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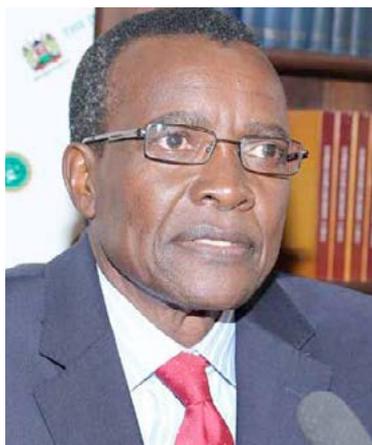
**SIMPLIFIED RESOURCE TOOL  
ON  
INHERITANCE AND RELATED  
FAMILY LAW PRACTICE IN KENYA**



*Family Division of the High Court*



## Foreword



This tool is a useful companion to all practitioners of Family Law in Kenya, ranging from Judges, Magistrates, Advocates, Students of Law and members of the public who are acting in Probate and Administration matters.

The Sustaining Judiciary Transformation: A Service Delivery Agenda has outlined enhancement of Access to Justice as the first strategic area. Probate and Administration matters involve preparation of several Forms under the Law of Succession Act. In most cases, Litigants and Advocates have had to make several visits to the registries before their files can be certified as compliant. This simplified version outlining the system and procedures is a step in the right direction.

The Magistrate's Court's Act 2015 not only increases the Civil Pecuniary Jurisdiction but also grants Jurisdiction to Magistrates to hear and determine any dispute under the Law of Succession Act in respect of all estates whose gross value does not exceed their pecuniary limit. The procedures outlined herein will go far in achieving nationwide uniformity and consistency in service delivery for Probate and Administration matters. I wish to thank the Family Division of the High Court, Nairobi, led by the Presiding Judge, Hon. Mr. Justice A. O. Muchelule and the Bar Bench Committee for their commitment and effort towards enhancing access to Justice.

**Hon. David K. Maraga  
Chief Justice and the  
President of Supreme Court.**

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Finally, we acknowledge the effort of Connie Ngondi, who researched and compiled the tool.

**Justice Aggrey O. Muchelule**  
**Presiding Judge, Family Division of the High Court,**  
**Milimani, Nairobi.**

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## Acronyms

<b>ACHPR</b>	Africa Charter on Human and People's Right
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>CEDAW</b>	Convention on Elimination of all Forms of Discrimination Against Women
<b>CRC</b>	United Nations Convention on the Rights of a Child
<b>ICCPR</b>	International Convention on Civil and Political Rights
<b>ICESR</b>	International Convention on Economic, Social and Cultural Rights
<b>ICRC</b>	International Convention on the Rights of the Child
<b>ICRPD</b>	International Convention on the Rights of Persons with Disability
<b>LRA</b>	Land Registration Act
<b>LSA</b>	Law of Succession Act
<b>NSSF</b>	National Social Security Fund
<b>P&amp;A</b>	Probate and Administration
<b>PWD</b>	Persons with Disability
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly

## Definitions

**A grant of probate** is a legal document that authorises an executor (or executors) to manage the estate of a deceased person in accordance with the provisions of the deceased's will

**A Petition** is a written application or prayer to the court to exercise its authority in the redress of a right, or to grant some favour, or privilege, or license.

**A will** or testament is a legal document by which a person, the testator, expresses their wishes as to how their property is to be distributed at death, and names one or more persons, the executor, to manage the estate until its final distribution. It may be oral or written

**Administration** is the collection and preservation and distribution of all the assets, interests and benefits that make up the estate of the deceased

**Administrator or Personal representative** is the person/entity appointed by the court to collect, preserve and distribute the estate of the deceased

**Attestation** refers to the act of, or evidence showing that the will is true

**Caveat**- Latin word for, 'Let him beware'. It is a formal notice or warning given by an interested party to a court, judge, or ministerial officer in opposition to certain acts within his /her power and jurisdiction

**Citation** is a command to a person entitled to apply for a grant ordering him to act within a specified period to apply for the grant or confirmation of a grant

**Digital estate** refers to digital media and rights that can be inherited. Digital assets are (in contrast to physical assets) more dynamic and ephemeral. When a person dies they leave behind a digital presence which can include online accounts, passwords, contracts, receipts, financial transactions, medical information or personal websites, and can involve banking, writing, images and social media. A digital estate is not only a person's online presence; it includes data stored digitally on personal technology such as a phone or computer. Digital assets are ephemeral and subject to constant change

**Digital inheritance** is the process of handing over (personal) digital media in the form of digital assets and rights to (human) beneficiaries

**Equality** means the state of having and enjoying equivalent rights and opportunities, and is a core ideal in a democratic society. In inheritance it refers to the state of entitlement and realisation of the same rights to inherit and to transmit wealth, marked by fairness and justice

**Executor** is the person named in the will of a deceased person as the one to distribute a deceased person's property and to arrange for the payment of debts and expenses

**Executor/executrix** is the person appointed under a will to collect, preserve and distribute the estate of the deceased

**Fiduciary** is one who is in a position of authority and who is obligated himself or herself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, courage and loyalty in fulfilling the duty

**Grant de bonis non administrates.** The Latin words mean “of goods not administered”. This grant is given where the personal representative has not completed the administration of the estate either because of death or some other reason. It is limited to the purpose of administering the un-administered part of the estate

**Grant of administration *pendente lite*.** The Latin words mean ‘during/pending litigation’. This grant is given to a person/s simply to preserve the estate during litigation e.g. if the will of deceased is being contested court may appoint a petitioner pending litigation to preserve the estate so it is not wasted

**Intellectual property** refers to creations of the mind such as inventions, literary and artistic works; designs; and symbols, names and images used in commerce

**Intestate succession** occurs when a person dies without making a will or the will is invalidated. The intestacy rules provide for distributions to people who have a direct blood link with the deceased apart from spouses. In the absence of blood relatives, the deceased’s estate passes on to the states

**Intersectionality** is the theory that social identities, related systems of oppression, domination, or discrimination, and multiple group identities intersect to create a whole that is different from the component identities. It is the idea that one’s identity is not singular, but is often compounded by multiple identities, and that those identities bring their related systems of advantage or disadvantage. In analysing one’s identity therefore (e.g. as a woman) it is important to interrogate the other identities that that person has (e.g. black, poor, disabled, a child), to establish what advantage or disadvantages those identities add to their reality

**Jurisdiction** refers to the extent of a court’s official power to make legal decisions and judgments

**Legal pluralism** is ‘the coexistence and interaction between multiple legal orders such as state, customary, and religion, all of which provide bases for claiming property rights

**Letters of administration** refer to authority to administer the estate of someone who has died without making a will. They are also granted where the executor/s validly appointed in the will, are not living, or if they are living, they are not willing or able to act

**Limited Grant –*ad colligenda bona de functi*.** The Latin words mean ‘for collecting the goods of the deceased’. This applies where it is necessary to secure the estate assets that may be at risk pending administration

**Originating summons** is one of the two modes in commencing a civil suit when: (1) it is required by a statute; or (2) a dispute is concerned with matters of law, and is unlikely to be any substantial dispute of fact

**Probate** is the process of proving a will, and it is the first step in the administration of the estate of the deceased. A successful probate will result in the grant of probate

**Renunciation** is the formal rejection of something such as a right or a claim. In inheritance it is the formal rejection by an executor or administrator of their role and duties or responsibilities

**Revocation** is the official cancellation of a decree, or decision of the court. Once a grant is confirmed, no objections or protests may be filed, only revocations (with exceptions)

**Testate succession** occurs when a person makes a valid and enforceable will which ensures that upon the death of that person, his/her property passes to a person[s] of his/her choice. A female person, whether married or unmarried has the same capacity to make a will as does a male person. If the deceased person's will does not adequately provide for a dependent[s], the court may, upon application, order a reasonable provision for the dependent[s]

**Testate succession** refers to the distribution of the estate of a deceased in accordance with his or her will

**Trust Corporation** is defined under the Trustee Act Cap 167 as: the public Trustee; a corporation appointed by the court; a trust corporation as defined by the law of Succession Act Cap 160 S. 3

## Objectives of the Resource Tool

This is a simple and practical reference tool for legal practitioners, courts and court users, outlining relevant law and procedure relating to probate and administration matters.

Dealing with the estate of a deceased person is an emotive and complex matter, and persons going through this process are expected to engage with the legal system from a point of understanding of the law and court procedures.

The simplicity of the tool eases court users' understanding of the law and laid out court procedures hence improving the quality of their interaction, experiences and outcomes in the courts. It also provides an easy reference for members of the bench and the bar hence improving the quality of service they offer to their clients and court users.

Consequently, the guide contributes to the realisation of the promise of Article 48 of the Constitution which provides that '*the state shall ensure access to justice for all persons...*', and the key objective of the Judiciary Transformation framework which is '*to achieve access to and expeditious delivery of justice to all*'.

The objectives of the tool are to:

- Highlight gender perspectives of inheritance and family law in Kenya
- Highlight the legal and policy framework on inheritance and related family matters
- Outline issues of jurisdiction and courts regarding inheritance and related family law matters
- Outline the procedures and current practice for the various court engagements on inheritance and succession matters, and related family law matters
- Provide a bibliography of articles on the law of inheritance, succession, contemporary issues in inheritance and other relevant matters for reference
- Provide a list of cases on inheritance and related family law matters from both local and comparable commonwealth jurisdictions.

# PART I: IMPORTANT ISSUES IN INHERITANCE IN KENYA

## 1. Introduction

Inheritance is a significant means of transferring, or excluding from transfer wealth from one generation to the next. As such, it can have positive or negative effects on poverty status over the life course. Inheritance events can either be boons of property accumulation or they can strip people of their previous security of access to assets.<sup>1</sup>

Inheritance patterns are connected to a society's kinship organization, social structure, and ideas about freedom, wealth, and equality<sup>2</sup>. Lack of equity in the distribution of inheritance often reflects existing social inequities, leaving those denied equal inheritance not only poorer than other family members or destitute, but also with fewer rights to decision-making within the family and community. It is therefore considered both an economic and a social justice issue.<sup>3</sup>

An already complex and emotive process, inheritance is becoming more complex with emergent forms of property as the Kenyan economy grows, such as intellectual property and digital property. The development of family law, and the pluralism of laws in the family sector as a result of the application of religious and customary laws to a significant proportion of the population, further complicates inheritance processes, and often intimidates court users.

An analysis of these issues follows, as a precursor to outlining court procedures in the inheritance process.

## 2. Emergent issues on inheritance practice

This section briefly discusses the issue of equality, as an example of an important principle in inheritance, and how it affects women, persons with disability and children. The section also highlights emerging areas of inheritance law practice with a focus on digital inheritance and the challenges it presents to the practice and persons involved.

### 2.1 Equality

Equality means the state of having and enjoying equivalent rights and opportunities, and is a core ideal in a democratic society. In inheritance, it refers to the state of entitlement and realisation of the same rights to transmit wealth and to inherit marked by fairness and justice. A core principle relating to equality in inheritance dispositions is that of distributive justice whose goal is equal distribution irrespective of status, gender, age, physical and mental abilities among others.

Equality is however a contested principle that is often modified by competing claims. For instance, understanding circumstances of different heirs may qualify strict adherence to the principle of equality. Different situations may evoke other distributive principles that

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<sup>1</sup>Cooper, E. 2010a. "Inheritance and the Intergenerational Transmission of Poverty in Sub-Saharan Africa: Policy Considerations." Working Paper 59.

<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

may be more important to families such as reciprocity, responsiveness to need, existing gifts made prior to death, and considering specific roles. Customary norms and beliefs, religion, and the law also create basis for modification of the meaning of equality in different circumstances. The situations of disability, age, and gender in inheritance are discussed further below.

### *Intersectionality*<sup>4</sup>

Intersectionality is an important concept within the broad idea of equality. It is the idea that one's identity is not singular, but is often compounded by multiple identities. Each of the identities may bring power, oppression and or discrimination to the person. For some, all their identities may bring disadvantage. These identities may present racism, sexism, classism, ableism, homophobia, transphobia, xenophobia, and religious or other belief-based bigotry and persecution.

It is therefore important to interrogate the other identities defining a person, in order to accurately assess their power, vulnerabilities and disadvantage. This assists in the understanding of systemic inequality and injustice.

For instance, when presented with a female in Kenya, the predominant identity may be that she is a Kenyan. However, upon interrogation one may find that she is: a woman; a child or elderly; black, poor, widowed, disabled, lesbian, foreigner, of religious minority, a concubine, and with HIV/AIDs. Each of these identities brings with it a form of disadvantage and these all intersect to compound her vulnerability. In contrast, one may find that she is: white, citizen, adult, wealthy, married, able, heterosexual, of majority religion, and HIV negative. These identities give her a significant amount of power and advantage comparatively even though she is still a female in Kenya.

In inheritance matters, it is important for the courts to interrogate multiple identities of parties and the advantage or disadvantage that they bring to the realities of the dependant or claimant. This may inform the court for instance in applying its discretion to make provision for a dependant. Such considerations may lead to different results than would have been where face value of the predominant identity would have informed the determination for provision. It may lead to justice not only being done, but being seen to be done.

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1. <sup>4</sup> Collins, Patricia H. (2015). «*Intersectionality's Definitional Dilemmas*». *Annual Review of Sociology*. **41**: 1–20. doi:10.1146/annurev-soc-073014-112142 – via ProQuest; Crenshaw, Kimberlé (1989). “*Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*”. University of Chicago Legal Forum. **140**: 139–167 – via *PhilPapers*; Knudsen, Susanne V. (2006), «*Intersectionality – a theoretical inspiration in the analysis of minority cultures and identities in textbooks*» (PDF), in Bruillard, Éric; Horsley, Mike; Aamotsbakken, Bente; et al., *Caught in the Web or Lost in the Textbook, 8th IARTEM conference on learning and educational media, held in Caen in October 2005, Utrecht, The Netherlands: International Association for Research on Textbooks and Educational Media (IARTEM)*, pp. 61–76, OCLC 799730084, archived from the original (PDF) on 11 December 2006; Crenshaw, Kimberlé W. (July 1991). “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”. *Stanford Law Review*. **43** (6): 1241–1299. doi:10.2307/1229039. JSTOR 1229039.

## 2.1.1 Gender equality and inheritance

### *Gender discriminatory customary norms*

Inheritance as a mode of property transfer is highly dependent on social customs and norms. Most Kenyan communities have customary norms that favour men over women and the Kenya's Constitution allows customary laws to apply to matters of personal law, including property inheritance. Customary law governs at least 65% of land in Kenya<sup>5</sup>. Inheritance of land (which is the most common and most valuable asset in most inheritance cases) is for majority of Kenyans governed by customary law.

### *Women exclusion in inheritance creates poverty patterns for women*

Most of Kenya's communities are patriarchal and hence are governed by norms of male priority, authority and power. Most of these communities, being poor and mostly in the rural areas are governed by customary law in their personal lives. Majority of those that may wish to invoke statutory law, are prohibited by cost, physical accessibility and inadequate understanding of how to engage the legal system.

In terms of ownership levels between men and women, Kenyan men have disproportionate share in ownership of property especially land, which means they have greater control of the means of production which is a source of economic and political power. This disproportionate power constitutes a major element of male authority. Inheritance practices that perpetuate this pattern of exclusion of women from ownership replicate patterns of poverty among women, and consequently large sections of the communities.

### *Men as a means for women's access to property*

Because men are the ones that own most property, the rights of most women to property in Kenya and most of the developing world are premised on their relationship to a man, whether father, husband, brothers or male relatives.<sup>6</sup> When the relationship ends through death, divorce, or separation, the woman stands a good chance of losing her home, land, livestock, household goods, money, vehicles and other property. As a result, widowed women and orphaned children are particularly vulnerable and prone to lose rights of ownership, control and access to properties they enjoyed during the lifetime of their husbands or fathers.<sup>7</sup>

The resulting alienation of women from property, including housing, land and other forms of property, leads to economic vulnerability, poverty traps, chronic poverty and the inter-generational transmission of poverty (IGT poverty).<sup>8</sup>

### *Great injustice in women's exclusion from ownership of land*

Women in Kenya contribute up to 80 % of the workforce, hence having the largest representation in the active participation in the production process. They however only hold 1% of registered land titles in their names and around 5-6 % of registered titles held in joint names. This inequity is a great injustice even from the basic premise of fair com-

<sup>5</sup> FIDA Kenya, Women's Land and Property Rights in Kenya (2009)

<sup>6</sup> Patricia Kameri Mbote, The Law of Succession in Kenya: Gender Perspectives in Property Control and Management, Nairobi, 1995. Available at [www.ielrc.org](http://www.ielrc.org)

<sup>7</sup> Rose, 2006; Oleke et al., 2005; Strickland, 2004; Drimie, 2003; Human Rights Watch, 2003; Drimie, 2000.

<sup>8</sup> (Carter and Barrett, 2006; Bird et al., 2004; Bird and Shinyekwa,

pensation.<sup>9</sup> More fundamentally however, it is an injustice because land in sub-Saharan Africa is the most important asset as it is viewed as having durability and permanence which no other asset possesses, and hence providing a long lasting source of livelihood, security, stability and a sense of belonging.<sup>10</sup> Further, even if assets can be obtained through alternative means, inheritance is often the main method of obtaining rights to land in Africa, so when it is closed to women, they are condemned to socio-economic instability, insecurity and are denied the realisation of basic human need of belonging, which in most of Africa is associated with a permanent relationship to land.<sup>11</sup>

In situations where women own property, their ownership of (especially of land) has been found to lead to improvements in their greater welfare, productivity, equality, and empowerment<sup>12</sup>, and the welfare of their families and communities. This ownership is a critical factor in social and economic well-being as land is a basic source of livelihood and a major source of women's access to other natural and productive resources, and credit, which is an important enabler to micro entrepreneurship. It therefore has economic, political and symbolic significance.

