The court should have regard to the earnings or income, earning capacity, pensions and social security benefits of the applicant in ascertaining the applicant's capital and financial resources. Koome J in *In the Matter of the Estate of Benson Joseph*

⁴⁵⁸ See the decisions in *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001 (Kimaru J), *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 (Nambuye J), *In the Matter of the Estate of Chumo Arusei* Eldoret High Court probate and administration number 26 of 1998 (Nambuye J), *In Re Estate of Kittany* [2002] 2 KLR 720 (Nambuye J) and *In the Matter of the Estate of Senvenje Korko (deceased)* Eldoret High Court probate and administration number 31 of 1995 (Nambuye J)

⁴⁵⁹ See *Re Fullard* [1981] 2 All ER 796.

Omondi Awinyo (deceased) Nairobi High Court succession cause number 1183 of 2002, considered the fact that the applicant was a pensioner and was receiving financial support from his other children.

The applicant's financial obligations and responsibilities should also be taken into account.

(c) The existing and future means and needs of the dependant.

Account should be given to the applicant's current and future earnings and earning capacity, as well as the present and future needs of the dependant. The physical, financial and emotional circumstances of the applicant should be considered. Visram J in *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased)* Nairobi High Court succession cause number 2322 of 1995 stated that the applicant must demonstrate the need to be provided for under section 26 of the Law of Succession Act.

In *In the Matter of the Estate of Ashford Njuguna Ndumi (deceased)* Nairobi High Court succession cause number 1589 of 1994, Waweru J took into account the fact that the first applicant, the mother of the deceased, was elderly and had no dependants and decided that the property given to her in the will was adequate. With regard to the other applicants who were the brothers of the deceased, the court considered that they were middle-aged, in good health and capable of taking care of themselves. The court was not convinced that these applicants did not have any income from their own preoccupations or that they were wholly dependent on the deceased. In *In the Matter of the Estate of Clement Albert Etyang (deceased)* Nairobi High Court succession cause number 1099 of 2002, where the dependant was a four year old grandchild of the deceased, Koome J considered the child's future needs to be those regarding his welfare and education.

(d) Any advancement or other gifts made by the deceased to the dependant during the deceased's lifetime

Any *inter vivos* gifts made to the applicant by the deceased during the applicant's lifetime should be taken into account. In *In the Matter of the Estate of Benson Joseph Omondi Awinyo (deceased)* Nairobi High Court succession cause number 1183 of 2002 (Koome J), the court considered that the deceased, shortly before his death, had given a vehicle to the applicant. A nomination made in favour of the mother of the deceased was also considered.⁴⁶⁰

460 See also *In the Matter of the Estate of Ashford Njuguna Ndumi (deceased)* Nairobi High Court succession cause number 1589 of 1994 (Waweru J).

(e) The conduct of the dependant in relation to the deceased

The conduct of the applicant towards the deceased could be positive or negative.⁴⁶¹ The Court of Appeal in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number of 213 of 1997 (Akiwumi and Shah JJA, with Bosire JA dissenting), considered the fact that one of applicants was not in good terms with the deceased. He had emigrated to another country and hardly kept in contact with the deceased. He did not even attend the deceased's funeral: he apparently came home to present and prosecute the application for reasonable provision out of the estate. The other applicant was found to have also had problems with the deceased.

In *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased)* Nairobi High Court succession cause number 2322 of 1995, Visram J took into account that the relationship between the applicant and the deceased was less than cordial. The deceased had in fact stated in his will that the applicant had treated him with disrespect. The deceased had even been forced to seek protection of the police from the applicant and two other sons. The applicant and his errant brothers had also written to the deceased's bankers asking that the deceased be prevented from withdrawing money from the deceased's account. They had also sought to prevent the deceased from dealings with land registered in his name.

(f) The situation and circumstances of the case, including the deceased's reasons for not providing for the dependant

This is a general or omnibus provision that should cater for all the other reasons and excuses that explain the deceased's conduct. One such consideration is the deceased preferences. In *Elizabeth Kamene Ndolo v George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995 (Gicheru, Omolo and Tunoi JJA), the Court of Appeal took into account the fact that appellant was the deceased preferred wife, and in exercising its power under section 26 gave her house a larger share of the deceased estate. In *In the Matter of the Estate of Benson Joseph Omondi Awinyo (deceased)* Nairobi High Court succession cause number 1183 of 2002 (Koome J), the court considered the circumstances of the widow of the deceased, the possibility that she had the same condition which led to the deceased's death, and the fact that she would need funds for medical care.

⁴⁶¹ See *Williams v Johns* [1988] 2 FLR 475.

In *In the Matter of Sadhu Singh Hunjan (deceased)* Nairobi High Court succession cause number 107 of 1994 (Kuloba J), the applicants were the daughter-in-law of the deceased and his grandchildren. The first applicant's husband died a year after the deceased. The court took into account the fact the applicants were not directly dependent on the deceased during his lifetime as their breadwinner was alive and in fact survived the deceased. Secondly, the applicants' breadwinner had been reasonably provided for in the deceased's will, and it really fell upon him to provide for the applicants in his own will, or if he died intestate, the applicants be provided for from his estate. In the opinion of the court, the applicants' complaint appeared to be that their fortunes had changed for the worse rendering them destitute, which circumstance is not countenanced by sections 26 and 28 of the Law of Succession Act.

20.7 PROPERTY AVAILABLE FOR REASONABLE PROVISION

If the court decides to make an order in favour of a dependant, the order is made against the 'net estate' of the deceased.⁴⁶² The 'net estate' is defined in section 3(1) of the Law of Succession Act to mean the estate of the deceased person after payment of the statutory expenses, that is: funeral expenses, debts and liabilities, and expenses relating to the administration of the estate. According to Visram J in *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased)* Nairobi High Court succession cause number 2322 of 1995, only the free estate of the deceased would be available for reasonable provision. A nomination is not free property, and therefore it is not available for reasonable provision contrary to Koome J's decision in *In the Matter of the Estate of Benson Joseph Omondi Awinyo (deceased)* Nairobi High Court succession cause number 1183 of 2002.

20.8 FORMS OF PROVISION

Under section 27 of the Law of Succession Act, the court has discretion to make one or more of the following orders once it is satisfied that reasonable provision has not been made for the applicant, namely: a specific share of the estate be given to the applicant, or periodical payments, or a lump sum payment. This list is not exhaustive and the court may make any other orders that it may consider fit and just in the circumstances.

462 See section 26 of the Law of Succession Act.

(a) Transfer of a specific asset

This entails the allocation of a particular asset to the applicant out of the net estate. In *In the Matter of the Estate of Benson Joseph Omondi Awinyo (deceased)* Nairobi High Court civil case number 1183 of 2002, Koome J awarded a particular asset to the applicant: a motor vehicle. In *In the Matter of the Estate of James Ngengi Muigai (deceased)* Nairobi High Court succession cause number 523 of 1996 (Koome J), the court after ordering reasonable provision for the dependants out of the estate, directed two particular assets be vested or transmitted to them. In *Elizabeth Kamene Ndolo v George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995 (Gicheru, Omolo and Tunoi JJA), the Court of Appeal directed that the land the subject of the proceedings be subdivided into specified portions between the three houses. In *In the Matter of the Estate of Ashford Njuguna Nduni (deceased)* Nairobi High Court succession cause number 1589 of 1994, Waweru J directed that the applicants be given portions of a particular asset.

(b) Periodical payments

This is usually of a specified sum, or a sum equal to the whole or to some specific part of the income of the net estate, or periodical payments of the income produced from capital of the estate appropriated for the purpose.

(c) A lump sum payment

This may be by instalments. Such orders are common where the applicant was a spouse of the deceased or where the estate is small so that the amount of income produced for maintenance would be insufficient. In *In the Matter of the Estate of Clementt Albert Etyang (deceased)* Nairobi High Court succession cause number 1099 of 2002 (Koome J), ordered that a sum of KShs 400 000.00 be the reasonable provision for the minor applicant. In *In the Matter of the Estate of Benson Joseph Omondi Awinyo (deceased)* Nairobi High Court succession cause number 1183 of 2002 (Koome J), awarded a lump sum of KShs 100 000.00 to the applicant.

20.9 THE EFFECT AND BURDEN OF THE ORDER

The effect of the order is to alter the disposition of the estate of the deceased from the date of the death of the deceased for all purposes. The successful applicant is put in the position of a beneficiary.

CHAPTER TWENTY ONE

DISCLAIMERS AND VARIATIONS

21.1 INTRODUCTION

Although a testator has the power to dispose of all his or her property by will to whomever they wish, after the testator's death, the terms of the will or the rules of intestacy can be varied by the court under section 26 of the Law of Succession Act in order to make provision for certain categories of persons. A testator can dispose of property by will to whoever he wishes, but a beneficiary cannot be compelled to accept a gift. This also applies to entitlement to gifts on intestacy. A beneficiary who does not wish to accept a gift, for whatever reason, may either disclaim the gift or effect a variation to the will or the operation of the rules of intestacy.

21.2 DISCLAIMERS

A disclaimer is a rejection by a beneficiary of the property left to him under a will or to which she is entitled under the intestacy rules. It may be voluntarily made, usually because of a contract.⁴⁶³ To effect a disclaimer, the beneficiary should inform the personal representatives of his intention to disclaim. It can be done orally or in writing. In *In the Matter of the Estate of Huseinbhai Karimbhai Anjarwalla* Mombasa High Court probate and administration number 118 of 1989 (Waki J), the disclaimer took the form of a deed filed in court before the grant was issued. Where the disclaimer is made by an unincorporated association or by a body corporate, this should in either case be by resolution. The consent of the personal representatives is not required for a disclaimer.

In intestacy, all the persons entitled to a share of the estate should be provided for unless they have disclaimed the right to the share. In *In the Matter of the Estate of Mariko Marumbi Kiuru (deceased)* Nairobi High Court succession cause number 2011 of 1997 (Ang'awa J), it was stated that the Law of Succession Act takes into account daughters in the distribution of the estate unless there is a disclaimer of the right to inheritance by the daughters. In *In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased)* Nairobi High Court succession cause number 2678 of

463 See *Re Clout and Frewer's Contract* [1924]2 Ch 230.

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2001, Ang'awa J stated that where a beneficiary or heir does not wish to take up their share, they are at liberty to disclaim their right to the estate.⁴⁶⁴ In *In the Matter of the Estate of Grace Nguhi Michobo (deceased)* Nairobi High Court succession cause number 1978 of 2000, Koome J held that all the children of the deceased (whether male or female) are treated equally by the Law of Succession Act, and, unless a child has willingly disclaimed their interest, they should not be denied their inheritance merely because of their marital status.⁴⁶⁵

The right to disclaim is subject to some limitations. In the first place, a beneficiary cannot disclaim once they have accepted the entitlement that is, upon having their entitlement transferred to them or by receiving interest or income from the property. Secondly, if a beneficiary wishes to disclaim their entitlement, they have to disclaim the whole of their entitlement under the rules of intestacy or their entire gift under a will. A disclaimer cannot be partial. Thirdly, if a beneficiary disclaims their gift, whether under a will or under the rules of intestacy, she cannot select the person or persons who are to take it in their place.

Once the beneficiary has disclaimed their gift, the property passes as if the gift to beneficiary had failed. If the disclaimed gift by will is a non-residuary gift, the property will fall into residue. If the disclaimed gift is a residuary gift in a will, it will pass on intestacy. However, if the beneficiary disclaiming is a joint tenant or the gift is a class gift, the property passes to the surviving joint tenant or members of the class. If the property disclaimed is part of the beneficiary's entitlement on intestacy, it will pass to the other members of the same class of beneficiaries or, if there are none, to the class of persons next entitled.

The main shortcoming of a disclaimer is that the beneficiary loses control over the final destination of the property that they have disclaimed. It is often the case that the disclaiming beneficiary wishes to select the persons to take their place. This is not possible through a disclaimer, but it can be achieved through a variation.

464 See also *In the Matter of the Estate of the Late Wanjihia Njuguna (deceased)* Nairobi High Court succession cause number 533 of 2002 (Ang'awa J) and *In the Matter of the Estate of Mary Wanjiru Thairu (deceased)* Nairobi High Court succession cause number 1403 of 2002 (Ang'awa J).

465 See also *In the Matter of the Estate of Wilson Wamagata (deceased)* Nairobi High Court succession cause number 261 of 1998 (Githinji J) and *In the Matter of the Estate of Ellah Warue Nihawa (deceased)* Nairobi High Court succession cause number 971 of 2001 (Ang'awa J).

21.3 VARIATIONS

A variation takes the form of a direction from a beneficiary to the personal representatives, to transfer all or some of the entitlement of the beneficiary to someone else. It amounts to an *inter vivos* gift by the beneficiary to another. Since a variation is effectively an *inter vivos* gift, it might be thought that the formalities necessary to effect an *inter vivos* gift have to be complied with.

There are differences between a variation and a disclaimer. Firstly, the original beneficiary can control the ultimate destination of the property as he decides who is to benefit in his place. Secondly, unlike a disclaimer, which cannot be partial, a partial variation can be made. Thirdly, a beneficiary can still effect a variation once property has been accepted, and even after the estate has been completely administered.

PART EIGHT

THE GENERAL PRINCIPLES OF AFRICAN CUSTOMARY LAW AND ISLAMIC LAW ON SUCCESSION

CHAPTER TWENTY TWO

AFRICAN CUSTOMARY LAW OF SUCCESSION

22.1 INTRODUCTION

The Law of Succession Act was meant to codify and consolidate the then existing laws, including African customary law, into one comprehensive statute. The Act has replaced African customary law to some extent and to another, embodied some of its principles.

African customary law is the general law that applied to Africans in Kenya in the advent of colonialism. The applicable law was not a uniform body of law: different rules applied to the different tribal groups in Kenya. The general principles were, however, common among all the communities. This body of law continues to apply to indigenous Kenyans, under various circumstances, to this day.

22.2 GENERAL PRINCIPLES OF THE AFRICAN CUSTOMARY LAW OF SUCCESSION

Most traditional African societies in Kenya were patrilineal,⁴⁶⁶ except for the Digo and the Duruma who were matrilineal. In most African communities, the heirs are the deceased's family members.⁴⁶⁷ In patrilineal communities, the term family refers to the surviving spouse, children, the siblings and the parents. Where the deceased is a woman, the heirs include her co-wives and step-children. Dependants include the extended family and members of the clan who are to be traced to the same ancestor. In *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA) it was emphasised that the term 'patrilineal' should be confined to the natural issue of the deceased. In matrilineal communities, reference to family means members of the woman's family: her brothers, their children, her mother, her uncles and aunts and their children.

466 See *Koinange and thirteen others v Koinange* [1986] KLR 23 (Amin J), *John Ndung'u Mubea v Milka Nyambura Mubea* Nairobi Court of Appeal civil appeal number 76 of 1990 (Gicheru, Kwach and Tunoi JJA) and *Maina Muangi v Gachihi Njihia* Nairobi Court of Appeal civil appeal number 89 of 1998 (Gicheru, Tunoi and Owuor JJA), *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal number 19 of 1999 (Gicheru, Shah and Owuor JJA) and *Mbuthi v Mbuthi* [1976] KLR 120 (Harris J).

467 See *Mukindia and another v Margaret Kanario* Nyeri Court of Appeal civil appeal number 19 of 1999 (Gicheru, Shah and Owuor JJA).

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The rules of distribution among the patrilineal tribes differ, and three general patterns are discernible. One in some communities there is equal distribution among the sons or among the 'houses' in a polygamous household. Two, other communities allow equal distribution among the younger sons or junior 'houses' with a slightly larger share to the eldest son or the senior 'house'. Three, unequal distribution among the sons or 'houses' on a descending scale, each senior 'house' getting a slightly more than its next junior. The general pattern of inheritance in most African societies appears to be based on the equal distribution of the deceased's property among his sons. This was the case regardless of whether the deceased was a monogamist or a polygamist. In some cases, the eldest or youngest son is entitled to receive a larger share. The widows have a right during their lifetime to use the property of the deceased given to them by the deceased during his lifetime. Daughters usually have not right of inheritance, although in some communities they were entitled to a small share. Among the Pokot, for example, the daughters would be entitled to one cow upon their marriage.⁴⁶⁸ Where the deceased does not have sons, the estate devolves upon the nearest patrilineal relatives: the father, brothers of full blood, brothers of half blood, and paternal uncles.

One major feature of all customary laws is that the rules relating to distribution are not rigid, as is characteristic of African customary law in general. The administrator in customary law has a very wide discretion to vary the rules. In distributing the estate, he takes into account: the means and needs of the beneficiaries; the maintenance of the widows and unmarried daughters; and the fact that certain sons may yet be unmarried and require cattle or other property to pay dowry. The other factor common in all customary laws, is that any distribution to sons during the father's lifetime is taken into consideration.

In most African communities, property passes according to the rules of intestacy, although the practice of making wills is also recognised. Where a will is made, the same must not depart from the general pattern of inheritance. The property may also be distributed during the deceased's lifetime to the heirs as they get married.