#### *Testacy and gender sensitive courts as important conduits for women's inheritance*

For majority of women especially in poor rural communities that are governed by Customary Law, acquisition of property through inheritance is most likely to happen in situations where the deceased has left a will. This is because in the absence of a will, customary succession practice, unsanctioned by the courts, favour male succession, and discriminate against women generally, whether widows, sisters or daughters. Women's chances of ownership of property through inheritance where no wills have been left, or where wills are contested to disinherit them, depends in a major way on gender sensitive court sanctioned succession processes.

#### *Gender responsive legal framework, but little gender equality in inheritance for majority*

The legal framework governing inheritance in Kenya is elaborate and to a large extent expressly provides for gender equality. Some parts of the law, and actual practice however have limited the realisation of the benefits of this progressive framework by majority of women.

Despite a progressive legal framework and system as described below, Kenyan women's land and property rights continue to lag behind those of men. The realisation of women's property rights can fundamentally reshape unequal power relationships between women and men. A major channel for such realisation is equitable inheritance of land and other forms of assets.

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<sup>9</sup> Njoki Wamai, E., Women and Poverty (Land Rights and Ownership) A policy brief on the Kenyan situation prepared for the African Women Rights Observatory (AWRO) Agarwal, B. 1994 *ibid*

<sup>10</sup> Agarwal, B. 1994, "Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia." *World Development* 22 (10): 1455–1478.10.1016/0305-750X(94)90031-0 [Google Scholar], 1456

<sup>11</sup> Cooper, 2010(a); Agarwal, B.1994, *ibid*.

<sup>12</sup> Agarwal, B. 1994. *Ibid*

### 2.1.1.1 Legal framework for gender equality in inheritance in Kenya

#### a) International Law

International law presents a rich legal framework for gender equality. Article 2 (5) and (6) of the Kenya Constitution draws in general principles of international law, and any treaty or convention ratified by Kenya as part of the laws of Kenya. Applicable international conventions on gender equality in property rights include:

*The Universal Declaration of Human Rights (UDHR).*

In article 2 UDHR prohibits discrimination on the 10 of grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. In Article 17 it provides that ‘Everyone has the right to own property, alone as well as in association with others...No one shall be arbitrarily deprived of this right.’<sup>13</sup>

*International Covenants on Economic, Social, and Cultural Rights (ICESR) and International Convention on Civil and Political Rights (ICCPR)*

Both conventions in their articles 2 also prohibit discrimination on the same grounds as UDHR, mentioning gender and property expressly.<sup>14</sup>

The UDHR, ICESR and the ICCPR have been referred to as forming the international bill of rights.

*The Beijing Declaration and Platform for Action adopted at the 1995 Fourth World Conference on Women*<sup>15</sup>

The platform has become a defining framework for change in women’s rights. It made comprehensive commitments under 12 critical areas and remains a powerful source of guidance and inspiration globally, for gender equality in all dimensions of life. The platform in article 15 provides for all governments’ commitments to: “Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy”.

*The United Nations Convention on the Rights of the Child*<sup>16</sup>

The CRC became effective in 1990 and deals with the child’s special needs and rights including an adequate standard of living; provides in article 1 that “A Child means every human being under the age of 18 years unless the law applicable to the child indicates earlier. Article 2 provides for non-discrimination on any grounds including property; and Article 3 for the best interests of the child to be a primary consideration in all matters concerning the child.

<sup>13</sup> Available at: [www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/)

<sup>14</sup> ICESCR available at: [www.ohchr.org](http://www.ohchr.org) › OHCHR › English › Professional Interest; ICCPR available at: <https://treaties.un.org/doc/publication/unts/.../volume-999-i-14668-english.pdf>

<sup>15</sup> Available at: [www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf](http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf)

<sup>16</sup> Available at: [www.ohchr.org](http://www.ohchr.org) › OHCHR › English › Professional Interest

## *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>17</sup>*

CEDAW is the main international instrument on gender equality which was adopted by the United Nations General Assembly in 1979 and entered into force as an international treaty in 1981. By accepting the Convention Kenya committed itself to undertake a series of measures to end all forms of discrimination against women, including:

- Incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women;
- Establishing tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- Ensuring the elimination of all acts of discrimination against women by persons, organizations or enterprises.

In Article 16(h) CEDAW requires State Parties to modify or abolish existing laws, regulations, customs, and practices that discriminate against women; and eliminate discrimination against women in all matters relating to marriage and family relations, in particular ensuring that both spouses have the same rights in the ownership, acquisition, management, administration, enjoyment, and disposition of property.

CEDAW committee General Recommendations are important guides in the interpretation and application of CEDAW. General Recommendation No.29 on the ‘economic consequences of marriage, family relations and their dissolution’ expressly mentions that State parties are required to ensure that disinheritance of the surviving spouse is prohibited.<sup>18</sup> General recommendation no. 21 on ‘equality in marriage and family relations’ notes that State parties are required to give women equal rights to administer property.<sup>19</sup>

### *Resolution 1998/15 of the United Nations Sub-commission on Human rights<sup>20</sup>*

The resolution urges governments to: amend and/or repeal laws and policies pertaining to land, property and housing which deny women security of tenure and equal access and rights to land, property and housing; encourage the transformation of customs and traditions which deny women security of tenure and equal access and rights to land, property and housing; and adopt and enforce legislation which protects and promotes women’s rights to own, inherit, lease or rent land, property and housing.

### *The African Charter on Human and People’s Rights<sup>21</sup>*

The Africa Charter provides in article 14 that: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.

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<sup>17</sup>

<sup>18</sup> Available at: [tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?...CEDAW/C/.../29..](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?...CEDAW/C/.../29..)

<sup>19</sup> Available at: [www.refworld.org/docid/48abd52c0.html](http://www.refworld.org/docid/48abd52c0.html)

<sup>20</sup> Available at: [http://ap.ohchr.org/Documents/E/SUBCOM/resolutions/E-CN\\_4-SUB\\_2-RES-1998-15.doc](http://ap.ohchr.org/Documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-1998-15.doc)

<sup>21</sup> Available at: <http://www.achpr.org/instruments/achpr/#a2>

This article read with articles 2 and 3 provide for gender equality in property ownership and economic empowerment. They provide that: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status”(Article 2); “Every individual shall be equal before the law” (Article 3(1); and “Every individual shall be entitled to equal protection of the law” (Article 3(2).

*The Protocol to the Africa Charter on Human and People’s Rights on the Rights of Women in Africa*<sup>22</sup> (Maputo Protocol)

Article 2 of the protocol mandates states to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

Article 6 (j) provides that during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Article 8 provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law; effective access by women to judicial and legal services, including legal aid (a); reform of existing discriminatory laws and practices in order to promote and protect the rights of women (f).

Article 21 expressly provides that a widow has the right to an equitable share in the inheritance of her husband’s property; a widow has the right to continue to live in the matrimonial home. If she marries, she retains this right if she owns or has inherited the house; and women and men have the right to inherit in equitable shares, hence protecting the inheritance rights of girl children.

*UN Convention on the Rights of Persons with Disability*<sup>23</sup>

Article 2 provides for human dignity and individual autonomy of Persons with Disability (PWDs); equality between men and women in article 7; and the right to own and inherit property and to ensure that PWD are not arbitrarily deprived of their property in article 12.

## **b) Kenyan Constitution, 2010**<sup>24</sup>

The Constitution elaborately provides for gender equality, including equality in ownership of property. It:

- Protects the right of both men and women to acquire and own property of any description anywhere in Kenya<sup>25</sup>
- Prohibits the state from making laws that arbitrarily deprive a person of property or the enjoyment of the rights /interests over property on any discriminatory grounds.<sup>26</sup>

<sup>22</sup> Available at: [www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf)

<sup>23</sup> Available at: [www.un.org/disabilities/documents/convention/convoptprot-e.pdf](http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf)

<sup>24</sup> [www.kenyalaw.org/lex/actview.xql?actid=Const2010](http://www.kenyalaw.org/lex/actview.xql?actid=Const2010)

<sup>25</sup> Article 40

<sup>26</sup> Article 40(2)

- Provides adults a right to marry a person of the opposite sex, based on the free consent of the parties.<sup>27</sup>
- Provides that parties to a marriage have equal rights at the time of marriage, during marriage and at the dissolution of marriage.<sup>28</sup>
- Set out the principles governing the land policy in Kenya. They include equitable access to land, security of land rights and elimination of gender discrimination in law, customs and practices related to land, among others.<sup>29</sup>
- Requires the states to define and keep under review a National Land Policy for ensuring that the principles of equitable access to land and associated resources are observed.<sup>30</sup>
- Requires parliament to enact laws to regulate the recognition and protection of matrimonial property<sup>31</sup>

### **c) The Law of Succession Act, 1981 Chapter 160 of the Laws of Kenya (LSA)**

The LSA is the core applicable law in Kenya regarding issues of succession. The Succession Act provides the law for testate and intestate succession.

#### *Gender discrimination provisions of the LSA*

The LSA in various provisions causes discrimination of women. The Act:

- Exempts certain areas from application of the intestacy rules,<sup>32</sup> leaving cases where one dies without a will to be subject to customary which in most cases is unfavourable to women.
- Gives priority to fathers over mothers by expressly granting them precedence to inherit a deceased child's property whenever the intestate leaves no surviving spouse or children.<sup>33</sup>
- Discriminates against widows in that they lose their life interest upon remarriage while widowers do not.
- Provides that in polygamous marriages, the husband inherits the full estate when each of his wives dies but his net estate when he dies is divided among his surviving wives and children.<sup>34</sup>
- Does not apply to succession to the estates of persons who at their death are Muslims<sup>35</sup>. It however seems to bring such estates under its jurisdiction in Part VII of the Act, on matters of administration of estates

<sup>27</sup> Article 45(2)

<sup>28</sup> Article 45(3)

<sup>29</sup> Article 60(1)

<sup>30</sup> Article 60(2)

<sup>31</sup> Article 68(c) (iii)

<sup>32</sup> Section 32, Law of Succession Act (Act No.10 of 1981).

<sup>33</sup> Ibid Section 39 (1) (a).

<sup>34</sup> Ibid Sections 35, 40.

<sup>35</sup> Section 2(4)

#### **d) National Land Policy 2009**

The National Land Policy (2009) has elaborate provision for gender equality in land ownership and management. It is guided by among others the principles of:

- equitable access to land, and
- gender equity

The policy requires the government to put in place appropriate laws to ensure:

- Effective protection of women's rights to land and related resources;
- Repeal of bad laws that discriminate against women in relation to land;
- Enforcement of existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;
- The making of provisions for joint spousal registration and documentation of land rights and for joint spousal consent to land disposals, applicable for all forms of tenure;
- Securing of inheritance rights of unmarried daughters in line with the practices of the respective communities;
- The carrying out of public education campaigns to encourage the abandonment of cultural practices that prevent women from inheriting family land;
- That the alienation of private rights to land takes into account all other legitimate rights held or claimed by other persons over the affected land, such as spouses and children;
- That private land is held, alienable and transmissible without discrimination on grounds of sex, ethnicity or geographical origin;
- The end to selling and mortgaging of family land without the involvement of the spouses, protection of the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property;
- The land rights of women living with HIV and AIDS, including rural women, are not unfairly appropriated by others to the detriment of such persons and their families.

#### **e) Matrimonial Property Act, 2013**

The Matrimonial Property Act is important for inheritance as it defines matrimonial property and concepts of ownership and entitlement to property between spouses, and parents and children. It provides that:

- Contribution to matrimonial property includes monetary and non-monetary contribution;<sup>36</sup>

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<sup>36</sup> Section 2

- Matrimonial property includes matrimonial home (s), household goods and effects in the matrimonial home(s), and movable and immovable property jointly owned and acquired during the subsistence of the marriage;<sup>37</sup>
- If a man marries more than one wife, matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only;<sup>38</sup>
- Spouse has a beneficial interest over property for which the spouse has contributed to improve, whether such property was acquired before or during the marriage;
- Matrimonial property or interests in matrimonial property are protected from sale, gifting, leasing or mortgaging during the subsistence of a monogamous marriage without the consent of both spouses;<sup>39</sup>
- Where matrimonial property is acquired during marriage in the name of one spouse, it is presumed that the property is held in trust for the other spouse, unless proven otherwise.

#### **f) The Marriage Act 2014**

The Marriage Act propagates gender equality in inheritance by providing equal rights even at dissolution of marriage, and also legitimising polygamous unions and equalising all marriages registered under the Act. It provides that:

- Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.
- Marriage is a voluntary union of a man and a woman whether in a monogamous (one man to one woman) or polygamous (one man to more than one wife) union and registered in accordance with the law
- All marriages registered under this Act have the same legal status.

#### **g) Land Registration Act 2012 (LRA)**

The LRA entrenches and protects gender equality in property ownership and rights by requiring consent of each spouse before selling or charging matrimonial property. It provides:

- That for a husband or wife to sell, charge mortgage of a matrimonial property their spouse must give consent;
- All registered land is subject to these overriding spousal rights<sup>40</sup>

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<sup>38</sup> Section 8 (1)

<sup>39</sup> Section 12 (1)

<sup>40</sup> Section 28

## **h) Community Land Act, 2016**

According to the Community Land Act, 2016<sup>41</sup> every registered member of the community has the right to equal benefit from community land<sup>42</sup> including full and equal enjoyment of rights of use and access.<sup>43</sup>

Even though the law provides that a registered community shall not directly or indirectly discriminate against any member of the community on any ground including among others, gender,<sup>44</sup> and even though the law further provides that, every man or woman married to a member of the community shall gain automatic membership of the community, the same law limits this right for women by providing that for women, such rights shall terminate upon their remarriage after divorce or their spouses death.

Women's rights in community land are therefore conditional upon their prescribed relationship to a man- either their father or their husband. It therefore means a woman who is a member of a registered community who gets divorced, and then remarries outside the community cannot transmit her community land rights through inheritance to her new spouse or children with that spouse because she loses these rights upon remarriage. This does not apply to men. The Community land Act therefore adopts the patrilineal kinship system in which an individual's family, and community membership derives from and is recorded through their father's or husband's lineage. A disconnection from this male kin extinguishes a woman's property rights.

## **i) Other Laws relevant to inheritance**

### ***Industrial Property Act***<sup>45</sup>

This act brings intellectual property into the ambit of the LSA by providing that a patent may be assigned or may be transferred by succession.

### ***Civil Procedure Act, 2009, Chapter 21 of the Laws of Kenya***<sup>46</sup>

The following parts of the civil procedure rules are applicable under the Law of Succession Act so far as they are relevant to proceedings under these rules, namely orders: 5 - Issue and Service of Summons; 10 - Consequences of Non-Appearance, Default of Defence and Failure to Serve; 15 – Issues; 18- Hearing of the Suit and Examination of Witnesses; 25 –Security and Costs; 44 –Pauper Appeals and 49- Special Powers of Registrars.

### ***Public Trustee Act, 2011 (Chap 167)***<sup>47</sup>

Part II of the Act stipulates circumstances under which the Public Trustee may become administrator or executor of an estate of a deceased person.<sup>48</sup>

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<sup>41</sup> No. 27 of 2016

<sup>42</sup> Community Land Act section 30 (1)

<sup>43</sup> Ibid section 30(2).

<sup>44</sup> Op cit section 30(3)

<sup>45</sup> [kenyalaw.org/kl/fileadmin/pdfdownloads/.../IndustrialProperty\\_Cap\\_509\\_.doc](http://kenyalaw.org/kl/fileadmin/pdfdownloads/.../IndustrialProperty_Cap_509_.doc)

<sup>46</sup> [http://www.kenyalawreport.co.ke/Downloads/Acts/The Civil Procedure Act.pdf](http://www.kenyalawreport.co.ke/Downloads/Acts/The%20Civil%20Procedure%20Act.pdf)

<sup>47</sup> [kenyalaw.org/.../kenyalaw/Kenya/.../Public%20Trustee%20Act%20Cap.../PublicTrustee](http://kenyalaw.org/.../kenyalaw/Kenya/.../Public%20Trustee%20Act%20Cap.../PublicTrustee).

<sup>48</sup> The Public Trustee's role in administration is discussed in part 15(2) further below

## ***Trustees Act***<sup>49</sup>-

Becomes applicable where a trust is created where there are beneficiaries who are minors as provided under the LSA.

## ***Magistrates Court Act 2015***<sup>50</sup>

The Act stipulates expanded jurisdiction for magistrates over probate and administration matters.

## ***Children’s Act, 2001 Chapter 141 Laws of Kenya***<sup>51</sup>-

The Act provides for non-discrimination of children on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. This makes children born in and out of wedlock equal for inheritance purposes.

### **2.1.2 Inheritance rights of children**

#### ***2.1.2.1 Principles guiding inheritance for children***

Various principles enshrined in laws guide considerations in inheritance matters affecting children. These are:

##### *The definition of a child*

Under Article 1 of the Convention on the Rights of a Child, and the Children’s Act: “A child means every human being under the age of 18 years unless under the law applicable to the child the majority age is indicated as an earlier one. This is an inclusive and non-discriminative definition which is instructive for inheritance purposes.