The distributable estate of the deceased comprises of the following property: land, livestock, traditional movable property and modern property. Traditional

468 E Cotran *Restatement of African Law: 2 Kenya II The Law of Succession* London Sweet and Maxwell 1969 at 133.

movable property includes crops, furniture, spears, shields, ornaments, walking sticks, among others. The modern property would include modern furniture, radios, television sets, motor vehicles, money, bank accounts, company shares, shops, houses, and so on. Apart from property, the deceased's duties or obligations over various persons, such as widows, minors and other dependants, are also distributed. Obligations over claims by and rights over debts against third parties are also distributed.

22.3 DISTRIBUTION DURING LIFETIME

The deceased has power under customary law to distribute his property during his lifetime. This is usually what happens, particularly where the deceased is an elderly person. In *Karanja Kariuki v Kariuki* [1983] KLR 209 (Madan, Potter and Kneller JJA), it was stated that normally the deceased would allocate to each son upon getting married his share of both land and livestock. Whether the land given *inter vivos* is taken into account as part of the son's share of inheritance after the deceased's death varies from community to community. In some communities, such property is considered, while in others it is not.

Distribution during lifetime enables the person to depart from the general pattern of inheritance upon intestacy, that he may alter the shares to which each heir is entitled to under the intestacy rules. The person may not in the course of the lifetime distribution of his property, for whatever reason, disinherit an heir. Alienation of property, especially land, to strangers was frowned upon. A distribution made during lifetime is final and may not be altered by will.

22.4 TESTATE SUCCESSION

The institution of will making is not uncommon among traditional Africans. A person may make his will during old age or on his deathbed.⁴⁶⁹ The purpose of the oral customary will appear to deal more with the appointment of a successor to act as the head of the family with responsibility over the deceased's property and family, rather than to distribute the estate. Where the testator does allocate shares to the heirs, the general rule is that he cannot depart from the basic rules of intestate succession. In *Koinange and thirteen others v Koinange* [1986] KLR 23 (Amin J), it was stated although the institution of will making is recognised in Kikuyu customary law, the will so made must not depart from the general pattern of

⁴⁶⁹ See *John Kinuthia Githinji v Githua Kiarie and others* Nairobi Court of Appeal civil appeal number 99 of 1988 (Gachuhi J).

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inheritance. The practice is for the person to call a meeting of close relatives, that is: wives, sons, brothers, other relatives, friends and clansmen. He should then declare orally how his property is to be distributed between them, item by item. He should also appoint the administrator of his estate, and assign his debts and claims to particular relatives. In *Mukindia Kimuru and another v Margaret Kanario Nyeri* Court of Appeal civil appeal number 19 of 1999, Shah J stated that under Meru customary law, any man or woman who owns property may make a will provided that he is very old or on his deathbed. Such a will would be valid if made in the presence of clan elders, close relatives and friends, by declaring who shall be his elder owner of the home and appointing an administrator. In *Re Rufus Munyua (deceased) Public Trustee v Wambui* [1977] KLR 137 (Harris J), it was held that under Kikuyu customary law, a valid oral will may be made when the testator is on his deathbed in the presence of his close relatives by declaring how his property is to be distributed item by item and by appointing the administrator of his estate.

At customary law any person, whether male or female, who owns property may make a will, provided that the person is advanced in age, or on his deathbed.⁴⁷⁰ Normally relatives would not allow a young person to make a will, as doing so would be seen as inviting death. It is not permissible for a person who is drunk, insane or senile to make a will. A will once made does not take effect until the maker's death, but the will may be revoked or altered by a procedure similar to that followed in making it.

Will making allows the testator to deviate to an extent from the rules of intestacy under customary law. In general, however the testator should not bequeath land to strangers, although in some cases he may make small gifts to strangers. The testator may will property to members of the family who are not entitled in intestacy, but he should not deprive an heir his whole inheritance. He may make gifts to daughters; however, this should not include land. He is at liberty to alter by will the shares of heirs to give more to one than another. He may not however disinherit anybody by will.

22.5 DISTRIBUTION UPON INTESTACY

The distribution of a person's property upon intestacy depends largely on the marital status of the deceased. As a rule, the widows lose any rights of inheritance upon their remarriage or upon moving back to their parents.

470 Compare Z R Chesoni 'Divorce and Succession in Luyia Customary Law' in 2(3) East African Law Journal 165.

(a) Estate of a monogamist with sons and daughters

With respect to land, the widow is entitled to remain on the piece of land given to her by the deceased upon marriage. Upon her death, her portion goes to the son who has taken care of her, normally the youngest son. During her lifetime, she will have the right of use and cultivation over this land together with the youngest son. The rest of the land is divided equally among the other sons except that the eldest son may receive a slightly larger share. Daughters are not entitled to a share of the land. In *Kanyi v Muthiora* [1984] KLR 712 (Kneller JA Chesoni and Nyarangi A. JJA) it was held that under Kikuyu customary law, land is inherited by sons to the exclusion of married daughters.⁴⁷¹ In *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal number 19 of 1999, Shah J stated that under Meru customary law women do not inherit land on their father's side; they play their part in the family or clan in which they marry. In *Duncan Gachiani Ngare v Joseck Gatangi and others* Nairobi High Court civil case number 1460 of 1977, Muli J left out the daughters from the sharing of the estate of a deceased person because under Kikuyu customary law females do not inherit land or property from their fathers.

In some communities, the rules of intestacy allow unmarried daughters to inherit land. In *Estate of Mutio Ikonyo* Machakos High Court probate and administration number 203 of 1996, Mwera J stated that under Kamba customary law only unmarried daughters or those divorced (and dowry returned) can claim to inherit.⁴⁷² In *Kanyi v Muthiora* [1984] KLR 712 (Kneller JA Chesoni and Nyarangi AgJJA) it was stated that unmarried daughters were allowed under Kikuyu customary law to inherit land.⁴⁷³ Where the unmarried daughter has no child her share is for life, but if she has an illegitimate male child then that child can inherit her share.

The rules on distribution of livestock are the same as those for land. The widow is entitled to keep livestock given to her by her husband, which revert to the youngest son upon her death. The other sons share the livestock equally among themselves, although the eldest son may get a slightly bigger share. The widow will usually retain the furniture, as well as the crops that she had been

471 See also *Mary Wanja Gichuru v Esther Watu Gachuhi* Nairobi Court of Appeal civil appeal number 76 of 1998 (Kwach, Shah and Pall JJA) and *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA).

472 See also *Mumo v Makau* [2002] 1 EA 170.

473 See also *Mbuthi v Mbuthi* [1976] KLR 120 (Harris J).

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cultivating and shares them with the youngest son. Crops from the deceased's land are shared equally among the other sons, with the eldest son receiving a slightly larger share. Ornaments and weapons are inherited by the eldest son. Daughters are not entitled to any share of traditional movable property, but the mother may give them some crops.

(b) Estate of a polygamist with sons and daughters

The widows retain the land allocated to them by the husband during his lifetime, which reverts to each widow's youngest son upon her death. The rest of the land is divided by reference to each house in equal shares.⁴⁷⁴ In *Kanyi v Muthiora* [1984] KLR 712 (Kneller JA Chesoni and Nyarangi AgJJA) it was held that under Kikuyu custom if a man with two or more wives died without making a will, his land is shared equally by the houses; each wife and her children. The houses never die when there are heirs to the houses and it is irrelevant whether the wives are alive or not. In *Koinange and thirteen others v Koinange* [1986], KLR 23 (Amin J) held that the cardinal principle of Kikuyu customary law of inheritance is the observance of equality amongst the different households of the deceased person. It was further held that in the distribution, the senior house may receive a slightly larger share.⁴⁷⁵ The land is subsequently divided within each house as in a monogamous household. The livestock is similarly divided, except that livestock received as dowry for a daughter automatically goes to the house from which the daughter was married, and is not shared by the other houses. With respect to movable property, each widow retains the furniture in her house. The crops are distributed as in the case of the land on which they stand. The eldest sons of each house share the ornaments and weapons of the deceased.

(c) Estate of a married man with one or more wives, no children or daughters only

Each widow retains her portion of land and the livestock given to her by the husband during his lifetime. Widows also retain crops from the land they were cultivating and the furniture in their houses. The deceased's brothers inherit the ornaments and weapons.

⁴⁷⁴ See *Maina Muangi v Gachihi Njihia* Nairobi Court of Appeal civil appeal number 89 of 1998 (Gicheru, Tunoi and Owuor JJA).

⁴⁷⁵ See *John Ndingu Mubea v Milka Nyambura Mubea* Nairobi Court of Appeal civil appeal number 76 of 1990 (Gicheru, Kwach and Tunoi JJA), *In the Matter of the Estate of Kiiru Muhia 'A' (deceased)* Nairobi High Court succession cause number 2487 of 1996 (Rawal J) and *Mbuthi v Mbuthi* [1976] KLR 120 (Harris J).