##### *Non-discrimination*

Under Article (2) of the Convention on the Rights of the Child (CRC), and Article 2 of the African Charter on the Rights and Welfare of the Child (ACRWC), “State Parties are supposed to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment based on the status, activities, expressed opinions or beliefs of the child parents, legal guardians or family members”.

The LSA makes no distinction between male and female children and does not discriminate in matters of inheritance.

##### *Right to be provided for by both parents*

Under Article 53 (1) (e) of the Constitution, a child has a constitutional right – “to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.” Similarly, section 6 of the Children Act provides for right to parental care.

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<sup>49</sup> file:///C:/Users/Connie/Downloads/TrusteeAct28of1929%20(1).pdf

<sup>50</sup> Which provides that Magistrates have jurisdiction over probate and succession matters subject to their pecuniary jurisdiction.

<sup>51</sup> [www.kenyalaw.org/.../kenyalex/Kenya/Legislation/.../Acts%20and%20Regulations/.../...](http://www.kenyalaw.org/.../kenyalex/Kenya/Legislation/.../Acts%20and%20Regulations/.../)

Courts<sup>52</sup> have found that this constitutional duty to provide for the child does not extinguish upon the death of the parent, and proceeded to find that children are entitled to provision from the estate of their parents.

### *Best interests of a child*

The United Nations Convention on the Right of a Child (CRC) Article (3) states that “the best interest of the child should be a primary consideration, and Article 53 (2) of the Constitution, that “A child’s best interests are of paramount importance in every matter concerning the child.” Additionally, section 4(2) provides that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

### *Adequate standard of living of the Child*

Article (27) of the CRC calls for adequate standards of living of the child, which include shelter, clothing and nutrition. This is relevant to inheritance because a child’s continued enjoyment of adequate standard of living after the demise of their parents can be realised through access to inherited assets.

### *Trusteeship where beneficiary is a minor*

The LSA outlines the need to ensure trusteeship of property of a surviving child until he or she reaches the age of 18 years where the trustee should be “appointed by a court of competent jurisdiction” (subsidiary rules, section 32).

### *Right to apply for inclusion or adequate provision*

For any disposition of the deceased estate that is deemed unreasonable by the court, the court has authority to order reasonable provision for any dependant left out of the deceased’s estate.<sup>53</sup> Dependant for this purpose includes minor children). Children also have a right to contest a parent’s will if they have valid legal grounds. For example, if a child was left out of a will and believes her/his parent’s will is invalid because her/his parent was controlled by another person while making it -- or lacked the capacity to understand what he/ she was doing while making it -- the child may contest the will in probate court. If the probate court is satisfied with a child’s testimony, the court may grant an appropriate share of the parent’s estate to the child.

Under the Law of Succession Act, the child as a dependant is entitled to apply to the court for adequate provision if the terms of a will or rules of intestacy do not make adequate provision for the child.<sup>54</sup> The Court has a discretion on an application by a child dependant (and other dependants) of a deceased, to make adequate provision for the dependent out of the net estate notwithstanding any will or rule on intestacy, where such an application is made before the confirmation of Grant.

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<sup>52</sup> In the matter of the estate of PWM (deceased) succession cause no. 974 of 2013. KLR 2013

<sup>53</sup> Section 26

<sup>54</sup> Sections 26, 27, 29 and 30 of the Law of Succession Act

### 2.1.2.2 Children in blended families

A blended family is any family unit that is made up of previously-married parents and their children from prior marriages, and formally and informally adopted children.

Families come in all different shapes and sizes. As a result of divorce, remarriage, or separation, polygamy, extended family informal adoptions, and formal adoptions, many of today's Kenyan families consist of 'children', step-children, half siblings, adopted children, and semi/informally adopted children. Though such children are defined as dependants under Section 29(d) of the LSA, in contested intestate succession, the burden of proof is often on such child to prove the dependency.

The definition of a child under the LSA also covers such children, but the burden is still on the child to prove their fitting in the definition. The Act provides that: ‘*“child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility*’. This definition assumes that only men can accept and acknowledge a child as their own and assume responsibility over them. Women also bring children from past marriages, and children from their deceased relatives, and other informally adopted children. Situations may arise where the deceased is a woman, and a child brought into the family by the man has to prove that they fit into the definition of a child to the deceased woman in order to inherit from her.

The challenge may be more for those children who are step-children but who have not been formally adopted by the deceased; and also those other children (such as those of deceased siblings or relatives) that the deceased may have ‘taken into his family as his own’ as is common in Kenyan families.

Blended families are becoming almost as common a phenomena in Kenya as nuclear families, and the inheritance rights of children in these families need to be well defined to ensure their realisation. Principles that may be useful to courts in this regard include that of the ‘best interest of the child. Case law can offer clearer guidance in this matter as more and more cases of blended families come to the courts.

### 2.1.3 Inheritance rights of Persons with Disability (PWD)

*Inheritance rights of PWD are protected in the law.*

The Convention on the Rights of Persons with Disability, provides for the human dignity of and individual autonomy of Persons with Disability (PWDs)<sup>55</sup>; for non-discrimination<sup>56</sup>; equality between men and women<sup>57</sup>; and the right to own and inherit property and to ensure that they are not arbitrarily deprived of their property.<sup>58</sup>

*PWDs among world's poorest and routinely denied inheritance rights*

PWDs are among the world's poorest and most marginalized individuals. They face stigma, prejudice, and social isolation, and often lack the education, social support net-

<sup>55</sup> Article 1

<sup>56</sup> Article 2

<sup>57</sup> Article 7

<sup>58</sup> Article 12

works, and legal right to appeal injustices at the family, community, or national level<sup>59</sup> Disabled people are routinely denied inheritance rights [in Kenya and] many countries. Of all PWDs, women are a majority, and they are at a higher risk of being denied inheritance rights.

### *One in four inheritance cases likely to involve a PWD*

In Kenya there is an estimated one million three hundred thousand persons with disability (3.5% of the population)<sup>60</sup> who are among the poorest and most marginalized in the country. Global statistics indicate that one in four households has a disabled member.<sup>61</sup> It is therefore reasonable to argue that one in four inheritance cases will have a disabled person involved.

### *Legal provisions for inheritance rights of PWD*

The right of PWDs to inherit is entrenched in the *Convention on the Rights of Persons with Disabilities* which specifically cites the right to own and inherit property and ensures that disabled persons are not arbitrarily deprived of their property.<sup>62</sup> The Persons with Disability Act, 2003 implicitly acknowledges the importance of property rights of PWDs by requiring the Attorney General to make regulations providing for free legal resources for PWDs with respect to matters affecting the violation of their rights or the deprivation of their property.<sup>63</sup>

### *Violations of inheritance rights may depend on kind of disability*

Exclusion from inheritance may depend on the type of disability and the socio-cultural perceptions about that disability. Persons with intellectual or mental health disabilities, for example, may face greater exclusion because they are considered incapable of looking after property.<sup>64</sup>

Many disabled persons are significantly less likely to obtain an education, and therefore not understand their inheritance rights or how to access the legal system to assert these rights. The paradox is that, that very inheritance could enable them to access needed education and resources. Many disabled persons and their caregivers also believe they are unable to adequately manage property, and hence relinquish their rights.

### *Dependency a cause of inheritance rights violation*

Dependency on others for a place to live, care, and social inclusion may restrict an individual's options to object or to question inheritance practices. Disabled persons may also relinquish inheritance rights, believing they are a burden and this is a way to 'repay' others for their care and concern.

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<sup>59</sup> Department for International Development. 2000. *Disability, Poverty, and Development*. London: DFID. [Google Scholar]; World Health Organization [WHO]/World Bank 2011WHO/World Bank. 2011. *World Report on Disability*. Geneva: WHO. [Google Scholar].

<sup>60</sup> www.knbs.or.ke/census2009

<sup>61</sup> WHO/World Bank. 2011. World Report on Disability. Geneva: WHO. [Google Scholar].

<sup>62</sup> Article 12 of the United Nations. 2006. *Convention on the Rights of Persons with Disabilities*. New York: UN. [Google Scholar].

<sup>63</sup> Section 38(a).

<sup>64</sup> Sultana, Z. 2010. "Agony of Persons with Disability: A Comparative Study of Bangladesh." *Journal of Politics and Law* 3 (2): 212–221-+-+-----+-

### *Customary and traditional legal systems and practices limit inheritance rights*

Customary and traditional legal systems and practices limit the right of disabled persons to inherit property and the right to appeal decisions made by other members of their families and communities regarding division of property. Legal pluralism makes it difficult for disabled persons to know which legal system governs their inheritance rights and makes it relatively easy for families and communities to ‘forum shop’ for a legal system to deny disabled persons their inheritance rights.

### *Stigma may influence individual judges*

Sometimes traditional stigma surrounding disability may make even lawyers and judges unlikely to care about supporting inheritance rights for disabled people. Lawyers and judges may also not be aware of emerging progressive legal developments such as the Convention on the rights of Persons with Disability.

### *Inaccessible court rooms and legal offices*

Inaccessible court rooms and legal offices – lacking sign language interpreters or ramps, for example – provide additional structural barriers. Disabled persons from rural communities are at even greater disadvantage because of distances to lawyers, judges, and courts hence making them even more reliant on the local, customary legal mechanisms.

### *Unique family situations*

An important consideration for inheritance and disability is the unique situation of families. While disabled persons must not be discriminated against, legitimate concerns of families must also be recognized. For instance, someone with an intellectual disability might require support to manage money and assets; similarly, someone with serious mental health problems might need facilitation to realistically decide how to spend their inheritance.

Ways in which disabled persons can maintain inheritance rights while considering that some might require help managing their inheritance require careful consideration and discussion.

## **2.2 Rights of heirs over those of nominees**

An area of controversy in succession is that of the rights of heirs as opposed to those of nominees in regard to various benefits. This regards to nominees to benefits in relation to: insurance; social security; bank account proceeds; *chamas*; *saccos*; companies shares; club or group membership rights among other things, upon the account holder, member or policy holder.

Under the LSA there are two forms of succession, testate and intestate. The current situation where laws such as the Companies Act, the NSSF Act 2013; the Banking Act and such other laws provides for nomination of beneficiaries means that rights of nominees trump those of heirs under the LSA. This amounts to a third method of succession wherein these statutory provisions which relate to nomination override prevailing succession laws.

Kenyan case law has upheld this situation by upholding the statutory rights of the nominees over those of heirs.

In the case of re Estate of *Carolyn Acheng Wagah* (deceased)<sup>65</sup> in Nairobi, *Musyoka, J.* rendered himself on the law as follows:

“It is the law that funds the subject of a nomination do not form part of the nominator’s estates and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing nominations. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.”

A similar legal position was taken by *Gikonyo, J.* in the case of *Benson Mutuma Muriungi vs CEO Kenya Police Sacco & Another*<sup>66</sup> the learned Judge said:-

“Nominations under the Co-operative Societies Act are statutory. Section 39(1) of the co-operative Societies Act provides that upon 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 thereunder ... The property which is subject of a statutory nomination is not free property of a deceased member. It does not pass or vest in the personal representative of the deceased member or to the estate; it passes directly to the nominee.”

In *G.A.A.M & another v M. O. A. O*<sup>67</sup> the court, relying on the above two cases held that

‘shares in a Co-operative Society do not form part of a deceased’s estate since they are dealt with in accordance with clear provisions of a statute’.

In India, a comparative commonwealth jurisdiction, courts seem to have settled the controversy regarding the rights of legal heirs as opposed to nominees by holding that the rights of legal heirs supersede the rights of the nominee of a shareholder.

The controversy arose with two Single Bench Bombay High Court judgments in *Harsha Kokate v. The Saraswat Co-operative Bank Limited*<sup>68</sup> (*Kokate case*) and *J. J. Salgaonkar v. J.J. Salgaonkar*<sup>69</sup> (*Salgaonkar case*). In the *Kokate case*, relying primarily on Section 109A of the erstwhile Companies Act, 1956 (1956 Act), the Court held that the nominee would be entitled to all rights in shares and debentures, including ownership rights, to the exclusion of all other persons. Thus, upon death of the shareholder, the securities would automatically get transferred to the nominee, and not the legal heirs.

However, the *Salgaonkar case* ruled that the *Kokate case* was *per incuriam* (without regard to the law) and in direct conflict with other Supreme Court decisions. The Court held that the legal heirs, and not the nominees, would obtain ownership of the shares. The nominees would merely hold the securities as a fiduciary on behalf of the claimants under prevailing succession laws.

<sup>65</sup> 2015 eKLR

<sup>66</sup> [2016] eKLR

<sup>67</sup> [2016] eKLR

<sup>68</sup> 2010 SCC OnLine Bom 615. Available at: <https://www.lawteacher.net/free.../case-comment-harsha-nitin-kokate-law-essays.php>

<sup>69</sup> Testamentary and Intestate Jurisdiction Notice of Motions No. 822 of 2014 in Suit No, 503 of 2014. Available at: <https://indiankanoon.org/doc/95245152/>.

Also in *Sarbati Devi v. Usha Devi*<sup>70</sup>, the Apex court held that

“a nominee can receive the policy but does not become owner of policy amount because:

- 1) Nothing in Section 39 indicates that it will operate as a third kind of succession;
- 2) The section provides that “the money shall be payable to the nominee” and not that it shall belong to the nominee. In this case the nominee is treated as a trustee.’

Further, in *Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah*<sup>71</sup>, the Bombay High Court, relying on *Sarbati Devi*, held that:

“the purpose of nomination under Section 30 of the Maharashtra Cooperative Societies Act, 1960 is essentially to provide for the discharge of the societies’ obligation and that a nomination does not lay down any special rule of succession of properties of a deceased member overriding the general rules of inheritance prescribed by the personal law of the member of a cooperative society.”

In India therefore from the above court decisions, the policy amount can be received by the nominee, but the amount can be claimed by the heirs of the deceased in as per law of succession.

## 2.3 Legal Pluralism

Legal pluralism is ‘the coexistence and interaction between multiple legal orders such as state, customary, and religion, all of which provide bases for claiming property rights.’<sup>72</sup> Overlapping systems regarding inheritance often contradict and compete with one another at the individual and community levels. Statutory laws may not reflect what occurs in practice. Sometimes different parties in the same matter may appeal to different legal systems to assert their inheritance claim for the same property.<sup>73</sup>

### *Primacy of customary law recognised*

In Kenya the Constitution and family statutory law recognizes the primacy of customary law in inheritance. For vulnerable groups such as women, and PWDs, statutory rights to equality before the law are in many instances undermined by customary practices.

Unfortunately, there is little written on customary inheritance laws especially in relation to disabled persons. As with the inheritance and development literature in general, much current research on relationships between customary and statutory inheritance law relates to women.

<sup>70</sup> Available at <https://indiankanoon.org/doc/1794785/>

<sup>71</sup>

<sup>72</sup> Meizen-Dick, R., and R. Pradhan. 2002. “Legal Pluralism and Dynamic Property Rights.” CAPRI Working Paper 22. International Food Policy Research Institute. [[Google Scholar](#)].

<sup>73</sup> Irianto, S. 2004. “Competition and Interaction between State Law and Customary Law in the Court Room: A Study of Inheritance Cases in Indonesia.” *Journal of Legal Pluralism* 36: 91–112.10.1080/07329113.2004.10756574[Taylor & Francis Online], [[Google Scholar](#)],

### *Uncodified and changing customary law provide window for manipulation*

Furthermore, much customary law is not systemised in to legislation, and it is therefore flexible, and changing.<sup>74</sup> In customary inheritance practice, formal wills are often unknown or ignored, and inheritance matters will almost always be intestate<sup>75</sup>. These factors make it relatively easy for family members and community elders to manipulate customary laws to keep or take property from women and other vulnerable individuals.

### *Discriminatory customary practices despite progressive statutes*

Although Kenyan laws now guarantee equal inheritance rights to all by statute, discriminatory customary law still dominates in practice.<sup>76</sup> Additionally, property-grabbing by family members, although outlawed by the State, is common and affects: widows; orphans; and disabled persons, who often lack the ability to challenge these practices in courts. Individuals meant to enforce the law often fail to do so as they frequently benefit from the property-grabbing themselves.

### *Family dynamics lock in vulnerable persons into customary system*

Vulnerable individuals may also find it difficult to bypass family and community leaders to assert their rights within the national legal system. Some are unaware of their rights and how to engage the court, while others may fear retaliation or alienation from family and community if they resort to non-community-based legal systems. Many women who have questioned traditional inheritance systems or turned to state courts have been threatened, beaten and been alienated from family and community.<sup>77</sup> This is also the case for PWDs who frequently depend on family for activities of daily living, and are already at increased risk of violence.

In many instances even where individuals are aware of statutory laws, many prefer using customary systems because these are more familiar and less expensive.<sup>78</sup>

Finally, even if individuals bring cases before state courts, these courts may still apply customary law and 'take personal relations, specific circumstances and backgrounds into account, not only strict legal rules'.<sup>79</sup>

## **2.4. Religion and inheritance**

Religion plays a significant role in inheritance, and especially regarding issues of in distribution of estates. Under Islamic law for instance, which governs practices by a significant

<sup>74</sup> Bushbeck, K. 2006. "Customary Inheritance Law – Methodological Aspects of Research and Main Features of Inheritance Traditions." In *Shade of New Leaves: Governance in Traditional Authority*, edited by M. Hinz and H. Patemann, 231–246. Berlin: Lit Verlag. [Google Scholar]; Kameri-Mbote 1995Kameri-Mbote, P. 1995. *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*. Nairobi: Women & Law in East Africa. International Environmental Law Research Centre

<sup>75</sup> Mwenda, K., F. Mumba, and J.Mvula-Mwenda. 2005. "Property-grabbing under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience, yet a Troubling Reality." *George Washington International Law Review* 37: 949–968. [Google Scholar].

<sup>76</sup> Mbatiah, S. 2010. "Kenya: Custom Law Trumps New Laws Covering Women's Land Rights." Rome: Inter Press Service, November 23, p. 1. [Google Scholar]; Mwenda, K., F. Mumba, and J.Mvula-Mwenda. 2005. Ibid

<sup>77</sup> Agarwal 1994, op cit; Mwenda, Mumba, and Mvula-Mwenda 2005, op cit.

<sup>78</sup> Cooper, 201b, op cit.

<sup>79</sup> Bushbeck, K. 2006. "Customary Inheritance Law – Methodological Aspects of Research and Main Features of Inheritance Traditions." In *Shade of New Leaves: Governance in Traditional Authority*, edited by M. Hinz and H. Patemann, 231–246. Berlin: Lit Verlag. [Google Scholar].

number in Kenya as in Islamic states and Muslim groups across Africa, only one-third of an estate can be willed freely, with the remainder divided between the deceased's children and other heirs.<sup>80</sup> Also daughters are entitled to one-half of the sons' share; widows are entitled to one-half of what widowers receive.<sup>81</sup>

### *Discriminatory religious inheritance laws*

From the perspective of international human rights standards of justice and fairness, these religious customs are seen to be unfair, unjust and discriminatory. However, rights to freedom of conscience have in many instances qualified the principles of gender equality. The Kenya Constitution for instance, qualifies the application of the provisions of the Bill of Rights on equality to allow for application of Muslim law before Kadhis' courts to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.<sup>82</sup>

## **2.5 Digital inheritance**

Digital inheritance is the process of transferring personal digital media in the form of digital assets and rights to beneficiaries. Examples of digital media includes digital images; digital video; video game; web pages and websites, including social media; of data and databases; digital audio, such as MP3; and electronic books. They may also be sensitive, such as banking and medical information, or shared, such as with social media contacts or in forums.

### *Growth of Digital assets in Kenya*

Digital assets and therefore digital inheritance is an important issue for the Kenya jurisdiction as the Kenyan population has largely gone digital with mobile penetration being at over 90%; mobile subscriptions up to 39.7 million; and smart phone uptake at 40%<sup>83</sup>. Mobile money subscriptions in Kenya reached 26.3 million in 2016, a factor that has contributed to Kenya being ranked number one in digital financial inclusion amongst 26 countries surveyed by the Brookings' Institution's Centre for Technology Innovation. This has led to Kes 227.6 million commercial transactions being made in one quarter in 2016 and Kes 429.4 Billion in person to person transfers. With internet subscribers at 26.8 million in 2016, and 37.7 million users, and broadband subscription at 10.8 million, 50% of Kenyans are said to be online.<sup>84</sup> According to a Deloitte study, Kenya is poised to becoming the regions first digital economy. This spread provides for large volumes of digital media, and related digital assets, and accordingly questions of inheritance of those assets.

<sup>80</sup> Deere, C., and C. Doss. 2006. "Gender and the Distribution of Wealth in Developing Countries." Research Paper No. 2006/115. United Nations University World Institute for Development; C. Doss. 2006. ("Gender and the Distribution of Wealth in Developing Countries." Research Paper No. 2006/115. United Nations University World Institute for Development Economics Research [Google Scholar]).

<sup>81</sup> Hacker, D. 2010. "The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought." *Journal of Empirical Legal Studies* 7 (2): 322–354.10.1111/jels.2010.7.issue-2, [Google Scholar]

<sup>82</sup> Constitution of Kenya, 2010. <http://kenyalaw.org/kl/index.php?id=398>

<sup>83</sup> Communications Commission of Kenya, Quarterly Sector Statistics Report, Fourth Quarter For the Financial Year 2015-2016. Available at [www.ca.go.ke](http://www.ca.go.ke)

<sup>84</sup> *Id.*

## *Definition and scope of digital assets*

Currently, there is no universal definition of a digital asset or digital estate.<sup>85</sup> They are however basically those digital media that one owns or has rights to, and are mainly information stored in an intangible medium on computers or other computer related technology.<sup>86</sup> They are accessed through a tangible piece of property such as a computer, hard drive, smart phone, or third-party server.<sup>87</sup> The prevalence of an individual's online presence can increase the number of assets available for transfer to heirs, thereby affecting access to valuable property. In Kenya however there is no law addressing the inheritance of digital assets/property.

This legislative gap affects: defining the assets and their scope; managing these assets; ascertaining; accessing; privacy; transfer and disposing.

Some things that are being considered in digital asset mapping for estate planning in developed jurisdictions such as America include: personal and business e-mails; attachments to e-mails; business websites; records of the sort that were formerly kept in a safe deposit box and are now stored online or digitally; digital pictures stored in your camera, on CDs or online; online brokerage or bank accounts; as well as libraries of music, movies, games, and software.

## *Access as a challenge to inheritance of digital assets*

One major challenge to inheritance of digital assets is access. Service agreement made between service providers and users, are important in determining who may get access to a digital asset.<sup>88</sup> An internet business can however change its service agreement with or without notice,<sup>89</sup> creating added complications for an heir attempting to access or even delete a family member's account. A personal representative or beneficiary may even be unable to delete the deceased's account as a way of managing/disposing it, just as the deceased may have been unable to delete it due to a service agreement.<sup>90</sup> For example, Skype is a service provider with a service agreement that does not provide users with the option to delete their accounts.<sup>91</sup>

Digital assets such as social networking sites can also be difficult to access. For example, Gmail has a policy through which anyone may be able to access a deceased person's mail if he or she can provide proof that the "user is known to be deceased."<sup>92</sup> Further,

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<sup>85</sup> See John Conner, Comment, Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death, 3 EST. PLAN. & COMMUNITY PROP. L.J. 301, 321 (2011)).

<sup>86</sup> Jamie B. Hopkins, Afterlife in the Cloud: Managing a Digital Estate, 5 HASTINGS SCI. & TECH. L.J. 209, 211-12 (2013)

<sup>87</sup> *Id.* at 212

<sup>88</sup> Kendal Dobra, An Executor's Duty Toward Digital Assets, PRAC. LAW., Oct. 2013, at 21, 24. at 29. See also: See, e.g., iCloud Terms & Conditions, APPLE, <http://www.apple.com/legal/internet-services/icloud/en/terms.html> (last revised Oct. 20, 2014) (archived at <http://perma.cc/9XL2-BW7M>).

<sup>89</sup> Woodrow Hartzog, The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?, 15 COMM. L. & POL'Y 405, 406 (2010)

<sup>90</sup> Victor Luckerson, 7 Surprising Things Lurking in Online 'Terms of Service' Agreements, TIME (Aug. 28, 2012), <http://business.time.com/2012/08/28/7-surprisingthings-lurking-in-online-terms-of-service-agreements/> (archived at <http://perma.cc/XCS2-5P3W>), at \*4 (E.D. Mo. Mar. 6, 2009).

<sup>91</sup> *Id.*

<sup>92</sup> Submit a Request Regarding a Deceased User's Account, GOOGLE, <https://support.google.com/accounts/contact/deceased?hl=en&rd=1> (select "obtain data from a deceased users account" radio button; then scroll down to access form) (last visited Feb. 25, 2015) (archived at <http://perma.cc/JL2U-3HYE>).

Yahoo's terms of service "explicitly states that an account cannot be transferred."<sup>93</sup> This may mean that the property in the account asset is not transferable, and therefore cannot be considered to be the user's property transmissible at death.

This raises the question as to the scope of property rights in digital assets currently. For instance, do unlimited property rights to digital accounts such as email accounts, exist only during a person's lifetime and terminate upon his or her death?<sup>94</sup>

### *Potential loss of digital assets*

Potential loss of digital assets is also a major concern.<sup>95</sup> For example, "individuals spend enormous amounts of money over their lifetimes purchasing files for their iTunes account, so a deceased's iTunes account could potentially represent a substantial asset."<sup>96</sup> However, iTunes files are non-transferable at a user's death and therefore cannot be transferred.<sup>97</sup> Lack of direct access to this type of digital asset could lead to a loss in a person's estate since this type of asset will not be included in any estate planning as actual property.

### *Lack of legal framework*

The lack of a legal framework for digital inheritance is a challenge not only in Kenya but also globally. Legislation would among other things, address the definition, scope and transfer of digital assets, and facilitate especially intestate succession. This is an important emergent area of inheritance practice in Kenya.

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<sup>93</sup> Yahoo! Terms of Service, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last updated Mar. 16, 2012) (archived at <http://perma.cc/ZF8M-3GGH>).

<sup>94</sup> Dobra, *supra* note 52

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> iCloud Terms & Conditions: Submit a Request Regarding a Deceased User's Account, GOOGLE, <https://support.google.com/accounts/contact/deceased?hl=en&rd=1> (select "obtain data from a deceased users account" radio button; then scroll down to access form) (last visited Feb. 25, 2015) (archived at <http://perma.cc/JL2U-3HYE>).

## PART II: JURISDICTION; COURT PROCEDURES; DOCUMENTS AND REQUIREMENTS FOR SUCCESSION MATTERS

### 3. Jurisdiction on Inheritance Matters

Jurisdiction refers to the extent of a court's official power to make legal decisions and judgments.

#### 3.1 Original Jurisdiction

- High Court: The High Court has Jurisdiction to entertain and determine any dispute under the law of succession
- Magistrate Courts: Magistrates Courts have the authority to entertain and determine any dispute under the LSA.<sup>98</sup> This authority is only limited by the maximum value of the property/subject matter of the case that each level of magistrate is authorised to entertain and determine under the Magistrates Courts Act, 2015.<sup>99</sup>
- Kadhis Court: The LSA gives authority to Kadhi's Courts regarding administration of the estate of a deceased Muslim<sup>100</sup>, and at the same time brings matters of administration of a deceased Muslim's estate under the Act.<sup>101</sup>

#### 3.2 Appellate jurisdiction

- Where the High Court is exercising original jurisdiction, the LSA is silent as to whether the decision is final.<sup>102</sup>
- An appeal has been held to lie to the Court of Appeal from a High Court exercising original jurisdiction because any order made under the LSA to pronounce decrees and make orders is appealable under section 66 of the Civil Procedure Act.<sup>103</sup>
- A contrary court decision has held that where any proceedings are covered by a special legislation, the Civil Procedure Act and Rules do not apply even if such legislation is silent and does not exclude the Civil Procedure Act<sup>104</sup>.
- Magistrates decisions may be appealed at the High Court and the High Court decision is final<sup>105</sup>

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<sup>98</sup> Subject to section 49 of the LSA

<sup>99</sup> Section 7(1) of the Magistrates Courts Act, 2015. (Section 23 of the Magistrates Courts Act 2015 which repeals the proviso to section 48(1) of the LSA).

<sup>100</sup> (Section 48(2) LSA),

<sup>101</sup> In Part 7 of the Act

<sup>102</sup> Section 50(1).

<sup>103</sup> Makhangu vs Kibwana (1995-1998) 1EA 175 -. See also Commissioner of Income Tax vs. Ramesh K. Menon (1982-1988) 1 KAR 695; Kaboi vs Kaboi & others (2003) 2 EA 472; and In the Matter of the Estate of Hezron Bernard Wamunga.

<sup>104</sup> Shah vs. Shah (No 2/2002 2 KLR 607)

<sup>105</sup> Section 50(1)

- Kadhi's Court decisions may also be appealed at the High Court, and any point of Muslim law may with prior leave be brought on appeal to the Court of Appeal.

<sup>106</sup>

### 3.3 Territorial jurisdiction

- Magistrates Courts have authority to adjudicate over succession matters in the areas where the deceased was living or buried subject to the maximum value of the property that the magistrate is authorised to make determinations on.

#### Note

- LSA does not provide mechanisms for enforcement of orders issued under the Act, hence no equivalent of Order 21 of the Civil Procedure Act (on Judgment and Decree)
- Probate proceedings are not suits in the ordinary meaning of the civil suits and hence orders and decrees of the probate courts are not enforceable under the Civil Procedure Act and that the only way of enforcing probate courts orders is through contempt proceedings.

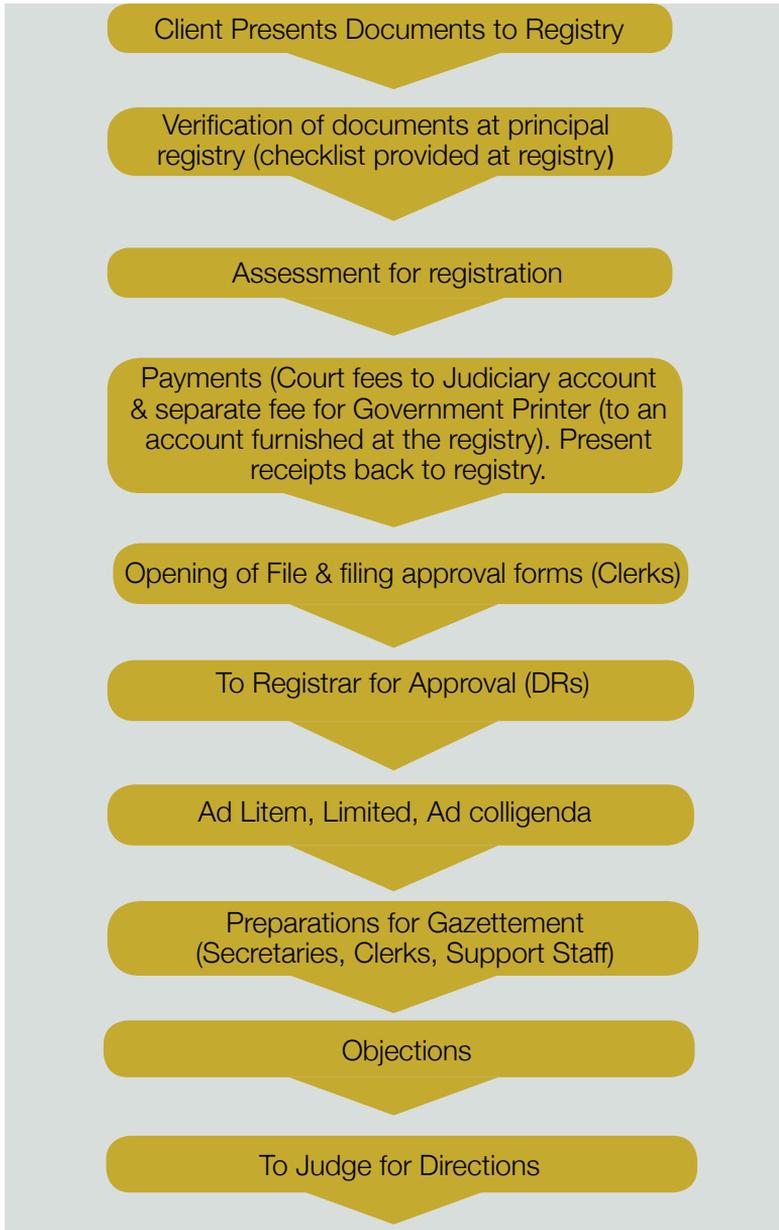
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<sup>106</sup> Section 50(2)

#### 4. Court Process Flow at the Probate and Administration Matters

Probate and administration matters begin, and are for the most part handled at the family registry of the court. The process follows an ordered sequence of stages from presentation of documents to award of grant. The registry is also the first place of call for objections, revocations, rectifications, renunciations, resealing and any other application related to a succession matter.

The following diagram illustrates the standard flow of the probate and administration process at the High Court Family Registry.





## Note

- All matters in Nairobi are filed under one register and allocated sequenced numbers as Succession Matters.
- Anything filed regarding any estate is therefore filed in the one original file that was opened upon the filing of the first matter regarding that estate.

## 5. Testate Succession

Testate succession refers to the distribution of the estate of a deceased in accordance with his or her will.

### 5.1 What is a will?

A will or testament is a legal document by which a person, the testator, expresses their wishes as to how their property is to be distributed at death, and names one or more persons, the executor, to manage the estate until its final distribution. It may be oral or written.

### 5.2 Making a will

- Under Kenyan law, no specific form of a will is required.
- A will may either be oral or in writing and may thus take any form provided it satisfies the laid down requirements of formal validity.<sup>107</sup>
- Where a conflict arises between the contents of a written and an oral will the contents of the written will shall prevail.<sup>108</sup>

#### *Oral will*<sup>109</sup>

In the case of an oral will:

- 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;
- An exception to these requirements is made for persons in active service in the armed forces and merchant marine. These wills that do not comply with formalities are called privileged wills.

## Note

- Where a deceased person gives instructions regarding the disposal of his assets and the instructions are reduced into writing by the persons recording them, such written instructions amount to an oral will, so long as the instructions are given in the presence of two or more persons.

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<sup>107</sup> Section 8

<sup>108</sup> Section 10

<sup>109</sup> Section 9.

### *Written will*

A written will is only valid if:<sup>110</sup>

- 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;
- each witness must attest and sign the will in the presence of the testator but not necessarily in the presence of the other witnesses.