(d) Estate of an unmarried man

The property of an unmarried man is usually shared out as follows:

1. by his father; or if dead or absent,
2. by his next younger brother; or if dead or absent, by his next older brother; or if dead or absent, by the son of his next younger brother; or in his absence,
3. by the son of his next older brother; or in his absence,
4. by his half-brother; or in his absence,
5. by the son of his half brother; or in his absence,
6. by his paternal uncles.

In *Mwathi v Mwathi and another* [1995–1998] EA 229 (Gicheru, Kwach and Shah JJA), the court held that where Kikuyu customary law applies to an intestate's estate, the property ought to be shared equally among the deceased's brothers, to the exclusion of the sisters, if any.

(e) Estate of a widow

The property of a widow, whether inherited from her husband or acquired by the woman, is inherited by her sons usually in equal shares. In some instances however, the youngest son, and in other cases the eldest son, may receive a slightly larger share. If there were no sons, the heir would be her deceased husband's brother.

(f) Estate of a married woman

The property, which a married woman holds, whether given to her by her husband or not, is inherited by the husband upon her death.

(g) Estate of an unmarried woman

Any property held by an unmarried woman is inherited by her father or in his absence by her full brother. Where there are several brothers, the estate is shared equally between them. If the woman had sons, they take priority over everyone else, and share the property equally. In *Mukindia Kimuru and another v Margaret Kanario Nyeri* Court of Appeal civil appeal number 19 of 1999, Shah JA stated that it was a matter of general notoriety that under Meru customary law, the property of an unmarried girl is inherited by her father, or in his absence by her eldest full brother, who is expected to share in unspecified amounts with her other full brothers.

22.6 ADMINISTRATION OF ESTATES

The administrator in customary law may be appointed either by will or by the family elders in intestacy.⁴⁷⁶ Usually after the burial and mourning, there would be a meeting of the elders, whose agenda would be to appoint or confirm an administrator and to discuss the inheritance and assign debts and claims. The elders usually appoint an elder son as administrator; unless there was good cause to pass him over. If the son is still a minor, the elders would appoint the deceased's eldest brother as was the case in *Ngeso arap Leseret v Ibrahim* [1929–30] 12 KLR 50 (Sir Jacob Barth CJ). Where there are no sons, the elders would appoint other male relatives of the deceased into the office.

There are three principal functions of an administrator in customary law of succession. In the first place, he becomes the head of the family of the deceased, and in that respect represents the family for all legal purposes. Secondly, he is the legal guardian of the widow and the children of the deceased in certain cases. Thirdly, he acts as the administrator of the deceased's estate.

The duties, rights, powers and liabilities of a customary law administrator are similar to those of the personal representative under the Law of Succession Act. The main duty of the administrator is to assume control over the property to be distributed. He has power, for example, to ask tenants-at-will to vacate land leased to them by the deceased. The administrator is also liable to be sued for debts owed by the deceased, except where such debts have been assigned to particular heirs. The administrator will also be responsible for payment out of the estate of any funeral expenses. It also falls upon the administrator to distribute the shares to the heirs. This should be in accord with the deceased's wishes as expressed in a will or according to the rules of intestacy as directed by the elders. Where there are minors, the administrator acts as the trustee of the property of minor heirs until they reach the age of majority. In *Gituanja v Gituanja* [1983] KLR 575 (Potter, Kneller JJA and Chesoni AgJ) and *Njuguna v Njuguna* [1984] KLR 527 (Madan, Law and Potter JJA), the Court of Appeal held that under Kikuyu customary law upon the death of the father the eldest son assumes title, as trustee over the land, but his rights are no more than that of other family members. He cannot sell the land or dispose of it in any other manner. He is essentially a trustee for his mother and other family members.

476 *Njuguna v Njuguna* [1984] KLR 527 (Madan, Law and Potter JJA).

The appointment as administrator whether by will or by the elders in intestacy may be revoked by the elders. In that eventuality, the elders appoint another administrator as a replacement. The elders resort to such action where the administrator is not performing his functions effectively. The functions of the administrator of the estate cease on the revocation of the appointment, upon death, or on the full administration of the estate.

22.7 PROOF OF AFRICAN CUSTOMARY LAW

The law requires that customary law must be proved as a matter of evidence.⁴⁷⁷ This means that it should be treated rather differently from legislation, common law and equity. Since customary law is unwritten, witnesses must prove it. The Privy Council in the Ghanaian case of *Angu v Attah* (1916) PC 1874–1928, 43 laid the rule on this point as follows:

As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them.

The statutory basis for proof of customary law in Kenya is the Evidence Act (Chapter 80 Laws of Kenya) and the Civil Procedure Act. Under section 51 of the Evidence Act, persons who are likely to know of its existence can adduce evidence concerning opinions relating to custom or right. In *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] EA 735 (Newbold VP and Crabbe JA, Duffus JA dissenting) it was held where customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it. The witnesses need not be experts as expert evidence is not necessary to establish customary law. The witnesses need not even be Africans.⁴⁷⁸ The Civil Procedure Act at section 87 provides that the court may call in the aid of assessors in any cause or matter in which questions may arise as to the laws or customs of any tribe, caste or community. The assessors' duty is to advise the court on matters of which they have special knowledge and in particular of the relevant customary law. Assessors are not expert witnesses.

The powers of the court to take judicial notice of customary law was stated

⁴⁷⁷ See *Otiato v Otieno* [1990] KLR 721 (Mango J) and *Atemo v Imujaro* [2003] KLR 435 (Omolo, Shah and Waki JJA).

⁴⁷⁸ See also *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA).

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in the rule in *Angu v Attah* (1916) PC 1874-1928, 43 to the effect that where particular customs have frequently been proved in the courts to the extent of being notorious the court will take judicial notice of them. It is not clear whether under the Evidence Act customary law may be judicially noticed. Section 60(1) of the Evidence Act provides that courts should take judicial notice of all written laws and all other laws, rules and principles, written or unwritten, having a force of law in any part of Kenya. The reference to unwritten law in the provision implies that the courts may take judicial notice of African customary law. In *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] EA 735 (Newbold VP, Crabbe and Duffus JJA), the Court of Appeal for East Africa (with Duffus JA dissenting) took the view that the rule in *Angu v Attah* (1916) PC 1874-1928, 43 applies and that customary law cannot be judicially noticed unless it has become notorious. The Court of Appeal in *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Masime and Kwach JJA, with Hancox CJ dissenting) held that the Kikuyu custom that a married woman cannot inherit her father's land was sufficiently notorious for the court to take judicial notice of and evidence was not required to establish the custom, which was a salutary one and ensured that the land remained in the family.

By virtue of the rule in *Angu v Attah* (1916) PC 1874-1928, 43 and the decision of the Court of Appeal in *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] EA 735 (Newbold VP, Crabbe and Duffus JJA) judicial precedent is an acceptable mode of ascertaining customary law.⁴⁷⁹

The growth in volume of material on customary law in the form of restatements, textbooks, articles, reports and other materials has meant that this aspect of proof of customary law has gained importance. Customary law may be proved as a fact by documentary as well as oral evidence. Books or manuscripts purporting to describe customary law are admissible in evidence. Where the statements of law are treated as binding or conclusive then the book is an authority and customary law is administered as law, but where the statements are treated as evidence of what the customary law is then, the law is ascertained as a fact. The legislative provisions in the Evidence Act on this are in sections 33, 41 and 60.

In *Mwathi v Mwathi and another* [1995-1998] 1 EA 229 (Gicheru, Kwach and Shah JJA), the Court of Appeal treated the statements of law on Kikuyu customs in

479 See also *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA).

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Eugene Cotran's Restatement of African Law: 2 Kenya II The Law of Succession regarding the distribution of the estate of an intestate as binding or conclusive on the matter.⁴⁸⁰ The Court of Appeal in *Atemo v Imujaro* [2003] KLR 435 (Omolo, Shah and Waki JJA) cautioned against treatment of Cotran's Restatements as binding on every issue of customary law in Kenya. It was stated that customary law is dynamic and the law as stated in the *Restatements* might not be the true position today. In *Gituanja v Gituanja* [1983] KLR 575 (Potter, Kneller JJA and Chesoni AgJA) and *Mary Wanja Gichuru v Esther Watu Gachuhi* Nairobi Court of Appeal civil appeal number 76 of 1998 (Kwach, Shah and Pall JJA) the Court of Appeal similarly treated Jomo Kenyatta's *Facing Mount Kenya: The Tribal Life of the Gikuyu*⁴⁸¹ as binding or conclusive on land inheritance among the Kikuyu.

For the purpose of causes or matters brought under the Law of Succession Act, rule 64 of the Probate and Administration Rules provides that where any party desires to provide evidence as to the application or effect of customary law, he may do so by calling oral evidence or by reference to any recognised treatise or other publication on the relevant customary law. Rule 64 does not introduce customary law to situations covered by the Act as suggested by Githinji J in *In the Estate of Mwangi Mbothu (deceased)* Nairobi High Court succession cause number 494 of 1994, rule 64 it merely provides for proof of customary law.