### *Writing*

- No prescribed form in the law so a written will maybe handwritten, typed, printed or in lithographed form;
- The writing may be that of the testator or of any other person and may be in any language;
- It may even be in a code so long as the code can be deciphered;<sup>111</sup>
- It may be written on any material provided the material produces a visible form.

### *Signature*

A signature:

- Includes any mark of the testator which is intended as a signature e.g. thumb print, initials, assumed name, or mark by a rubber stamp with the testator's name;
- Need not even consist of a name at all;<sup>112</sup>
- Made by another person should be done in the testator's presence and under his direction;
- Can 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.<sup>113</sup>

### *Witnesses*

- The testator's signature must be made in the presence of two witnesses who need not be present at the same time.<sup>114</sup>
- A witness competent to attest a will is a person of sound mind and full age<sup>115</sup>

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<sup>110</sup> Section 11

<sup>111</sup> Kell v. Charmer, 23 Beav. 195 (Ch. 1856)

<sup>112</sup> *Re Cook's Estate* (1960)

<sup>113</sup> Section 11 (b)

<sup>114</sup> Section 11 c

<sup>115</sup> Section 3(1)

## *Attestation*

Attestation refers to the act of, or evidence showing that the will is true. For a will to be valid:

- Each witness must sign the will in the presence of the testator. They need not necessarily sign in the presence of each other.<sup>116</sup>
- A beneficiary may attest so long as the signatures of such beneficiaries are further attested by at least two additional competent and independent witnesses<sup>117</sup>.

### **5.3 What is probate?**

Probate is the process of proving a will, and it is the first step in the administration of the estate of the deceased. A successful probate will result in the grant of probate.

### **5.4 What is a grant of probate and who can apply for the grant of probate?**

A grant of probate is a legal document that authorises an executor (or executors) to manage the estate of a deceased person in accordance with the provisions of the deceased's will.

Since the executor is responsible for collecting the assets of the deceased, he/she can take the grant of probate to persons that currently have assets of the estate or that are debtors of the estate (such as banks) and require them to transfer the assets or monies to the executor (or to such other persons as the executor may nominate in accordance with the will).

The person named in the will as the executor/s is the person/s who should apply for the grant of probate. If the will does not nominate an executor, then it is not possible to apply for probate. In such cases a beneficiary under the will can apply for letters of administration with the will annexed.

#### **Note**

- If assets of the deceased were jointly owned as joint tenants (that is where the co-owners did not own distinct portions of the property - no person has a separate share), if on the death of one of the joint owners (or tenants) the property automatically passes to the remaining joint tenant or tenants.

### **5.5 Process of Proving Wills**

All wills are referred to the Deputy Registrar for:

- Verification of attestation (of the signing)
- Verification of executorship (of who is named as the person to manage the distribution of the estate)
- Determination of validity (the soundness, and factual correctness of the will)

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<sup>116</sup> Section 11 (c)

<sup>117</sup> Section 13 of LSA

## 5.6 Application for grant of probate

### *Documents Required*

- a) P&A Form 78 (petition).
- b) P & A Form 3 (affidavit)
- c) The original Will and any codicil. A codicil is a separate addition to the original Will, or a document that explains, modifies or revokes a Will or part of a Will
- d) 2 photocopies of the Will & original death certificate.

### *Procedure*

- a) If all documents are in order the file is placed before the Hon. Judge by the deputy registrar.
- b) It is given orders to have the matters advertised in the Kenya Gazette.
- c) If no objections are raised before end of 30 days, letter of grant Probate is issued in P&A Form 45 with a copy of the Will attached.
- d) Period of 6 months is given for the parties to confirm the said grant.
- e) Accounts need to be submitted within 6 months after the confirmation of grant.

### **Note**

- No distribution of estate before confirmation of grant (section 55 LSA).
- The LSA and P&A rules provide no way of the court to ensure that accounts are submitted or that section 55 is adhered to.
- After letter of grant, the court can only be moved through application for revocation.

## 5.7 Grant of Probate for “Oral will”

### *Documents Required*

- Requirements are the same as for application where there is a written will.
- Any person making or purporting to make a will shall be deemed to be of sound mind.

### **Note**

- The burden of proof that a person making a will was, at the time he/she made it not of sound mind, shall be upon the person who so alleges.
- An oral will is not valid to the extent that it is contrary to any written will which the maker of the oral will has also made whether before or after the date of the oral will, and which stands unrevoked.

## 5.8 Application for grant of Letters of Administration with written will annexed

Letters of Administration with will annexed are applied for where there is a will, but no executor is appointed in the will, or if he/she is appointed he/she is not alive, or willing or able to execute. A named beneficiary or other adult of sound mind may apply, including other interested parties such as creditors.

### *Documents and information required*

- P & A Form 79 (petition).
- P & A Form 3 (affidavit).
- The original Will with codicil if any, and 2 photocopies of the Will.
- Original death certificate or certified copy. If it's a case of presumption of death, the court's order of presumption of death court must be attached.
- Full inventory of assets and liabilities of the deceased at the time of death including estimated values.
- List of Names, ages, addresses, description and marital status of all surviving spouse (s) and/or children, or of any person who would succeed where no spouse or children have survived the deceased.
- Letter of introduction of petitioner and heirs from the Area Chief.

### **Note**

- Original Wills submitted should be registered in a central register and deposited in a central depository in the principal registry.

## 6. Renunciation

A person named in a will as an executor, and a person entitled to apply for Letters of Administration, may apply to be relieved of those responsibilities through application for renunciation.

A renunciation is the formal rejection of something such as a right or a claim. It is important to note that:

- Both executors and administrators may renounce their right to apply for a grant
- The renunciation should be in writing signed by the person entitled to the grant or declared orally
- A renunciation order can be made before or after the grant has been issued
- Once renunciation has been made it can only be retracted (reversed) by an order of the court
- Renunciation cannot be made by one who has inter-meddled (interfered) in the estate of the deceased
- Renunciations may be made in cases of testate or intestate situations.

## Documents required

- Renunciations may be made in cases of testate or intestate situations. (Forms P & A 98 to 102).

## 7. Intestate Succession: Application for Grants of Letters of Administration

Letters of Administration refer to authority to administer the estate of someone who has died without making a will. They are also granted where the executor/s validly appointed in the will, are not living, or if they are living, they are not willing or able to act.

### 7.1 Ways of approaching the court under the LSA

Every application under the LSA should be either by way of:

- *Petition*: A written application or prayer to the court to exercise its authority in the redress of some wrong, or to grant some favour, or privilege, or license; <sup>118</sup>
- *Caveat*- Latin word for, 'Let him beware'. It is a formal notice or warning given by an interested party to a court, judge, or ministerial officer in opposition to certain acts within his /her power and jurisdiction;<sup>119</sup>
- *Originating summons*- One of the two modes in commencing a civil matter when: it is required by a statute; or a dispute, which is concerned with matters of law, and is unlikely to be any substantial dispute of fact. <sup>120</sup>

### 7.2 Who may be issued with a grant of Letters of Administration?

Persons entitled to apply for a grant are:

- Executor/s named in a will. This is the person named in the will of a deceased person as the one to distribute a deceased person's property and to arrange for the payment of debts and expenses;
- Any adult person of sound mind who is not bankrupt;
- A Trust corporation<sup>121</sup> may act as executor or administrator in any case with the permission of the court, giving such security as the court may determine; <sup>122</sup>.
- The Public Trustee, can take up administration in the following instances:<sup>123</sup>:
  - o The deceased died intestate and there is no one willing or capable to take up administration;
  - o The person named as executor is dead or has renounced probate;
  - o The deceased has appointed Public Trustee administrator.

<sup>118</sup> <http://thelawdictionary.org/petition/>

<sup>119</sup> <https://legal-dictionary.thefreedictionary.com/caveat>

<sup>120</sup> [https://www.elitigation.sg/\\_.../Originating\\_Summons/Originating\\_Summons.htm](https://www.elitigation.sg/_.../Originating_Summons/Originating_Summons.htm)

<sup>121</sup> A trust corporation is defined under Section of the Trustee Act Cap 167 as: the public Trustee; a corporation appointed by the court; a trust corporation as defined by the law of Succession Act Cap 160 S. 3

<sup>122</sup> Under section 3 of the LSA

<sup>123</sup> Section 46 LSA.

## Note

- Where a person died without making a will, the Court has wide discretion in appointing administrator but is guided by order of preference in the LSA.<sup>124</sup>
- A maximum of 4 applicants may apply for Letters of Administration.
- Where deceased had minor children, there must be minimum of two adult applicants.
- The Public Trustee may upon application and grant have the same powers and duties of personal representatives as outlined in the LSA.
- The Public Trustee also exercises any other powers granted by the Public Trustee Act, e.g. to levy fees for his/her services.

### 7.3 Application for Grant of Letters of Administration intestate

Intestate means where a person dies not having made a will. In these circumstances:

- Any person may apply for grant of Letters of Administration intestate;
- Priority is given to a survivor and in order of consanguinity (blood relationship to the deceased).<sup>125</sup>

#### *Documents required for general basic situation*

- P & A 80 (petition)
- Form P & A 5 (affidavit)
- Form P & A 11 (affidavit of justification of proposed sureties)
- Form P & A 12 (affidavit of means)
- Form P & A 57 (guarantee of personal sureties)
- Original death certificate or certified copy. If it's a case of presumption of death, the order of the court must be attached
- Full inventory of assets and liabilities of the deceased at the time of death including estimated values
- List of heirs
- Letter from Area Chief introducing petitioner and heirs
- Two receipts from bank payment: Court fees paid to Judiciary account, and fees to Government Printer for court to submit for gazettment and notices (account furnished at the registry).
- Grant is issued in form P&A 41.

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<sup>124</sup> section 66

<sup>125</sup> Section 66 LSA

*Documents required where petitioner is a widow/widower with adult children as survivors*

- Same as for the general situation in 3.3 above, plus Form P & A 38 (Consent form).

**Note**

- Adult children are required to give their consent to the widow/widower.
- If no consents are available ensure notices have been issued to every person entitled in the same degree as or in priority to the applicant
- Grant issued P & A 38a.

*Documents required (widow/widower with minor children as survivors)*

- Same as regarding the situation with adult children, but for the requirement that a minimum of two persons must apply for the grant to create a continuing trust
- The grant is issued in Form P&A 41.

**7.4 Limited Grant –*ad colligenda bona de functi* (Latin for ‘for collecting the goods of the deceased’)**

This applies where it is necessary to secure the estate assets that may be at risk pending administration.<sup>126</sup>

***Who may apply?***

- Any person to whom a report of the death is made as per the LSA <sup>127</sup> may apply
- Any other person may apply.

*Documents required*

- Form P&A 85
- Supporting Affidavit P&A 19
- Consent if any
- Death certificate certified and endorsed
- Introduction letter from the Chief.

**Note**

- If documents are in order, the Deputy Registrar places file before Judge for issuance of the grant.
- There is no need for the petitioner to appear before the judge
- Grant issued (P & A 47).

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<sup>126</sup> (P&A Rule 36(1))

<sup>127</sup> Section 46(2)

### **7.5 Limited Grant of Letters of Administration *ad litem* ('for the purposes of the legal action only')**

This grant enables the representative of the estate to sue on behalf of the estate, or defend a suit where the estate has been sued.

*Documents required:*

- Form P&A 90B
- Supporting Affidavit P&A 19
- Consent if there are adult survivors
- Death certificate certified and endorsed
- Introduction letter of beneficiaries from the Chief
- Where possible evidence of the cause of action
- Evidence of relationship.

#### **Note**

- If documents are in order, the Deputy Registrar places file before Judge for issuance of the grant.
- There is no need for the petitioner to appear before the judge.

### **7.6 Grant of administration *pedente lite* ('during/pending litigation')**

This grant is given to a person simply to preserve the estate during litigation e.g. if the will of deceased is being contested, the court may appoint a petitioner *pedente lite* to preserve the estate so it is not wasted.

The holder has no power to distribute the estate and the grant is terminated upon conclusion of the pending proceedings.

*Documents required*

- Form P&A 90
- Form P&A 19 (Affidavit).

#### **Note**

- In this type of grant the petitioner may be required to appear before a judge.

### **7.7 Grant *de bonis non administratis* ('of goods not administered')**

This grant is given where the personal representative has not completed the administration of the estate either because of death or some other reason. It is limited to the purpose of administering the un-administered part of the estate

### *Documents required*

- Form P&A 86 (where deceased died without making a Will)
- Form P&A 87 (where deceased died having made a Will)

#### **Note**

- Note If documents are in order the matter proceeds to gazettelement
- If no objection is filed after gazettelement, the grant is issued

### **7.8 Special Limited Grant<sup>128</sup>**

This grant is made in special circumstances where the urgency of the matter makes it impossible for the court to make a full grant to meet the necessities of the estate.

### *Documents required*

- Form P&A 85 (petition)
- Form P&A 19 (affidavit)

#### **Note**

- For special limited grant the petitioner must appear before the judge.

### **7.9 Other Limited Grants**

The court may make other limited grants such as:<sup>129</sup>

- When a personal representative is out of the country;
- Where a will has been misplaced or lost, until the original grant or authentic copy is availed.

### *Document required*

- Form P&A 94
- Where there are no prescribed forms for a limited grant, forms in the first schedule of the LSA can be used with such adaptations, additions and amendments as may be necessary in all proceedings under the P&A rules
- The supporting affidavit in all cases must provide evidence in support of the petition.

## **8. Objections<sup>130</sup>**

Once applications for grants have been gazetted, before the end of 30 days, anyone wishing to challenge the application may file an objection. The objection proceedings are meant to deal with preliminary issues such as whether the applicant is the correct person to apply for the grant.<sup>131</sup>

<sup>128</sup> Provided for under the amendment to the fifth schedule of LSA which was made by legal notice number 39 of 2002

<sup>129</sup> Section 54 of the LSA

<sup>130</sup> Sections 68 and 69(1)) LS

<sup>131</sup> Such was the case *In the matter of the Estate of Aggrey Makanga Wamira Succession Cause number 89 of 1996* where the father of the deceased argued that the petitioner and administrator, his daughter in law was young and inexperienced and she was likely to remarry, and that his grand-daughter was just a minor. Hon Justice Waki, said that the

Another instance when objections may be made include where the existence of a will is in serious dispute. The court makes a finding on the preliminary issue, and thereafter the administration proceeds in the normal manner.

### *Procedure*

- Objections to an application for grant must be filed in triplicate. It is entered into a register by the registrar
- Upon receipt of the objection, the registrar notifies the applicant of the filing of the objection
- Registrar also sends a notification in Form P & A 67 to objector requiring the objector to file an answer to the petition by way of cross application
- If no objection, answer to or cross petition have been filed, the court may proceed as if no objection has been raised<sup>132</sup>
- The registrar refers the matter to court for directions once all the requisite paper has been filed
- Judge gives directions as to who is entitled to start during the trial
- Registrar notifies both parties (petitioner & objector) of the time & place set for hearing, of the petition, answer & cross applications. The dispute is then determined.

### **Note**

- Objections may be withdrawn, by way of a notice to withdraw.<sup>133</sup>
- Any objector may amend his objections by lodging an amended answer & cross application. A copy is required to be served on the petitioner.

## **9. Confirmation of a Grant**

Once a grant has been awarded, after expiry of 6 months the holder of the grant should apply to the court for confirmation. Confirmation of the grant will empower the distribution of capital assets, that is significant pieces of property such as homes, cars, investment properties, stocks, bonds, and even collectibles or art.

### *Documents required*

- P&A 108 (application) and P&A 8 (affidavit) where a grant has been issued for a will
- P&A 108 (application) and P&A 8 (affidavit) where a grant has been issued for letters of administration with will
- P&A 108 (application) and P&A 9 (affidavit) where grant has been issued for letters of administration without a will.

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widow was suited to be appointed as an administrator

<sup>132</sup> Section 69 (1) 70 & 71

<sup>133</sup> Form P & A 66 (rule 17 (7))

## Procedures

- Dependants of the deceased must be mentioned in the application, assets of the deceased listed, and method of distribution outlined
- All beneficiaries should give consent to the mode of distribution (Form P&A 37)
- If documents filed are in order, if there is a caveator (*someone who had recorded an interest in the estate with the court*), the deputy registrar will send Form P&A 111 to caveator warning them of the application for confirmation.
- If no caveator, the deputy registrar will give a hearing date when the judge on being satisfied with the application would confirm the grant.
- In contested cases, the caveator or beneficiary who has refused to consent to the application will be required to file an affidavit detailing grounds for objection<sup>134</sup> (files form P&A 28 for Caveator and P&A 10).
- Upon filing of the affidavit of objection, the matter will proceed for hearing, when all parties are heard.

### Note

- Regarding disposing of protest to confirmation hearings, if the dispute is only over certain properties, then the undisputed properties should be confirmed, and the disputed properties go to full hearing.<sup>135</sup>
- Where the court confirms the grant a certificate of confirmation shall be issued.

## 10. Citations<sup>136</sup>

A citation is a command to a person entitled to apply for a grant ordering him to act within a specified period to apply for the grant or confirmation of a grant.

### Documents required

- Where there is a will P&A31
- Where there is no will P&A 32
- Creditors P&A 36 (A person or entity to whom money is owed by the estate)

### Procedure

- The applicant swears an affidavit asking the registry to issue the citation
- If there are good grounds, the registrar signs the citation which is then served on the person cited in the manner directed by the registrar
- The person cited must enter an appearance within 15 days of service (that is must submit themselves to the jurisdiction of the court in the prescribed form)

<sup>134</sup> P&A Rule 15

<sup>135</sup> Angawa J, In *Mary Gachuru Kabogo (deceased) Nairobi Succession Cause number 2930* of 2001.

<sup>136</sup> Rules 21,22 and 23

- If this time expires before the cited person enters appearance, the person applying for the citation may petition the court to make the grant to him/her
- In the alternative summonses to be taken out or notices to such person cited to take out the grant or by other person.
- Once application for citation is granted, the Letter of Administration is applied for in the normal way.

## 11. Rectification

Where there are *errors* in a grant in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, an application may be made for court to rectify, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

This provision is however narrow and specific, hence locking out some fundamental omissions or mistakes that may occur in grants such as exclusion of parts of the estate, or of legitimate dependants. The courts<sup>137</sup> have sought to cure this limitation by providing that where a rectification interferes with the court's earlier orders, one must move the court by way of making an application for review of the orders to accommodate the anticipated changes.

Authority for review is drawn from section 63 of the Probate and Administration Rules that has adopted some of the rules of the civil procedure rules. Review per the civil procedure rules applies where there is among other reasons a fundamental error or discovery of new and important evidence like in this case.

### *Documents required*

- P & A 62 (Notice) filed in original application.
- No affidavit required.
- For rectification after a grant has been issued, with or without a confirmed grant.
  - o P & A 110 summons for rectification of grant.
  - o P & A 13 (affidavit) (unless exempted by the registrar).

### *Procedure*

- Application placed before court without delay.
- Court makes order as to rectification of grant. Alternatively, court may direct notices to issue to all parties first, including applicant to attend court.
- In both cases of rectification, the procedure is administratively in the first instances.
- Notice served on objector to the rectification
- Where there are no objectors or amendments are minor, the registrar may permit amendments without notice to any parties.

<sup>137</sup> Musyoka J, in *Re Estate of Charles Kibe Karanja (deceased) Succession Cause No. 339 of 2001*

## 12. Resealing of Grant of Probate or Grant of Letters of Administration

A grant or its equivalent that is made by a competent foreign court may have the same effect, force and operation in Kenya as if granted by that Kenyan court if:

- It is produced to and a copy deposited with the Court; and
- It is sealed with the seal of that court<sup>138</sup>.

*Documents required:*

- Evidence of payment of stamp duty;
- Evidence of the domicile of the deceased person. ('Domicile' means the country that a person treats as their permanent home, or lives in and has a substantial connection with);
- Form P&A 81 or P&A 82(Petition);
- P&A 7 (Affidavit);
- Certified copy of the grant issued by the foreign country.

*Procedure*

- Grant issued by Court (P&A 81)
- Grant from foreign country is filed
- File is minuted
- Notice to Kenya Gazette is issued
- If no objections, then grant letters is issued.

### **Note**

- A grant given by a Kenyan court can be used in foreign courts for resealing.

## 13. Revocation

A revocation is the official cancellation of a decree, or decision of the court. Once a grant is confirmed, no objections or protests may be filed, only revocations (with exceptions).

*Procedures*

- Applicant fills forms 107 and 14
- Once in receipt of application, registrar issues form P&A 70 (Notice) to the applicant (seeking revocation) to attend the judge without the other parties for directions
- Registrar also issues Form P&A 68 to the administrator notifying him of the revocation application and inviting him to file an affidavit to oppose the application
- Applicant takes dates & appears before a Judge for directions without the other parties

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<sup>138</sup> Section 77

- The Judge directs which persons should be served with the application (Form 107, 14); (These persons are those normally affected by the revocation); the mode of service to such persons (personal or otherwise) including the manner of efficiency of the service
- Applicant wishing to revoke grant then serves the persons named with Form P & A 107 & 14 and a notice under Form 68
- Each person served may fill an affidavit stating whether they support or oppose the application and the grounds for so doing
- The registrar then gives notice to all concerned to appear before the court for hearing
- The court, on the day set down for all parties to appear, may determine the application or make such orders that it deems fit
- The court on its own motion may revoke grant<sup>139</sup>. If it does so, a notice in Form P & A 69 must be issued & served on all persons concerned, before revocation is done
- Grounds for which a grant may be revoked include:
  - o Proceedings were defective in substance as for instance where the will was obtained by fraud;
  - o Where the grant was obtained by the making of a false statement or untrue allegations of fact;
  - o Where there has been concealment(hiding) of material fact to the court for instance deliberately omitting some beneficiaries from the petition;
  - o Person to whom the grant was made has failed to confirm it within a year or to proceed to produce inventory or accounts of the administration of grant as required under the LSA;<sup>140</sup>
  - o When there has been lack of diligence (care) in administration of the estate such as failure to provide accounts.

### Note

- Proof of services is required
- Any person may apply by way of a citation supported by an affidavit signed by the registrar.
- Examples of instances where citation may be issued include:
  - o Where a person either in intestacy or testate has an entitlement to a grant prior to the person applying for citation delays or declines to apply for a grant, he/she may be cited to accept or refuse a grant;

<sup>139</sup> Rule 44 (5).

<sup>140</sup> As required under section 38 (e), (g) Section 76 (d).

- o Where a person with equal priority has refused to give his/her consent to the taking of a grant by another with equal priority;
- o Where a beneficiary has refused to give his consent to the mode of distribution of an estate;
- o Where a purchaser or creditor is owed money by the estate.

## 14. Notices

All applications for grants, except a limited grant for collection and preservation of assets must be advertised in the Kenya Gazette inviting objections within 30 days from publication date.<sup>141</sup>

- The notice is also exhibited in a conspicuous place in the court house
- The notice informs the public of the death of the deceased and the identity of the person seeking representation to the estate
- If no objection is received by the court, the Letters of Grant is issued.

## 15. Administration of Estates

### 15.1 The role of the Public Trustee in the administration of estates

#### ***What is the Public Trustee?***

The Office of the Public Trustee is established under the Public Trustee Act (Chapter 168 Laws of Kenya) which was enacted in 1925, and amended in 2011. It operates within the organizational framework of the Division of the Administrator General in State Law Office and Department of Justice.

The Public Trustee offers services of a specialized nature which involve identification and collection of assets, identification of beneficiaries, management and subsequent transmission of both movable and immovable property either as an estate or a trust. The Office also discharges duties relating to custodianship, management of properties of persons living with mental disability and management of enemy property.

#### ***What is the mandate of the Public Trustee?***

The mandate of the Public Trustee can be summed up as follows:

- Administration of Estates under the Public Trustees Act Chapter 168;
- Administration of Trusts under the Public Trustees Act Chapter 168;
- Estate Duty Commissioner under the Estate Duty Act Chapter 483;
- Custodian of Enemy's Property Act;
- Custodian Trustee for Property owned by public schools, colleges and other public institutions under the Public Trustee Act Chapter 168;
- Management of the Public Trustee Fund under the Public Finance Management Act.

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<sup>141</sup> (P&A Rule 7(4))

## ***Regional offices of the Public Trustee***

The Division of Administrator General is headed by the Administrator General who also holds the office of the Public Trustee. The Division has established regional offices in Kisumu, Lamu, Malindi, Mombasa, Kakamega, Embu, Nyeri, Kisii, Machakos, Garissa, Meru, Eldoret and Nakuru. Plans are underway to operationalise two additional Offices in Kericho and Bungoma in line with Vision 2030, Medium Term Plan and Article 6(3) of the Constitution of Kenya as part of its decentralisation programme to ensure that Public Trustee services are easily accessible to the public.

## ***The role of the Public Trustee in Administration of Estates***

The Public Trustee may apply to court under the LSA for a grant of representation where he/she has been appointed as the executor or administrator, or in all those other circumstances where any other person may apply under the Act.<sup>142</sup> The Public Trustee may also renounce executorship.

The court may also under particular circumstances that appear as requiring, give grants to the Public Trustee. This may be granted even where there are persons who are entitled under the LSA.

The Public Trustee can also hold legacy gifts for persons with mental disabilities and minors for whom the Public Trustee is their trustee. These gifts should be transferred by the giver, executor or administrator in an instrument in writing to the Public Trustee.<sup>143</sup>

To carry out these functions, the Division of Administrator General has got a section that is responsible for administration of estates. The functions of that section include:

- Receiving estates for administration;
- Ascertainment of proprietorship of assets;
- Ascertainment of heirs;
- Calling in of the assets;
- Obtaining consents for administration;
- Advertisement for claims against estates in the Government Press;
- Collection of debts due to the estate;
- Preparing legal opinions;
- Settlement of claims against the estate;
- Attending clients;
- Authentication of documents;
- Issuance of Certificates of Summary Administration in estates whose gross value does not exceed Kshs. 500,000/=;

<sup>142</sup> Section 6 Public Trustee Act

<sup>143</sup> Section 21.

- Advancing estate funds to beneficiaries for advancement of their education and to cater for their immediate needs pending the conclusion of the administration of estates;
- Administration of Civil Servants Group Accident funds;
- Mediating family disputes on inheritance;
- Drawing pleadings for Passing of Accounts;
- Attending court for the passing of accounts in compliance with Section 83(g) of the Law of Succession Act Cap 160 Laws of Kenya and Rule 4 of the Public Trustee Rules;
- Issuance of Estate Duty Certificates.

### ***The role of the Public Trustee in the administration of trusts***

The Division has established the administration of trusts section which administers trusts for minors, persons living with mental disability, charitable trusts and also acts as a custodian trustee on appointment by the court under Section 20 of the Public Trustee Act. The Section is also responsible for custodianship of enemy property and property owned by schools, colleges and other public institutions.

### **15.2 Powers and duties of administrators/executors and Public Trustee**

- Executor/administrator has full powers over the property of the deceased over which he/she has a grant;
- They are not trustees but act as trustees to beneficiaries and creditors as they are in a fiduciary position in regard to the property they are administering;
- This overlap in roles of trustee and personal representative makes some provisions of the Trustee Act cap 167 relevant to Succession matters;
- Powers of personal representatives are differentiated as follows: <sup>144</sup>
  - o A grant of probate, regardless of when issued shall take effect from the date of the death of the deceased;
  - o A grant of letter of administration shall only validate acts done after the issue, therefore dealing with the estate prior may amount to offences under section 45 LSA.

### **15.3 Powers of representatives<sup>145</sup> are:**

- To pursue all causes of action which survive the deceased (effective once grant is issued).<sup>146</sup>

<sup>144</sup> Section 80

<sup>145</sup> Section 82

<sup>146</sup> Under Order XXIII rule 3(1) of the Civil Procedure Rules where a plaintiff dies and the cause of action survives him, the court upon application should cause the legal representative to be made a part to the suit. Under order XXI rule 18 where a decree is obtained against a personal representative the personal representative shall be liable only to the extent of the property of the deceased

- To collect and preserve the assets of the deceased.<sup>147</sup> Assets which do not vest upon the personal representative include:
  - o property held by the deceased as joint tenant;
  - o money payable under a discretionary pension scheme;
  - o Assets the subject of a nomination to a specified person such as cooperative savings;
  - o Insurance policies expressly in trust.
- To sell, mortgage or lease any property of the deceased;
  - o In case of intestacy the personal representative during confirmation facilitates the distribution of shares to the beneficiaries;
  - o No immovable property may be sold before confirmation of the grant;
  - o The representative has power to sell any assets to settle any debts and liabilities the deceased may have had, and the mode of sale will be the one most advantageous to the estate;
  - o The executor in intestate succession exercises a power of sale in accordance to the terms of the Will, and if no power of sale in will, exercises the statutory power of sale or applies to court for an order of sale;
  - o Public Trustee can convert into money movable property of an estate which he administers,<sup>148</sup> but requires authorisation of the court to sell immoveable property.
- Power to delegate their duties.
  - o Extent to which delegation can be done is the same as for trustees<sup>149</sup>
  - o The delegation can be to: advocates; banks or to an estate agent to sell land belonging to the estate.
- Power to Invest.
  - o Wills usually give representatives wide powers of investment.
  - o In case of intestacy, the representative can only exercise statutory powers to invest.
  - o As a trustee, a representative may invest trust funds in his possession in accordance to the relevant provisions of the Trustee's Act.<sup>150</sup>

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<sup>147</sup> It is an offence under section 95 to fail wilfully and recklessly neglect to collect any assets of the deceased.

<sup>148</sup> Section 12(1)

<sup>149</sup> Governed by section 24 of the Trustee Act.

<sup>150</sup> Under provisions of section 4 of the Trustee Act. Under rule 6 of the Public Trustee Rules, the Public Trustee is allowed to make authorised investments such as investments in a first mortgage or charge and deposits in any bank or financial institutions

- o Power to appropriate the estate.
- To assign shares of the estate to individual beneficiaries after confirmation of grant.
- To carry out the deceased's business.
  - o In testate succession, executor can carry out business of deceased in accordance with the will of the deceased.

#### **15.4 Duties of personal representative**

- To pay for reasonable funeral expenses for the deceased
- To collect all the free property of the deceased and debts owing to him
- To pay out of the estate of the deceased all the costs of administering the estate including fees payable to experts assisting with the administration.
  - o Fees payable to the Public Trustees and court fees and other administration expenses payable are second after funeral expenses.<sup>151</sup>
- To ascertain and pay all the debts of the deceased.
  - o This is an absolute duty and does not depend on representative's knowledge of the existence of a certain debt.
  - o It is a requirement in case of Public Trustee, that a notice be placed in the Kenya Gazette calling for creditor to prove debts within a specified time.<sup>152</sup>
  - o If the estate is insolvent, all the debtors will be paid, and beneficiaries receive nothing, and bequests made in a Will shall have no effect in that instance
- To produce a full and accurate inventory of the assets and liabilities of the deceased within a period of six months from the date of the issue of the grant
- To distribute the assets remaining after payments of expenses and debts in accordance with the terms of the will or in accordance to the respective beneficial interests of the survivors
- To apply for confirmation of the grant within a period of one year. Failure to do this can be a ground for the court of its own motion to revoke the grant.
- To be ready to produce to the court an accurate inventory of the assets and liabilities of the deceased and the dealings related thereto.

#### **15.5 Offences of personal representatives<sup>153</sup>**

Wilfully and recklessly failing to collect assets of the deceased:

- Wasting the assets of an estate
- Subjects the estate to loss or damage

<sup>151</sup> Under section 13 of the Public Trustee Act

<sup>152</sup> Under section 12 of the Public Trustee Act

<sup>153</sup> Section 95 LSA

- Fails to produce an inventory of the assets of an estate and or accounts
- Produces an inventory and account which is false
- Continues to administer an insolvent estate without petitioning for bankruptcy
- Being the sole surviving administrator in an estate where there is a minor fails to petition court to appoint a co-administrator within three months.

## 16. Principles Regarding Distribution of an Estate

- Where a deceased has left one spouse and a child or children, the spouse shall be entitled to:
  - o Personal and household effects of the deceased
  - o Life interest in the whole residue of the net intestate estate
- The surviving spouse can during the life interest gift any part of the net intestate to the surviving children or child of the deceased, which shall take effect immediately.
- Surviving spouse can, with consent of adult children, or co-trustee sell moveable property for his/her own maintenance during the life interest. For sale of immovable property consent of the court must be sought.
- If the deceased is a man and had several wives, each house is entitled to his personal belongings and a portion of the net intestate estate depending on the number of children in each house
- Where the deceased has left a surviving spouse and no children, the property devolves to:
  - o Personal and household effects of the deceased absolutely;
  - o The first twenty thousand shillings out of the estate or 20% depending on whichever is greater;
  - o A life interest in the whole of the remainder.
- Where the intestate has left no spouse, but a child or children, the net intestate estate goes to the surviving child if he/she is one or to the children in equal shares so long as:
  - o Property to minor children shall be held in trust;
  - o Previous gifts to a child or beneficiary shall be considered in distributing the net intestate estate.
- Where a child predeceases an intestate, his children shall be entitled to his share of the estate which he would have inherited
- Where the deceased has left no child or spouse the net intestate estate goes in the following order of priority: father; mother; brothers and sisters and their children; half-brothers and half- sisters and their children; other relatives.

## Note

- o Upon determination of the life interest the property shall devolve by order of priority.

## 17. Rights of Beneficiaries

Beneficiary have a right to expect:

- Completion of administration of the deceased estate within the shortest time possible (required time is one year);
- Protection of their interests by the personal representative through proper administration of the estate;
- Income and profits accruing from gifts made from the estate up to date of distribution.
  - o The principles relating to validity of gifts (include):
    - Gift was made in contemplation of death
    - The person gives moveable property
    - There is delivery to the intended beneficiary means of possession of the property
    - The person making the gift dies from any other cause of death apart from the contemplated cause of death
    - The intended beneficiary survives the person making the gift.

## Note

- No gift shall be valid if the person making the gift commits suicide.