480 Cotran's Restatement was also relied on in *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)* Nairobi High Court succession cause number 1781 of 2001 (Koombe J), *Mukindia Kimuru and another v Margaret Kanario Nyeri* Court of Appeal civil appeal number 19 of 1999 (Gicheru, Shah and Owuor JJA), *Kanyi v Muthiora* (1984) KLR 712 (Kneller JA Chesoni and Nyarangi AgJJA), *Wambugu w/o Kimani v Stephen Nyaga Kimani* (1988-1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA), *Mary Wanja Gichuru v Esther Watu Gachuhi* Nairobi Court of Appeal civil appeal number 76 of 1998 (Kwach, Shah and Pall JJA), *In the Matter of the Estate of Samuel Muchiru Githuka (deceased)* Nairobi High Court succession cause number 1903 of 1994 (Kamau J), *Karanja Kariuki v Kariuki and others* [1983] KLR 209 (Madan, Potter and Kneller JJA), *In the Matter of the Estate of Gathererie Muturi (deceased)* Nairobi High Court succession cause number 2170 of 1999 (Koombe J), *Njuguna v Njuguna* [1984] KLR 527 (Madan, Law and Potter JJA), *Gituanja v Gituanja* [1983] KLR 575 (Potter, Kneller JJA and Chesoni A.JA), *John Ndung'u Mubea v Milka Nyambura Mubea* Nairobi Court of Appeal civil appeal number 76 of 1990 (Gicheru, Kwach and Tunoi JJA), *Koinange and thirteen others v Koinange* [1986] KLR 23 (Amin J) and *Mbuthi v Mbuthi* [1976] KLR 120 (Harris J)

481 London, Mercury Books, 1961. See also *Wambugu w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292 (Hancox CJ, Masime and Kwach JJA).

CHAPTER TWENTY THREE

THE ISLAMIC LAW OF SUCCESSION

23.1 INTRODUCTION

Islamic law was, for a long time before colonialism, the law governing Muslims in Kenya. The advent of colonialism saw the continued application of Islamic law to Muslims, especially on their personal law matters. The Law of Succession Act sought to end this practice by providing a uniform code of succession applying to all the residents of Kenya.

The distributable estate of the deceased includes all rights to property, rights connected with property and other related rights, such as debts, compensation, among others.⁴⁸² The duties arising from the estate are those that are capable of being satisfied out of the estate. The residue after payment of funeral expenses and the discharge of all obligations and debts is distributed according to Quranic principles.

23.2 GENERAL PRINCIPLES OF ISLAMIC LAW OF SUCCESSION

Inheritance is a matter of great importance to Muslims, and for this reason, the law of succession is a crucial aspect of Islam. Islam is considered a complete way of life or culture. The Islamic legal term for inheritance is *mirath*, which means the inheritance to be shared from the property of the deceased among his successors. The Islamic law of inheritance is scientific and exact. It guides as to who is inherited, inherits, and in what shares.⁴⁸³ The distributable property will be all the property that the deceased owns, without distinguishing between personal and family property. The main criteria for inheriting property in Islam are relationship by blood and marriage. Islamic law recognises both testate and intestate succession. The Quranic rules also give a Muslim the freedom to dispose of his property during his lifetime.

Only a third of deceased person's estate can be disposed of by will. The remaining two thirds are distributed under the rules of intestacy which are laid out in the Quran. The Quran fixes the shares allocated to the persons identified

482 Sh S Mahmood, Principles and Digest of Muslim Law, Lahore, Markazi Kutubkana, 1960 at 220.

483 A Ahmad, Islamic Law in Theory and Practice, Lahore, The All Pakistan Legal Decisions, 1956 at.506.

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in the holy book as heirs. In *Chelang'a v Juma* [2002] 1 KLR 339 (Etyang J) it was stated that Islamic law has fixed the shares of each heir and the said shares cannot be changed, modified, added to or deleted by anyone. The heirs include the surviving spouse, parents and children of the deceased. Grandparents will usually inherit if heirs in the nuclear family cannot inherit for whatever reason. Generally, both sons and daughters are entitled to a share, although sons take a share larger than that of daughters.

The rules regulating succession in Islam are founded on the principle that the deceased's property should devolve on those, who by reason of consanguinity or marital relations, have the strongest claim. Where there are many claimants and it is difficult to settle the claims, the estate would be distributed among the claimants in such order and proportions as are in harmony with the natural strength of their claims.

23.3 DISTRIBUTION DURING LIFETIME

Islamic law permits a person to give away all his property by gift *inter vivos*. It is, however, expected that the person would think of his dependants, and not give away his property in a manner, which leaves them destitute.

23.4 TESTATE SUCCESSION

Will making is allowed, and even encouraged, under Islamic law. However, the testamentary capacity of a Muslim is subjected to two limitations, namely: he can only bequeath one-third of his property by will, and even then, he cannot give any part of the one-third to his heirs as stated in *Re the Estate of the Late Suleiman Kusundwa* [1965] EA 247 (Sir Ralph Windham CJ), *W B Keatinge v Mohamed bin Seif Salim and others* [1929–30] 12 KLR 74 (Thomas J) and *In the Estate of Faiz Khan, deceased* [1929–30] 12 KLR 74 (Thomas J).⁴⁸⁴ The one-third can only be willed to outsiders or strangers, but the willable one-third may be bequeathed to the testator's heirs with the consent of heirs. Testamentary power is exercisable by any Muslim who is sane, rational and above the age of fifteen. A will is vitiated by undue influence or fraud,⁴⁸⁵ and can be revoked at any time by the testator before his death or by the operation of the law.

484 *Anarali Museraza* (a minor by his next friend) *Mohamedtaki AP Champsi v Mohamedali Nazerali Jiwa and others* [1966] EA 117 (Wicks J).

485 *Ahmad (supra)* at 478

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According to Sir Clement de Lestang in *Mohamed Thabet Ali Maktari v Mohamed Rageh Mohamed Saleh Maktari and others* [1966] EA 35, under Islamic law, a will may be made either orally or in writing. It does not have to take any particular form. If oral, it must be made in the presence of two male adult Muslim witnesses. If it is in writing, it need not be signed and if signed it need not be attested.⁴⁸⁶ In *W. B. Keatinge v Mohamed bin Seif Salim and others* [1929-30] 12 KLR 74 (Thomas JJ) it was held that an oral will would require two male adult Muslim witnesses, but in the absence of witnesses, the will would stand good if approved by the heirs. A similar holding was made in *In the Estate of Faiz Khan, deceased* [1929-30] 12 KLR 74 (Thomas J), where it was held that where there is a reputable witness supported by other witnesses, the court may accept the evidence of the reputable witness where it differs from that given by the other witnesses. The will of a Muslim need not be attested as the Quranic injunction regarding witnesses is considered to be a mere recommendation, it is not mandatory. What really matters is the intention of the testator and so long as the intention of the testator is reasonably clear the will takes full effect. It was, however held in *Mohamed Thabet Ali Maktari v Mohamed Rageh Mohamed Saleh Maktari and others* [1966] EA 35 (de Lestang AVP, Duffus and Law JJA) that where the alleged will is neither written nor signed by the maker and its validity depends solely on oral evidence the court should treat such evidence with caution and act on it only if it is reliable.

What is available for distribution by will is a third of the residue of the estate after the payment of debts and other liabilities.⁴⁸⁷ The Quranic rules require that the subject matter of the bequest be in existence at the time of the testator's death, and not at the time of the making of the will. If the gifts exceed the allowed one-third, they would not take effect. The gifts in excess of the one-third may take effect with the consent of the heirs which must be obtained after the testator's death. If the consent is not available, then the gift fails or abates.⁴⁸⁸

As mentioned above, the one-third of the estate can be bequeathed to strangers. This can be to any person who is capable of holding property, regardless of his religion. A bequest can also be made to an institution or for a religious or charitable object that is not opposed to Islam. The beneficiary must be alive or in existence at the time of the bequest, and not necessarily at the time of the testator's death. A bequest to an heir is invalid. The killer of the testator cannot inherit from the deceased, and a gift to the killer therefore lapses. The death of a beneficiary before that of the testator automatically results in the lapse of the gift.

486 Ahmad (*supra*) at 478

487 NBE Baillie, Digest of Moohummudan Law, Lahore, Premier Book House, 1958 at 233.

488 Mahmood (*supra*) at 196, 198.

23.5 INTESTACY

The other two-thirds that are not subject to testate succession are disposed of in accordance with the rules of intestacy. The Quran contains rules for the disposal of intestate property. It provides for inheritance by both male and female relatives of the deceased and for a share for everyone entitled however small the estate.⁴⁸⁹ Under these rules, all kinds of property are subject to the Islamic law of intestacy, but the issue of inheritance only comes up when the deceased has left some property. The nearer relative precludes the distant relative from inheritance. The distribution in intestacy is after the payment of debts and legacies.

The shares of the various heirs are fixed under the Quranic rules of intestacy, and cannot be interfered with or exceeded. In *Manser bin Simba v H. Fitzgerald Reece as Trustee for Mwana Aisha binti Juma* 1918-22) 2 ZLR 30 (Reed ACJ, Barth CJ and Pickering J) it was held that a Muslim heir may sell his interest in the estate, but the heir in the circumstances cannot sell more than their Quranic share in the estate. The Quran gives the son a portion equal to that of two daughters. In *Juma bin Mwenyezagu v Mwenye bin Abdulla* (1897-1905) 1 EALR 95 Hamilton J stated that under Islamic law a son is entitled to inherit the estate of his deceased father on the ground of the acknowledgement of paternity only by the deceased. It was also said that the proof of the marriage of the son's mother with the deceased is not necessary.

The fixed shares are laid down in the Quran for each of the deceased's relatives. The precise shares are specified as follows: for the widow (one-eighth) and widower (one-quarter), for the father (one-sixth) and mother (one-sixth), for daughters (one-half), for full and consanguine sisters (one-half) and for uterine brothers and sisters (one-sixth).⁴⁹⁰ If there are only daughters, their share is equivalent to two-thirds of the estate subject to intestacy. If the only child is a daughter, her share is one-half of the estate available for distribution in intestacy. Each surviving parent is entitled to a sixth of the intestate estate if the deceased leaves children. If there are, no children and the parents are the only heirs; the mother takes one third while the father takes the other two thirds of the available estate. If, however, the deceased is survived by parents but no children and siblings, the mother of the deceased will take a sixth.⁴⁹¹

489 Quran, Chapter 4 verse 7

490 The Sunni school includes in the distribution the parental grandfather, the true grandmother and the son's daughter.

491 Quran, Chapter 4 verse 11.

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Heirs are divided into seven classes: three principal and four subsidiary classes. The three principal classes are Quranic, agnatic and uterine heirs.⁴⁹² The subsidiary classes are successor by contract, acknowledged relative, sole legatee and the state. The intestate property goes in the first instance to the Quranic heirs. If the Quranic heirs do not exhaust the estate or there are no such heirs, it goes to the agnatic heirs. In the absence of Quranic and agnatic heirs, the property is divided among the uterine heirs. The heirs in the subsidiary category inherit only if the principal heirs are not there.

There are certain impediments to inheritance. These may be complete or partial. There are three general categories of persons who are barred or excluded from benefit.

The first category is that of persons who are excluded from inheritance because of their conduct or attributes. In this category are the killer of the deceased whose estate is the subject of inheritance. Homicide bars the killer absolutely from inheriting the property of the victim.⁴⁹³ Difference or change of religion is the other consideration.⁴⁹⁴ A non-Muslim may not inherit in intestacy. In *Chelang'a v Juma* [2002] 1 KLR 339 (Etyang J) it was held that under Islamic law a non-Muslim cannot inherit the estate of a Muslim. In that matter a daughter and siblings of the deceased Muslim, who confessed to be Christians, were excluded from benefit because of their being non-Muslims. It was held, however, that the mother of the deceased who was a non-Muslim was nevertheless entitled to a share of the estate under Islamic law as a dependant. It is, however, permissible for a Muslim to benefit a non-Muslim by will.

Islamic law recognises certain marriages between Muslim men and non-Muslim women. Where a Muslim man contracts a marriage with a *kitabiah* that is with a Jewess or Christian woman, but not with a pagan or idolatress, the marriage will be valid. In *Re Salum* [1973] EA 522, Mfalila AgJ held that a Christian widow in the matter was entitled to a share of the deceased's estate as Islamic law recognised her marriage to the deceased.

Slavery is another bar to inheritance.⁴⁹⁵ This is, however, of no relevance today since slavery has been outlawed.

492 SA Ali, *Mohammadan Law*, Lahore, All Pakistan Legal Decisions, 1965 at 269-290; Mahmood (*supra*) at 269-290, Ahmad (*supra*) at 519-630; Baillie (*supra*) at 273-275.

493 Ahmad (*supra*) at 516, Baillie (*supra*) at 266.

494 Ahmad (*supra*) at 517

495 Baillie (*supra*) at 267 See also *Ahmed bin Abdallah v Administrator of Native Estates* [1924-1926] 10 KLR (Sir T S Tomlinson CJ Russell CJ and Reed J).

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The second category is of potential heirs who are excluded from inheritance because of the immediacy of certain other recipients who are closer to the deceased.⁴⁹⁶ Relatives of the second grade do not inherit if there is a relative, among the survivors, who is of the first grade. The general rule is that an heir who relates to the deceased through another, or who is remoter, does not inherit if the latter are among the survivors. In *In the Matter of the Estate of Robert Napunyi Wangila* (Nairobi) High Court succession cause number 2203 of 1999 (Koome J), it was held that according to the principles of Islamic law, step-relations of a Muslim are precluded and disqualified from inheriting the deceased's estate. Likewise, illegitimate children have no right of inheritance under Islamic law. It was on this ground, inter alia, that the illegitimate daughter of the deceased in *Chelang'a v Juma* [2002] 1 KLR 339 (Etyang J), whom the deceased recognised as his own and supported during his lifetime, was excluded from benefit.

The third category is of heirs whose shares may vary, but who are not entirely excluded from benefit. This is called partial exclusion whose effect is a wider distribution of the property in smaller shares.⁴⁹⁷ A father's share depends on whether or not the deceased wife is survived by any children. If children survive, the wife, the father's share is reduced from one-half to one-quarter of the net estate. A sister of the deceased may be excluded from one-half to one third if there is another sister to join her, but she will be excluded entirely if there is a son of the father of the deceased among the heirs.

23.6 ADMINISTRATION OF ESTATES

According to the general principles of Islamic jurisprudence, there was no administration but a mere distribution of the estate by the heirs or by the state. The notion was that the estate did not vest in the personal representative of the deceased or the state, but in the heirs from the moment of the death of the deceased.

Administration of estates, in the sense of the recognition of executors or the appointment of an administrator is alien to Islamic law or jurisprudence. The duty of distributing the estate of the deceased lies with the state or the heirs. This is so because the estate of a deceased Muslim vests upon the heirs immediately upon death.⁴⁹⁸ Probate is generally not necessary for the admission of the will of a Muslim

496 Ali pages 81–85 Baillie (*supra*) at 270 Mahmood (*supra*) at 255, 261.

497 Ali (*supra*) at 80–81; Baillie (*supra*) at 271.

498 Baillie (*supra*) at 248.

as evidence, and a grant of letters of administration in intestacy is unnecessary except for the recovery of debts due to the estate of the deceased.

The duties of the administrator, whether the state or the heir, include arranging a decent funeral and burial ceremony for the deceased, discharging the just debts from the whole of estate, distributing what remains to the heirs and effecting and paying legacies out of one third of what remains after his debts are paid. In *Administrator General v Abdul Hussein* 4 EALR 26 (Hamilton J) it was stated under Islamic law strict proof of claims against the estates of deceased persons is required. It is also the duty of the administrator to distribute the residue among the deceased's successors who are identified in the Quran and in accordance with the shares stated in the scripture. The shares of the heirs are settled from the net estate after payment of funeral expenses, debts and legacies.

PART NINE

CONFLICT OF SUCCESSION LAWS

CHAPTER TWENTY FOUR

CONFLICT OF SUCCESSION LAWS

24.1 INTRODUCTION

The multiplicity of autonomous legal systems within a country and the legal consequences that follow give rise to conflicts of laws and the legal consequences that follow. It is often referred to as competition of laws. Where a choice has to be made between two or more bodies of laws applying in the same country, it is called internal conflict of laws.

Internal conflict of laws in Kenya is a heritage of her colonial past. The Kenya legal system is comprised of various distinct bodies of law that apply concurrently. These are set out in section 3(1) of the Judicature Act; and include statutes, common law and equity, African customary law and Islamic law. Kenya's legal system reflects the contradictions in the country. The system symbolises the conflicting social conditions in the society making conflicts of laws inevitable.

There are different levels of conflict. Conflicts between statutes themselves, especially between general statutes and specific statutes. There are also conflicts between African customary law and the applicable English common law, mainly where the particular dispute is not subject to statutory regulation. Conflicts are common between statutes and African customary law, between different African customary laws and between African customary law and Islamic law.