## 18. Applications By Dependants

- A dependant not properly provided for by a will of the deceased or the laws of intestacy may move a court under this section seeking for reasonable provision<sup>154</sup>
  - o Documents required: Form P&A 106 if a grant has been made and not confirmed and Form P&A 96 if no grant has been applied for; an affidavit of facts of case.<sup>155</sup>
- A child can apply to court after confirmation of a grant in the cause in which the grant was confirmed, to have his share of the estate apportioned to him by a surviving spouse of the (Form P&A 105 and 17)<sup>156</sup>

<sup>154</sup> Applications under section 26

<sup>155</sup> Rule 45 contains the relevant facts to be contained in the affidavit

<sup>156</sup> Rule 4 stipulates relevant facts required in the affidavit

- o The summons and affidavit shall be served on surviving spouse, children of deceased and such other person as the court shall deem fit
- Beneficiaries and creditors may move the court by way of originating summons<sup>157</sup> seeking:
  - o Determination of any questions affecting their interests or rights;
  - o Furnishing of accounts by the personal representative;
  - o Payment into court of any money in the hands of the administrator;
  - o Directing the personal representative to refrain from doing any particular act;
  - o The determination of any questions directly arising from administration;
  - o The administration of the estate of the deceased;
  - o Determination of any question regarding the construction of a will.
- A personal representative can by the same provision move the court seeking:
  - o Order for ascertainment of any class of heirs, creditors;<sup>158</sup>
  - o Order for the approval of a sale, purchase, compromise or other transaction.

### Note

- All parties likely to be affected by any order made should be served with the originating summons.
- The court will give directions on the mode of hearing and make such orders as are necessary for the ends of justice.

## 18.1 Other applications<sup>159</sup>

- Where a codicil is discovered after a grant of probate or of letters of administration with will annexed, an application may be made to court by way of summons and affidavit
- Where applicant is not holder of first grant he/she is required to serve the original holder of grant and beneficiaries of the deceased
- Where after a grant of probate is issued, a codicil is discovered which appoints different executors, applications are by way of Form P&A 97 in the same cause in which the probate was granted.
  - o The codicil is lodged together with the petition supported by an affidavit in Form P&A 14 identifying the codicil and stating reasons for its omission
  - o Every executor is named as a respondent and shall be required to file an affidavit

<sup>157</sup> Applications under Order XXXVI of the Civil Procedure Rules

<sup>158</sup> (Rule 42(3)

<sup>159</sup> Under section 61 or 75 of the Act

## 19. Accounts

- The court while confirming a matter gives six months for filing of completed account.
- On date of account, any interested person may be heard before the accounts are approved.
- The approval may be dispensed with if all persons sign consent that accounts are approved.
- The Accounts should contain the following:
  - o An inventory of all assets owned by the deceased
  - o A list of all assets owing to the deceased
  - o An account of the deceased's funeral and testamentary expenses
  - o Particulars of all receipts
  - o Particulars of all payments
  - o Particulars of transfer of assets
  - o Particulars of all assets vested in and held by the personal representative
  - o Particulars of all outstanding liabilities.

## PART III: ANNEXES

### I. Bibliography

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## II List of Cases

### Procedure

1. **Makhangu vs. Kibwana** (1995-1998) 1 EA 175

The court held;

- An appeal does lie to the Court of Appeal from a decision of the High Court in probate matters.
- Under S 47 of the LSA, 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 S 66 of the Civil Procedure Act, either as a matter of right if it fell within the ambit of S 75 of the Civil Procedure Act or by leave of the court if it did not.

- See also ***Commissioner of Income Tax vs. Ramesh K. Menon (1982-1988) 1 KAR 695***

**2. *In the Matter of the Estate of Hezron Bernard Wamunga.*** The court held:

- 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.

**3. *Shah v Shah No.2/2002 2 KLR 607*** – Onyancha J held:

- Where any proceedings are covered by special legislation, the Civil Procedure Act and Rules do not apply unless covered by special legislation even if such legislation is silent and does not exclude the application of the CPC and CPA
- The LSA is a self-contained code covering both procedure and substance of the matter dealing with succession.
- The High Court, in a number of decisions, has held that section 47 of the LSA and rule 73 of the P&A 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.

**4. *In Re Estate of Kilungu (deceased) (2002) 2 KLR 136***, the court held:

- Rule 73 of the P & A Rules saves the court's inherent powers in the same way as section 3A Civil Procedure Act, [but it] cannot be used to do what the LSA does not allow the court to do.
- Rule 73, just like section 3A of the Civil Procedure Act, must be used to do what is lawful only.
- Rule 73 [cannot] not be invoked to apply Order 39 (TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS) of the Civil Procedure Rules in probate matters
- The only provisions of the CPR imported to the LSA are Orders dealing with. service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.
- If a party wishes to obtain orders which are enforceable, they must bring proceedings under the CPR by filing an ordinary suit by way of plaint/summons

**5. *Kangwana & Company Advocates vs. Solomon I. Kisili Nakuru CACA No. 41 of 1984***,

- Actions against executors and administrators can be brought under Order 30 (RECOGNIZED AGENTS AND ADVOCATES), Order 34 (ORIGINATING SUMMONS) and Order 4 (INSTITUTION OF SUIT AND ISSUE OF SUMMONS) rule 1 of the CPR.

- Probate proceedings are not suits in the ordinary meaning of civil suits. Therefore, orders and decrees of the probate courts are not enforceable under the Civil Procedure Act.
- The only way of enforcing a probate courts orders is through contempt proceedings.

## Gender equality

### 6. *Rono v Rono & Another, Rono v Rono and Rono, Appeal judgment, Civil Appeal No 66 of 2002, (2008) 1 KLR (G&F) 803, Justice Waki.* The court held:

- The fact that the girls would one day get married was not a determining factor when it came to the distribution of the net estate of the deceased.
- The court had a duty to exercise its discretion judiciously when it came to distributing the estate.

### 7. *Samson Kiogora Rukunga v Zipporah Gaiti Rukunga 2011 [eKLR]* High Court at Meru. The court held:

- The law as it is now, it matters not, whether a daughter of the deceased is married or not when it comes to consideration of whether she is entitled to inherit her parent's estate.
- Marital status of a daughter is not a basis to deny her the right to inherit her father's estate.

### 8. *Re Estate Priscilla Wairimu Kamau [2005] eKLR*

The court held:

- Daughters, just like sons, have equal rights to inherit their parents' property.
- The law does not distinguish the deceased's children on the basis of their gender or marital status.

### 9. *Re Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR*

The court held:

- The daughters of a Maasai man who had died without leaving a will had a legitimate claim to inherit his property.

### 10. *Shilubana v. Nwamitwa, (2008 (2) SA 66 (CC) 44-49.)*

The court in this South African case held:

- Customary rule that chieftainship is passed down to the eldest son is out of step with society's new norms that men and women are equal;
- Customary law must be permitted to develop;

- The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail.

**11. *Bhe 2004 (1) SA 580 (CC) 1 156*, Ngcobo J. concurring,**

- “[W]hen dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law.
- Legal norms develop in different situations under different cultures and in response to different conditions

**12. *E.S & S.C. v. United Republic of Tanzania (CEDAW/C/60/D/48/2013 Communication No. 48/2013)***

Two widows in Tanzania (E.S. and S.C.) under Tanzania’s customary inheritance law, were denied the right of inheriting or administering the estates of their late husbands and evicted from their homes with their minor children by their in-laws. Committee held:

- Women’s equal rights to own, administer and enjoy property is “central to their financial independence and /may be critical to their ability to earn a livelihood and to provide adequate housing and nutrition for themselves and for their children, especially in the event of the death of their spouse”.
- By condoning legal restraints on inheritance and property rights that discriminate against women, [Tanzania] had violated several articles under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including, among others, provisions pertaining to equality before the law [15 (1), 15 (2)], the right to bank loans, mortgages and other forms of financial credit [13 (b)], and the same rights for both spouses in respect of the ownership, management, administration and enjoyment of property [16(1)(h)].
- In reaching its conclusion, the Committee also considered a number of its general recommendations, particularly No. 29, which explicitly prohibits disinheritance of the surviving spouse.

**13. *In Action Rights Ctr. v. Nigeria*, (Soc. & Econ. Action Rights Ctr. v. Nigeria, Judgments Afr. Comm’n on Human & Peoples’ Rights, 1 44, 46-47, ACHPR/COMM/AO44/1 (2002).**

The African Commission on Human and Peoples’ Rights stated that:

- [The State must] move its machinery [to protect beneficiaries of the protected rights] towards actual realisation of the rights.

**Testamentary freedom**

**14. a) *Elizabeth K. Ndolo vs George. M. Ndolo* CIVIL APPEAL 128 of 1995. Court held:**

'In Section 5 [of the LSA], every adult has an unfettered testamentary freedom to dispose his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property.....given by section 5 must be exercised with responsibility, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.'

**b) *In the matter of the Estate of Pratik Ramesh SH Meghji Shah Succession Cause 2355 of 2013***

The deceased had left a will, and appointed his sister executrix and sole beneficiary of his estate. She was granted probate. The applicants were biological children of the deceased, who sought provision in the estate of the deceased, claiming that they were dependents. Court held:

The applicants were biological children of the deceased, but they did not acknowledge him as their father during his life, and they were not his dependants, and as such they were not entitled to any reasonable provision from his estate. The deceased's testamentary freedom under section 5 of the LSA was upheld.

## **Revocation**

### **15. *In the matter of the Estate of Solomon Odwar Anyango (deceased)***

#### ***Succession Cause no. 142 of 2015 eKLR***

Deceased died intestate, was married to three wives and had several children. Respondent, a son of the third wife applied for and was granted letters of administration in 2000, and grant was confirmed in 2001. The only property of the deceased was given to the respondent.

Applicant, a son of the deceased applied for revocation of grant on the ground that the petitioner failed to disclose all the survivors of the deceased's estate and obtain their consent, that he has now transferred the property to himself

The court, revoking the grant, and quoting section 71 of the LSA, held that in distribution, the court confirming the grant is obliged to identify each beneficiary and their share before confirming the grant.

## **Wills**

### **16. *Re Rufus Ngethe Munyua (Deceased) Public Trustee vs. 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 the instructions on a piece of pa-

per. The deceased died a few days later. It was held that the writing disposing the property was an oral will.

**17. *Kell vs. Charmer* 23 Beav. 195 (Ch. 1856)**

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.

**18. *Hodson vs. Barnes***

A will written on an eggshell was admitted to probate

**19. *In Re Cook's Estate* (1960) 1 All ER 7689**

The words "your 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.

**20. *Re Chalcraft's Goods* (1948). 1 All ER 700**

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.

**21. *Weatherall vs. Pearce* ChD 7 19914**

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 S 17 of the U.K Act. It was held that since she had intended her name as signed to be her signature the will was properly signed.

**22. *Wood vs. Smith* and another CA 6 May 1992**

A testator wrote in his own handwriting at the top of his will and before writing the rest of the will "My will by Percy Winterborne". 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.

**23. *Beth Wambui and another vs. Gathoni Gikonyo and others* Nairobi CACA No. 82 of 1993**

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.

**24. *In the Estate of Bean* (1944) P. 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 on the envelope to identify rather than ratify the will. Probate of the will was refused.

**25. In Re Mann's Goods** (1942) P. 146

A testatrix forgot to sign her will, but put it in an envelope and wrote on the envelope, "Last will and testament of J. C. 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.

**26. In the Matter of the Estate of Susan Kanini Kilonzo (deceased) Nairobi HCSC No. 2669 of 2002)**

A will signed by one witness, would be in contravention of s 11(c) of the LSA 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 i.e. the fact of signing. The witnesses need not look at the signature or even know that the document is a will.

**27. Brown vs. 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.

**28. 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.

**29. John Kinuthia Githinji vs. Githua Kiarie and others Nairobi CACA No. 99 of 1988**

A witness competent to attest a will is defined in s 3(1) as a person of sound mind and full age

**30. In the Estate of Bravda** (1968) 1 WLR 479

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.

**31. Githinji J in Karanja and another vs. 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 court was convinced that the deceased made the wills and codicils and duly executed

them in accordance with the provisions of S 11 of the LSA; and there were no circumstances which disturbed the conscience of the court about the same.

### **32. *In the Goods of Hale (1950) 2 Irish Reports 362***

The court held that typist working with the marines on a ship was entitled to make a privileged will.

### **33. *Gattward vs. 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 favor'. 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 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.

### **34. *In the Matter of the Estate of James Ngengi Muigai (1996) Koome J***

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.

## **III. List of relevant laws**

### **International, regional and national laws**

1. The Universal Declaration of Human Rights (UDHR)
2. International Covenants on Economic, Social, and Cultural Rights
3. International Convention on Civil and Political
4. The Beijing Platform for Action adopted at the 1995 Fourth World Conference on Women;
5. The United Nations Convention on the Rights of the Child
6. United Nations Commission on Human Rights resolution 2002/49
7. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
8. Resolution 1998/15 of the United Nations Sub-commission on Human rights
9. The African Charter on Human and People's Rights
10. The Protocol to the Africa Charter on Human and People's Rights on the

## Rights of Women in Africa<sup>160</sup> (Maputo Protocol)

### **Kenyan Laws**

11. The Constitution of Kenya 2010
12. The Law of Succession Act, 1981
13. The Public Trustee Act, 2011
14. The Matrimonial Property Act, 2013
15. The Marriage Act, 2014
16. The Children's Act, 2001 (Revised 2012)
17. Civil Procedure Act, 2009
18. Land Registration Act, 2012
19. Trustees Act, 2012
20. Civil Procedure Act, 2009
21. Magistrates Courts Act, 2015

### **Policies**

22. The National Land Policy (2009)

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<sup>160</sup> Article 21 which provides that a widow has the right to an equitable share in the inheritance of her husband's property; a widow has the right to continue to live in the matrimonial home. If she marries, she retains this right as she owns or has inherited the house; and women and men have the right to inherit in equitable shares, hence protecting the inheritance rights of girl children

## REPUBLIC OF KENYA SUCCESSION CHECKLIST LIMITED GRANT AD LITEM

1. Petition- Form 90 B.
2. Affidavit in Support- Form 19.
3. Consent- Form 38 duly executed.
  - All adult beneficiaries to sign.
4. Original Police Abstract duly certified (where applicable).
  - In any other case such appropriate evidence on cause of action to be availed.
5. Original Death Certificate accompanied by a duly certified copy.
6. Original Introduction Letter from Local Chief.
  - Letters to clearly state that deceased hailed from their jurisdiction, all beneficiaries including minors, their relationships with the deceased and their respective age.
  - Letter to have contact telephone or mobile numbers of the authors.
7. A draft pleading clearly indicating the parties.
  - In case a suit is already filed, to attach certified copies of pleadings.
8. Duly certified copies of the Identity Card of the Petitioner (s) and all adult beneficiaries.
9. If any of the beneficiary (ies) is a minor, the Petitioners MUST be more than ONE.
10. If a man dies and is survived by a wife, the wife MUST be one of the wife MUST be one of the Petitioner (s).



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
P&A CAUSE NO. ....**

**IN THE MATTER OF THE ESTATE OF ..... (DECEASED)**

*LIMITED GRANT OF LETTERS OF ADMINISTRATION AD LITEM*

Be it known that Letters of Administration ad Litem of all the Estate of the above ..... who died domiciled in Kenya on ..... which devolves to and vests in his/her Personal Representatives but limited to the purposes only for .....  
....., and until further representation is granted by this court to .....  
..... THEY/HE/SHE having undertaken to administer such estate according to law (limited as aforesaid) and until further representation be granted and render a true and just account thereof whenever required by law to do.

Issued by the High Court through the Registry at Nairobi this ..... day of ..... 2009.

**JUDGE  
HIGH COURT OF KENYA**

**REPUBLIC OF KENYA**  
**SUCCESSION CHECKLIST**  
**LIMITED GRANT AD COLLIGENDA BONA**

1. Petition- Form 85
2. Affidavit in Support
3. Consent- Form 38 duly executed.
  - All adult beneficiaries to sign.
4. Original Death Certificate accompanied by a duly certified copy.
5. Original Introduction Letter from Local Chief.
  - Letters to clearly state that deceased hailed from their jurisdiction, all survivors, their relationships with the deceased and their respective ages.
  - Letters to have contact telephone or mobile numbers of the authors.
6. Documentary evidence of the Deceased's property to be collected, preserved or protected include Title documents, Bank Account Nos..., Motor Vehicle registration books (Log books), official searches, share certificates, etc, if applicable.
7. Duly certified copies of the Identity Cards of the Petitioner (s) and all adult beneficiaries.



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO. ....**

**IN THE MATTER OF THE ESTATE OF ..... (DECEASED)**

**LIMITED GRANT OF LETTERS OF ADMINISTRATION  
AD COLLIGENDA BONA**

Be it known that letters of administration ad colligenda bona of all the estate of the above named ..... late of ..... who died domiciled in the Republic of Kenya on ..... which by law devolves to and vests in his personal representative but limited only for the purpose of ..... and until further representation were granted by this court to ..... he having undertaken faithfully to administer such estate according to law (limited as aforesaid) and until further representation be granted and render a true and just account thereof whenever required by law so to do.

ISSUED by the High Court in NAIROBI this .....day of .....

**JUDGE OF THE HIGH COURT OF KENYA AT NAIROBI**

**REPUBLIC OF KENYA**  
**SUCCESSION CHECKLIST**  
**INTESTATE PETITION WITH BENEFICIARIES**  
**UNDER/ABOVE 18 YEARS**

1. Petition- Form 80
2. Affidavit in Support- Form 5
3. Consent- Form 38 duly executed (where applicable)
  - All adult beneficiaries to sign.
4. Affidavit of justification of Surety (Form 11).
5. Affidavit of means by Proposed Administrators (Form 12).
6. Guarantee by Sureties
7. Original Death Certificate accompanied by a duly certified copy.
8. Certificate of Thumb Print/Illiteracy by an Advocate.
9. Original Introduction Letter from Local Chief.
  - Letter to clearly state that deceased hailed from their jurisdiction, all beneficiaries/survivors including minors, their relationships with the deceased and their respective ages.
  - Letters to have contact telephone or mobile numbers of the authors.
  - Documentary evidence of the Deceased's Assets (including Title documents, Bank Account Nos....., Motor Vehicle Registration books (log Books), official searches, share certificates, etc if applicable)
10. Duly certified copies of the Identity Card of the Petitioner (s), all adult beneficiaries and Sureties.
11. If any of the beneficiaries/survivors is a minor, the Petitioners MUST be more than ONE.
12. If a man dies and is survived by a wife, the wife MUST be one of the Petitioners (s).