The Kenyan law on conflict of laws, section 3(1) of the Judicature Act, is a fairly vague provision. It lists the general laws applicable in Kenya and directs the courts on which law to turn to and in what situations. The provision requires that the English common law and equity should apply 'so far as the circumstances of Kenya and its inhabitants permit'. It is not clear what these circumstances are. Section 3(2) state that the courts should be guided by African customary law. Likewise, it is not clear what 'guided' means. It is not clear if African customary law is to be applied in all cases where one or two of the parties are subject to it or affected by it.

24.2 AREAS OF CONFLICT OF SUCCESSION LAWS

Conflicts in this area manifest themselves in several ways. Conflicts arise from the interaction of the different systems of succession laws applicable to the various cultures of the Kenyan peoples. The other area of conflict arises from the application of the Law of Succession Act to the administration of the estates of those persons who died before the Act came into force on the one hand and those who wrote their wills before that date, but died after the Act had come into force. There are also conflicts between the Law of Succession Act and other statutes that have a bearing on probate and administration. The application of foreign laws to property in Kenya is another area of possible conflict.

24.3 DIFFERENT SUCCESSION SYSTEMS

The main cause of the conflicts arises from the fact that Kenya does not have a homogeneous community with the same culture, religion and language. Instead, it has peoples of different cultures, each with their own set of succession laws or principles. Interaction between the African peoples and other races resident in Kenya has also created a further dimension to the conflict.

When faced with this conflict the colonial court attempted to find a solution by making three main assumptions. The first assumption was expressed in section 39 of the African Christian Marriage Divorce Ordinance, 1902. This provision assumed that once an African contracted a marriage under the statute he automatically abandoned the African way of life, African culture and African laws including those pertaining to succession. The law made applicable to such African was the English law of succession.

The leading case to illustrate this assumption is *Yinska v Yinska* (1972) JAL 86. Nigeria, being then a British colony, had legislation in *pari materia* with the Kenyan African Christian Marriage and Divorce Ordinance, 1902. In the Nigerian case, the deceased was a Muslim who died testate having written his will in accordance with the Wills Act of 1887 of England. By following the English statute, he disposed of his property in a manner inconsistent with the Quran, which requires a Muslim to dispose only a third of his property by will, leaving the rest to be disposed of according to the Quranic principles. The will was challenged on this ground. It was held that since the deceased chose to write his will according to English law, he intended thereby that Muslim law would not apply and the proper law was the Wills Act of 1887.⁴⁹⁹

⁴⁹⁹ See also *Fraankel v Sechele* (1967) JAL 55

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In *Cole v Cole* (1898), 1 NLR 15 a Nigerian Christian married a Christian woman. They had a son who was of unsound mind. Upon the death of the man, a dispute arose over his estate. His elder brother argued that the law of succession governing the deceased was African customary law under which women did not inherit the estates of their deceased husbands. The widow argued that since she and the deceased had married under the Marriage Ordinance, they had by so doing removed themselves from the operation of African Customary law and had instead adopted the English law of succession. Consequently, she and her son were the sole heirs of the deceased person. The deceased's brother lost. The court held when the deceased and his wife celebrated marriage under statute they thereby removed themselves from the operation of African customary law and the operative law was the relevant English law of succession.

The other assumption used to resolve the conflict was that even upon conversion into Christianity, the African retained certain aspects of his culture and kept his way of life, as before, except in those situations expressly provided by statute. This assumption was resorted to as a compromise measure in those situations where it was clear that despite embracing the Western faith and way of life the African did not intend to be governed completely by Western law. The dispute in *Otieno v Ougo and another* (number 4) [1987] KLR 407 (Nyarangi, Platt and Gachuhi JJA) was a conflict between the application of customary law and statutory law on a burial where the applicable law is not clear. The widow grounded her claim on statute and the common law, while the extended family/clan relied on customary law. The Court of Appeal resolved the dispute by choosing African customary law. The court's key finding was that an African person in Kenya cannot possibly opt out of his customary law, unless the dispute is subject to statute.

This conflict also touches on the validity of a customary law marriage contracted in spite of a persisting statutory marriage. In *Anastacia Mutheu Benjamin v Lakeli Benjamin and another* Nairobi Court of Appeal civil appeal number 6 of 1979 (Madan, Law and Potter JJA) the deceased was survived by two widows. The deceased had married the first widow under statute; at the time of death, the two were estranged but not divorced. The second widow was not married to the deceased under any system of law and she was therefore a cohabitee. She had been married previously by someone else under both statute and customary law, and whereas the customary law marriage had been dissolved, that under statute was still subsisting. The Court of Appeal concluded that the second widow was not a widow of the deceased as she lacked capacity, by virtue of section 4 of the African

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Christian Marriage and Divorce Act and section 37 of the Marriage Act, to marry the deceased; and she was therefore not entitled to inherit his estate.⁵⁰⁰ The High Court made similar decisions in *Re Ruenji's Estate* [1977] KLR 21 (Sachdeva J) and *Re Ogola's Estate* [1978] KLR 18 (Simpson J).⁵⁰¹

The other assumption was that the African remained an African even if he adopted the Western way of life. With regard to succession, this meant that African customary law would apply even to the African who had embraced and led the Western way of life. This assumption was given legislative recognition by the Native Christian Marriage and Divorce Ordinance, 1904, which provided that African customary law was applicable to all Africans irrespective of their way of life or religion. It was on the basis of this law that in *Benjawa Jembe v Priscilla Nyondo* (1912) 4 EALR 120 (Barth J) the court held that marriage under the rites of the Anglican church did not affect the succession to the estate of the deceased which remained subject to African customary law.

When conflicts arise between African customary law and Islamic law, the courts resolve them in favour of Islamic law. In *Ali Ganyuma v Mohamed Ali* [1927-1928] 11 KLR 30 (Sir Charles Griffin CJ, Sir Alison Russell CJ and Guthrie-Smith J) the issue was whether succession to the estate of a Mdingo who had converted to Islam and practised the Islamic faith, should be according to African customary law or Islamic law. It was held that where Africans were Muslims, Islamic law applied to them. This decision was founded on a special legislation, section 4 of the Mohammedan Marriage Divorce and Succession Ordinance, which provided that where a person contracted a marriage under Islamic law, upon his death, the law of succession applicable to his estate was Islamic law. In *Re Salum* [1973] EA 522 (Mfalila AgJ) the issue was whether customary law or Islamic law applied to the estate of the deceased African of the Hehe tribe who was brought up a Muslim, had married a Christian outside his tribe, did not live according to tribal customs and brought up his children as Muslims. The court, after considering the deceased's lifestyle, found that customary law did not apply to the estate, Islamic law instead applied. In *Re the Estate of the Late Suleiman Kusundwa* [1965] EA 247 (Sir Ralph Windham CJ) it was stated that there are two systems of law which may apply in an African muslim community, Islamic law in matters peculiarly personal, such as marriage, and customary law

500 See also *In the Matter of the Estate of Samuel Muchiru Githuka (deceased)* Nairobi High Court succession cause number 1903 of 1994 (Kamau J).

501 See also *In the Matter of the Estate of Reuben Nzioka Mutua (deceased)* Nairobi High Court probate and administration number 843 of 1986 (Aluoch J).

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which may apply in all other spheres of life. On the facts of the case, it was held that the status and rights of a wife after her husband's death must be governed by the same corpus of law as governed them before his death. Her rights of inheritance are bound up with her rights, or comparative lack of them, during matrimony.⁵⁰²

The Ismailia Muslims and Memons provided another dimension to the conflict; they were subject to both Islamic law and Hindu customary law. It was not clear which law should be applied to the estate of a deceased Ismaili Muslim. In *Anarali Museraza (minor by his next friend) Mohamedtaki A. P. Champsy v Mohamedali Nazerali Jiwa and others* [1966] EA 117 (Wicks J) it was held that the law governing succession for Muslims belonging to the Khoja sect was Islamic law of succession because these people were Muslims even though they were also governed by Hindu customary law. In *Abdurrahmin Haji Ismail Nathu v Halimabai* (1916) 6 EALR 113 (Earl Loreburn, Viscount Haldane and Lord Wrenbury)⁵⁰³ the Privy Council held that that a Hindu family, being themselves Muslim emigrants detached from India and settled among Muslims, the presumption arises that they have accepted the law of the people whom they have joined, if their actions are such as to raise the inference that they have cut themselves from their old environments. On the facts of the case, it was held that an inference arose that the law governing succession to intestate estates amongst Memons domiciled at Mombasa must be taken to be Islamic law.⁵⁰⁴

The other theatre of conflict is between customary law and statute law. In *Kivuitu v Kivuitu* [1991] KLR 248 (Gachuhi and Masime JJA, and Omolo AgJ), the Court of Appeal underscored the supremacy of written law over customary law and held that in the event of a conflict between statute and customary law the same ought to be resolved in favour of the statute. In *Re Kibiego* [1972] EA 179 Madan J disregarded Nandi customary law, which required elders to appoint the eldest son of the deceased as administrator, applied the statute, and held that a widow of whatever race is the proper person to obtain representation to her husband's estate.