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO..... 20.....**

**IN THE MATTER OF THE ESTATE OF ..... (DECEASED**

We/I, ..... of P.O. Box ..... HERE-  
BY PETITION this Honourable Court for a grant of letters of Administration intestate of  
the estate of the above named ..... who died on the  
.....

AND SAY as follows:

The deceased died intestate domiciled in Kenya.

I/We, present this petition in our capacity as .....

Every person having an equal or prior right to a grant of representation herein has con-  
sented hereto (or has renounced such right or has been issued with a citation to re-  
nounce such right and apply for a grant of representation and has not done so.

We will faithfully administer according to law all the estate which by law devolves upon  
and vests in his personal representative of the deceased and we will render a just and  
true account of such estate whenever required by law so to do and we will when required  
by this court deliver up thereto the said grant.

.....

.....

Signed by the above named... ..

In the presence of .....



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO..... 20.....**

**IN THE MATTER OF THE ESTATE OF ..... (DECEASED)**

**AFFIDAVIT OF JUSTIFICATION OF PROPOSED ADMINISTRATOR**

We/I ..... of P.O. Box ..... having petitioned this Honourable court for a grant of letters of administration intestate of the estate of the above named ..... who died on ..... make oath and say as follows:-

1. I/We are after payment of all our just debts and having taken into account of all my liabilities well and truly worth net of such debts and liabilities in immovable and movable assets in Kenya at least the sum of Kenya shillings .....
2. The facts herein deponed to are known to us of our personal knowledge.

SWORN at NAIROBI

This.....day  
of ..... 2014.

Before me:

}  
.....  
}  
.....  
DEPONENT

Commissioner for oaths/Magistrate



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO. OF 20.....**

**IN THE MATTER OF THE ESTATE OF.....(DECEASED)**

**AFFIDAVIT IN SUPPORT OF PETITION FOR LETTERS OF  
ADMINISTRATION INTESTATE**

We/I, ..... of P.O. Box .....  
jointly and severally make oath and say as follows:-

1. The full name of the deceased to whose estate the proceedings herein relate is ..... and we are the petitioners named in the petition herein dated the ..... day of ..... upon which we have endorsed our name (s) at the time of swearing this affidavit.
2. The deceased died on the ..... at ..... as appears from the attached photocopy of the certificate of death marked '.....' upon which we have written our names at the time of swearing hereof.
3. The deceased was at the date of his death domiciled in the Republic Kenya and his last known place of residence was at .....
4. The deceased died intestate and left the following surviving him: -
  - a) .....
  - b) .....
  - c) .....
  - d) .....
  - e) .....
  - f) .....

- g) .....
- h) .....
- i) .....
- j) .....
- k) .....

- 5. We are related to the deceased by reason of being his .....
- 6. The following is a full inventory of all the assets and liabilities by the deceased at the date of his death (including such assets if any) as have arisen or become known since that date.

- i. ....
- ii. ....
- iii. ....
- iv. ....
- v. ....
- vi. ....
- vii. ....

Total estimated value shillings .....

LIABILITIES - .....  
 .....

7. The facts herein deponed to are known to us of our personal knowledge

Sworn at NAIROBI

This..... 20.....

Before me:

.....  
 (Deponent(s))

Commissioner for oaths/Magistrate

Drawn& Filed By



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO..... 20.....**

**IN THE MATTER OF THE ESTATE OF ..... (DECEASED**

Whereas the above named .....late of ..... who died on the ..... and ..... (hereinafter called "the administrator") is the intended administrator of his estate:

NOW, we ..... and ..... of P.O. Box ..... hereby jointly and severally guarantee and agree as follows; -

1. We will when lawfully required to do so make good any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of the breach by the administrator of his duty:-
  - a. To collect and get in the estate of the deceased and administer it accordingly to law.
  - b. When required to do so by the Court to exhibit on oath in court a full inventory of the said estate and when so required to render an account of the estate; and
  - c. When so required by the courts to deliver up the grant to the court.

2. The giving of time to the administrator of any other forbearance of indulgence shall not in any way affect our liability under this guarantee.  
The liability under this guarantee shall be continuing and shall before the whole amount of the loss mentioned in paragraph one above that our agreeable total liability shall not in any event exceed the sum of Kenya Shillings .....

DATED THE.....

Signed, Sealed and delivered  
by the within named

.....  
.....

}      ○  
          ○

In the presence of  
Commissioner for oaths



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO. .... 20.....  
IN THE MATTER OF THE ..... (DECEASED)**

**AFFIDAVIT OF JUSTIFICATION OF PROPOSED SURETIES.**

We ..... and ..... of P.O. Box ..... jointly and severally make oath and state as follows: -

1. We are proposed sureties on behalf of ..... the intended administrator of the estate of the above named ..... in the sum of Kenya Shillings .....
2. I, ..... for myself say that I am after payment of all my debts and having taken into account all my liabilities, well and truly worth net of such debts and liabilities in immovable and movable assets in Kenya at least the sum of Kenya Shillings .....
3. I, ..... for myself say that I am after payment of all my debts and having taken into account all my liabilities, well and truly worth net of such debts and liabilities in immovable and movable assets in Kenya at least the sum of Kenya Shillings .....
4. The facts herein deponed to are known to our personal knowledge

Sworn at Nairobi

This.....

By:- 1: .....

2. ....

Before me:

Commissioner for oaths/Magistrate



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO.                      OF 20.....**

**IN THE MATTER OF THE ESTATE OF..... (DECEASED)**

**CONSENT TO THE MAKING OF A GRANT OF ADMINISTRATION INTES-  
TATE TO PERSON OF EQUAL OR LESSER PRIORITY**

**WHEREAS** the above-named .....who died on the  
..... intestate and representation has not been raised to his estate:

**AND WHEREAS I** ....., undersigned are entitled to  
apply for letters of administration to the estate of the said deceased in equality with or  
priority to ..... but nevertheless am agreeable to the said  
so applying.

**NOW I,** the said aforesaid do hereby consent to letters of adminis-  
tration to the estate of the said deceased being granted to the said  
.....

Dated the .....

- a)
- b)
- c)
- d)
- e)
- f)
- g)
- h)
- i)
- j)

Signed by the said beneficiaries)

In the present of .....)

**REPUBLIC OF KENYA**  
**SUCCESSION CHECKLIST**  
**GRANT OF PROBATE TESTATE**

1. Petition- Form 78, 3
  - To be signed by the Petitioner (s) against their names.
2. Affidavit in Support.
3. Original Death Certificate accompanied by a duly certified marked and endorsed copy.
4. Original Will accompanied by 2 duly certified copies.
5. Executor (s) who are appointed in the Will of the deceased to apply.
  - Form 101 to be filed where any of the Executor (s) had renounced appointment.
  - Avail an Original Certificate of Death where Executors (s) has died.
6. Certificate copy of the Identity Cards (s) of the Executors (s) and all adult beneficiaries.



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO. ....**

**IN THE MATTER OF THE ESTATE OF ..... (DECEASED)**

**BE IT KNOWN** that on the ....., Letters of Administration Intestate of all the estate of ..... deceased late of ..... who died domiciled in the **REPUBLIC OF KENYA** on the ..... at ..... which by law devolves to and vests in his/her personal representative were granted by this Court to ....., he/she/they having undertaken faithfully to administer such estate according to law and to render a just and true account thereof whenever required by law so to do.

**ISSUED** by the High Court through the registry at **NAIROBI IN KENYA, THIS** .....  
.....

**Judge of the High  
Court of Kenya at Nairobi.**

**REPUBLIC OF KENYA**  
**SUCCESSION CHECKLIST**  
**APPLICATION FOR CONFIRMATION OF GRANT**

1. Summons for Confirmation of Grant- Form 108.
2. Affidavit in Support- Form 108.
3. Consent- Form 37
  - All adult beneficiaries to sign.
4. Copies of the Identity Card of all be beneficiaries who are over 18 years old and who **MUST** attend Court for the confirmation.
5. In cases where there is/are minor beneficiary (ies), it must be clearly stated who will hold the minor's (s) shares **IN TRUST** and such a person to swear an Affidavit confirming such an acceptance.
6. In the event the period between the filing of the Petition and the filing of the Summons for confirmation of the Grant is more than 12 months, the party seeking to confirm the grant **SHALL FILE FRESH** searched **TOGETHER** with the Summons for confirmation of the Grant.



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
SUCCESSION CAUSE NO. ....**

**IN THE MATTER OF THE ESTATE OF..... (DECEASED)**

**CERTIFICATE OF CONFIRMATION OF GRANT**

I HEREBY certify that the above written grant of representation to the estate of the late ..... issued to ..... therein named has this ..... been confirmed by the Court pursuant to the provisions of section 71 of the Law of Succession Act AND it has been directed that the deceased's estate be distributed as follows:

Names	Description of Properties	Share of Heirs

Dated at Nairobi this.....

.....  
**Judge of the High Court of Kenya, Nairobi**

## REPUBLIC OF KENYA ADOPTION CHECKLIST

1. Chamber Summons for Application of Guardian Ad Litem and Report by Director of Children Services.
2. Affidavit of fitness of proposed Guardian Ad Litem.
3. Consent of Guardian Ad Litem.
4. Original Summons.
5. Statement of Facts.
6. Affidavit in Support.
7. Annexures.
8. Report from adopting society, certificate freeing child for adoption to be annexed.

**REPUBLIC OF KENYA**

**ADOPT CAUSE NO.....OF.....**

**CHECK-LIST  
ADOPTION**

NO.	Document	Date filed	Amount Kshs.	Checked by
1	Chamber Summons		250	
2.	Prayers		150 per pray	
3.	Affidavit of fitness		75	
4.	Consent of guardian ad litem		75	
5.	Originating Summons		1,500	
6.	Prayers for Originating Summons		150 per prayer	
7.	Affidavit in Support, statement of facts		10 per annexed	
8.	Report from adopting society/ Certificate freeing child annexed		75	
	<b>TOTAL TO BE PAID</b>			

CHECKED BY:

.....

**Deputy Registrar**

	Answer form-25 cross application	Form 84	NO/YES
	Appearance	Form 26	NO/YES
	Caveat	Form 28	NO/YES
	Application for Grant: No objection filed		NO/YES
	Gazette Notice No.....of..... file		NO/YES

## WHERE THERE IS A VALID WILL (TESTATE SUCCESSION)

### Application for grant of probate

#### Preliminary steps

1. Obtain the original will plus two photocopies (of the will)
2. The deceased's death certificate

Where there is a valid will, an application to determine the validity of the will (grant of probate) can be filed by:

- a) *Persons named as executors to the will*
- b) *Persons other than the executor(s) provided they can demonstrate special circumstances such as death of the executor(s), authority from the executor etc.*

The following documents are filed:

- P&A 78-Petition
- P&A 3-Affidavit
- Original will (annexed)
- Two photocopies of the will
- Certified copy of the death certificate

If the will is held to be valid, inheritance is done in accordance with the wishes of the deceased.

#### Important points to note:

1. *The will could either be oral or written.*
2. *The number of persons applying for grant of probate should not exceed four.*
3. *If the value of the deceased person's property is greater than 20 million shillings these documents should be filed at the High court.*
4. *If the value of the deceased person's property is less than 20 million shillings then these documents should be filed at the Magistrate's court.*



1

## WHERE THERE IS NO VALID WILL (INTESTACY)

### Application for letters of Administration

This arises when either a person dies without a will or the will left by the deceased is held to be invalid by the probate court.

An applicant in such cases petitions the court for grant of letters of administration intestate. The following documents are lodged in the registry (depending on the age of the persons surviving the deceased):

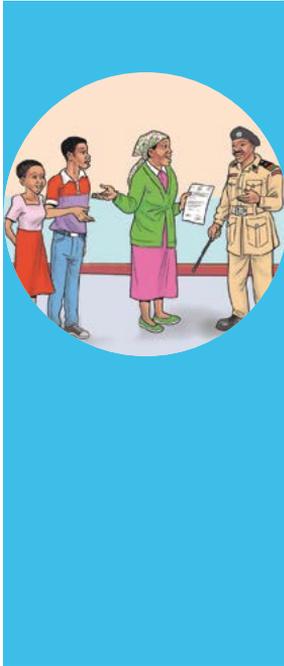
#### i) Widow or widower (with minor children) as survivors

- P&A 80-Petition
- P&A 5-Affidavit
- P&A 11-Affidavit of justification (Proposed sureties)
- P&A 12-Affidavit of justification (Proposed administrator)
- P&A 57-Guarantee of personal sureties
- Certified copy of the death certificate
- Applicant's identity card
- A letter from the area chief listing all the beneficiaries to the property, their ages and relationship with the deceased
- Identity cards of all sureties (those who have taken responsibility for what you say)
- Proof of ownership of the property of the deceased e.g. Title deeds, logbooks, share certificates etc.



2

# Succession Steps



## ii) Widow or widower (with adult children) as survivors

- P&A 80-Petition
- P&A 5-Affidavit
- P&A 12-Affidavit of justification (Proposed administrator)
- P&A 38-Consent form
- A letter from the area chief listing all the beneficiaries to the property, their ages and relationship to the deceased
- Certified copy of the death certificate
- Applicant's identity card
- Identity cards of the beneficiaries (those entitled to the property of the deceased)

## iii) Minors as beneficiaries

The application for letters of administration shall be made by not more than two adult relatives appointed by court to hold the property on behalf of the minors until they become adults. Unless the administrator is the public trustee who is legally allowed to be a sole administrator.

### Important points to note:

1. The number of persons applying for letters of administration should not exceed four.
2. After an application has been filed, with or without a will annexed, one must publish a notice in the Kenya Gazette; and wait for 30 days to allow for any objections.
3. Any person with an objection must clearly state them in court for determination.



### Document filing:

File all the documents above at the nearest court for approval and assessment of fees.

3



### Payment:

Once an invoice is issued by the deputy registrar, make two separate payments for the court fee and gazette ment fee at the specified bank. Present the bank slips at registration to obtain receipts.

4



### Gazette ment:

Once the notice is published in the Kenya Gazette, wait for 30 days to allow for any objections.

If a person had been left out of the list of beneficiaries, he/she can apply to the court to be included.

5



### Letter of administration:

Six months after gazette ment, if there is no objection, grant of letters of administration is issued.

Errors in names, descriptions, place and time of death may be rectified before or after the confirmation of grant.

If the error is fundamental and likely to interfere with the rights of parties then the parties should apply for the grant to be cancelled after which the court will direct the parties to re-apply.

N/B Rectification is for correcting errors only not redistribution

6



## APPLICATION FOR A LIMITED GRANT

This is an application made to enable transactions for a specific reason as one waits for the full grant (such as payment of school fees, selling farm produce and other acts necessary in collecting and preserving the estate)

### Who is entitled to apply for a limited grant?

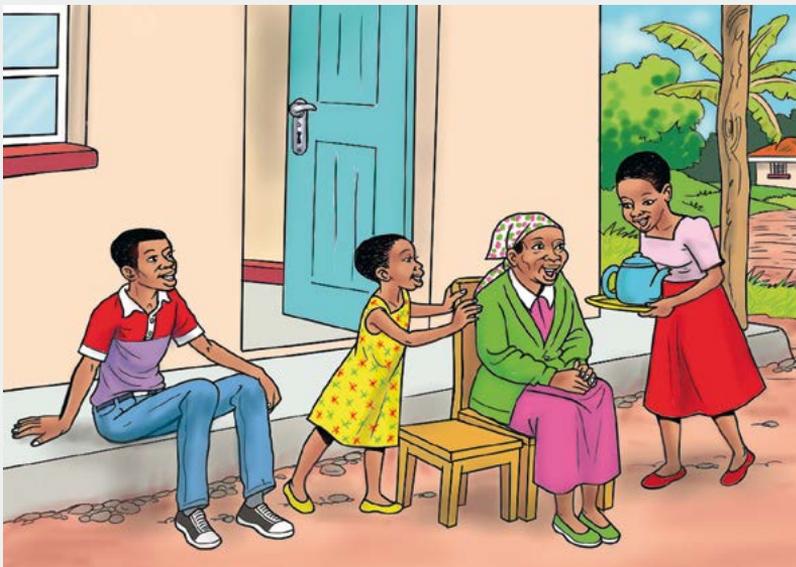
- a. A person appointed in the will as the one to manage the property of the deceased (executor)
- b. An adult who is not bankrupt and is of sound mind
- c. Any person can apply for a limited grant. However, priority is given to the spouse, children and parents, according to the degree of closeness.

### Required documents

1. A letter from the area chief listing all the beneficiaries to the property, their ages and relationship to the deceased
2. Certified copy of the death certificate
3. Applicant's identity card
4. Identity cards of the beneficiaries (those entitled to the property of the deceased)
5. Form P&A 85-Petition
6. Form P&A 19-Affidavit

### CONFIRMATION OF GRANT

Six months after gazettelement, if there is no objection, an application to confirm the grant of letters of administration and distribution of estate must be applied for (issued).







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