502 Compare with the decision in *Mtoro bin Mwamba v The Attorney-General* (1952) 19 EACA 108 (Sir Barclay Nihill P, Sir Newnham Worley VP and Sir Herbert Cox).

503 See also *Halimabhai v Abdarrahim Haji Ismail Nathu* (1913-1914) 5 EALR 34 (Hamilton CJ).

504 See *Jafferli Bhaloo Lakha and others v The Standard Bank of South Africa Ltd* (1923-27) 3 ZLR 64 (Lord Cave LC) and [1927-1928] 11 KLR 1.

24.4 THE LAW OF SUCCESSION ACT AND CONFLICT OF SUCCESSION LAWS

(a) African Customary Law

The Law of Succession Act provides under section 2(1) of the Law of Succession Act that the statute has universal application to all Kenyans in matters of testate and intestate succession and that it applies to all persons who died after 1 July 1981. In *Francis Njoroge Muigai and another v Johnson Njoroge Muigai* Nairobi High Court civil appeal number 18 of 2001 (Kamau AgJ) it was impliedly held that section 2(1) of the Act effectively excludes the application of customary law to the estates of deceased Africans. Section 2(2) provides that for those persons who died before that date the law governing succession to their estates is the law which was in force at the time of their death.⁵⁰⁵ However, in matters of administering the estates of such persons the applicable law is the Law of Succession Act. In other words for persons who died before 1 July 1981 the substantive law of succession applicable to them is the law which was in force at the time of their death. However, the procedural law applicable to their estates is the Law of Succession Act. In *In the matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)* Nairobi High Court succession cause number 935 of 2003 Kamau AgJ stated that since the deceased in the matter died prior to the commencement of the Act, the distribution of his estate was to be strictly governed by the applicable customary law.⁵⁰⁶

The other provisions which seek to resolve conflicts between customary law and the Act are sections 32 and 33 of the Act, which exempt sections of the Kenyan society from the intestacy provisions and allow the application of customary law. In *In the Matter of the Estate of Mwaura Gathari (deceased)* High Court succession cause number 1678 of 1999 Rawal J said that the only provisions in the Act which allow the application of customary law to estates of persons who die intestate after the commencement of the Act are sections 32 and 33, but limited to those areas gazetted as required in law.

Although the Act is clear on the circumstances under which customary law may apply to the estate of a deceased intestate, the courts often overlook the Act

505 See *In the Matter of the Estate of Kiiru Muhia 'A' (deceased)* Nairobi High Court succession cause number 2487 of 1996 (Rawal J).

506 See also *In the Matter of the Estate of Gathererie Muturi (deceased)* Nairobi High Court succession cause number 2170 of 1999 (Koome J).

and apply customary law. In *Mwathi v Mwathi and another* [1995-1998] 1 EA 229 (Gicheru, Kwach and Shah JJA), the Court of Appeal overlooked Part V of the Act and applied Kikuyu customary law to the estate of an intestate who died in 1987. The court asserted, quite erroneously, that 'the intestate succession of a deceased Kikuyu is governed by Kikuyu customary law'.⁵⁰⁷ In *Estate of Mutio Ikonyo (deceased)* Machakos High Court probate and administration number 203 of 1996, Mwera J decided that a married daughter was not entitled to inherit from her father's estate, despite the deceased having died after the Law of Succession Act came into force, which does not discriminate between male and female children whether married or not.

(b) Family Law Statutes

The Law of Succession Act has sought, through section 3(5), to resolve the conflict presented by the marriage of a wife under customary law in spite of a persisting statutory marriage, by recognising wives married under customary law by a man who had previously or subsequently contracted a statutory marriage. Section 3(5) seeks to circumvent section 37 of the Marriage Act and section 4 of the African Christian Marriage and Divorce Act. The Court of Appeal in *Irene Njeri Macharia v Margaret Wairimu Njomo and another* Nairobi Court of Appeal civil appeal number 139 of 1994 (Omolo and Tunoi JJA, and Bosire AgJ) stated that section 3(5) was intended to reverse the position taken by the courts in *Re Ruenji's Estate* [1977] KLR 21 (Sachdeva J) and *Re Ogola's Estate* [1978] KLR 18 (Simpson J). In *Muigai v Muigai and another* [1995-1998] 1 EA 206 Amin J held that in view of section 3(5) of the Law of Succession Act, section 37 of the Marriage Act is not a bar to subsequent wives for purposes of succession. Section 3(5), however, does not provide an ideal solution to the conflict between customary law and the family law statutes, but creates another conflict between the family law statutes and the Law of Succession Act so long as the former remain in force.

(c) Islamic law

The other dimension is the possible conflict between Islamic law and the Law of Succession Act. Section 2(3) of the Law of Succession Act resolves any such conflicts by disapplying the substantive provisions of the Act, those relating to testamentary and intestate succession, to the estate of a deceased Muslim, and instead subjects the estate of a deceased Muslim exclusively to Islamic law. This

507 At 231.

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is reiterated in section 48(2) of the Law of Succession Act, which states that the *Kadhis'* courts exercise jurisdiction for the determination of questions relating to inheritance in accordance with Islamic law. This position was analysed in detail in *Chelang'a v Juma* [2002] 1 KLR 339 (Etyang J).

(d) Movable and immovable property

A third possible conflict is in respect of succession to immovable and moveable property, with respect to the law applicable to property situated in Kenya, but owned by a foreigner. Will the law of the country where the deceased comes from or the law of Kenya where the property is situate govern succession to such property? Section 4 of the Act attempts to resolve this conflict by providing that matters of succession relating to immovable property situated in Kenya are governed by the Law of Succession Act, regardless of the domicile of the deceased at the time of death. On the other hand, succession to moveable property is governed by the law of the country where the deceased was domiciled at the time of his death. It is further provided that a person who immediately before his death was ordinarily resident in Kenya is to be presumed to have been domiciled in Kenya at the time of his death, unless there is evidence to the contrary. In *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684, Waki J stated that the law of succession that applies with regard to moveable property is the law of the country where the deceased is domiciled, and for the purpose of the distribution of such property the grant of representation ought to be obtained from the domicile of the deceased at the time of his death.

The rationale behind this provision is that it is an accepted principle under the conflict of laws that matters relating to land are best governed by the law of the country where the land in question is situated. This is because there are usually numerous national legislation regulating the use and disposal of land which may not allow the operation of foreign laws. Regarding moveable property, it is generally accepted that most of this is the deceased's personal property and his personal law, that is the law of his domicile, should govern its disposal.

(e) Foreign grants

There is also the conflict between local grants and grants made by foreign courts or authorities. A grant made by a Kenyan court only enables the administrator to deal with the property in Kenya. Where there are assets located in foreign

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countries, a grant obtained in those countries will be necessary to deal with such property in accordance with the laws of the relevant country, unless such laws expressly allow the use of grants issued in Kenya. Pickering J in *National Bank of India Ltd v The Administrator General of Zanzibar* [1924-1926] 10 KLR stated that it is the law that no suit can be brought against an administrator in his official capacity except in the courts of the country from which he derives his authority. In *Keshavlal Bhoja v Tejalal Bhoja* [1967], EA 217 (Fuad J) it was held that a suit filed in a Ugandan court, on the strength of a grant made in Kenya, was not maintainable.⁵⁰⁸

The domicile of the deceased⁵⁰⁹ is often a criterion used to resolve conflicts of laws. In *In the Matter of the Estate of Gerald Felix Nyawira Otiso (deceased)* Nairobi High Court civil case number 2715 of 1996 (Ang'awa J) the court held that in deciding whether to apply for grant in Kenya in respect of the estate of a Kenyan dying abroad or to apply for the grant in the country of death and thereafter seek the resealing of the foreign grant, the key determinant should be the domicile of the deceased. Where the Kenyan resides abroad but his domicile is in Kenya, the grant should be sought in Kenya. In the instant case, the deceased was a civil servant working in the Kenyan mission in South Africa, who met his death in a motor accident there. It was held that his domicile was not South Africa, which was merely his workstation, but Kenya. His estate should be subject to a grant issued in Kenya, which can then be resealed in South Africa for the purpose of dealing with any property situated in South Africa.⁵¹⁰

508 See also *Najeno v Serwanga* [1974] EA 322 (Allen AgJ).

509 The Kenyan law on domicile is the Law of Domicile Act.

510 See also *In Re Estate of Naftali (deceased)* [2002] 2 KLR 684 (Waki J).

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This text broadly and comprehensively covers the area of law of succession in Kenya. It exposes the substantive succession legal regime applying in Kenya as well as the Kenyan probate practice. It is tailored specifically for the legal practitioner, the Magistrate and Judge and the law student.

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