



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Stanley Paul Buliba (Deceased) (Succession Cause
2A of 2019) [2023] KEHC 2702 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 2A OF 2019**

WM MUSYOKA, J

MARCH 24, 2023

IN THE MATTER OF THE ESTATE OF STANLEY PAUL BULIBA (DECEASED)

JUDGMENT

1. This cause relates to the estate of Stanley Paul Buliba, who died on August 7, 2017, according to Certificate of Death No xxxx. The letter from the Chief of Shieywe Location, dated June 27, 2017, indicates that he was survived by 2 widows, Racheal Khatievi Waswa and Mirriam Kahenda Wilunda; 2 sons, Hosea Opindi Buliba and Wilber Shikuku Buliba; and 2 daughters, Arlene Ayiera Aswani and Christina Eshikumo Buliba. He was said to have died possessed of Kakamega/Municipality/Block II/58, East/Wanga/Isongo/2716, Butsotso/Shikoti/5714 and Kisa/Mundobelwa/1576. He also owned a motor vehicle, registration mark and number xxxx, and he had money in 5 banks.
2. Representation to his estate was sought in two separate causes. The probate proceedings were initially commenced in Kakamega CM CSC No 369 of 2017, which was initiated on July 30, 2017, by Racheal Khatievi Waswa and Mirriam Kahenda Wilunda, in their capacities as widows. The survivors of the deceased, disclosed in the petition, were the 2 widows, 2 sons and 2 daughters listed in the Chief's letter, and the assets enumerated in that letter. The cause was gazetted on September 1, 2017, and a grant of letters of administration intestate was made to the petitioner on October 4, 2017, and duly issued on October 6, 2017. The said grant was not confirmed.
3. The cause herein, that is to say Kakamega HCSC No 2A of 2019, was commenced by way of a summons, dated December 18, 2018, seeking transfer of the cause in Kakamega CM CSC No 369 of 2017 from the Chief Magistrate's Court to the High Court, on grounds that the value of the estate exceeded the pecuniary jurisdiction of the Chief Magistrate's Court. That application was not opposed, and I allowed it on July 25, 2019, and a grant of letters of administration intestate in this cause was issued on September 26, 2019, in the names of Racheal Khatievi Waswa and Mirriam Wilunda, who I shall refer hereto as the 1st administratrix and 2nd administratrix, and collectively as the administratrices.
4. What I am called upon to determine is a summons for confirmation of grant, lodged herein on November 17, 2020, and dated December 19, 2019. It is brought at the instance of Rachael Khatievi



Waswa, and seeks several prayers. I shall refer to the said Rachael Khatievi Waswa hereafter as the applicant. There is a prayer for confirmation of the grant, based on the proposals made in the affidavit sworn by the applicant in support of the application. The other prayer invites the court to order an unnamed respondent, who I suppose is meant to be the other administratrix, Mirriam Kahenda Wilunda, to render accounts, with respect to rents received between June 2017 and the date of the application, from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814. The other prayer is for the rents receivable from the said Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814, to be paid into an account to be opened in the joint names of the 2 administratrices.

5. In the supporting affidavit, sworn by the applicant on December 19, 2019, there is information on the survivors of the deceased, the assets that make up the estate, and the mode of distribution of the said assets. The survivors are the 6 individuals named in the Chief's letter, being the 2 widows, the 2 sons and the 2 daughters, namely, Rachael Khatievi Waswa, Mirriam Kahenda Wilunda, Hosea Opindi Buliba, Wilbur Shikuku Buliba, Arlene Ayiera Aswani and Christina Eshikumo Buliba, respectively. The assets are listed as Kakamega Municipality/Block II/58; East Wanga/Isongo/2816; Butsotso/Shibeye/1277; Butsotso/Shibeye/1478; Butsotso/Shibeye/1479; Butsotso/Shibeye/1480; Butsotso/Shibeye/1481; Butsotso/Shibeye/1482; Butsotso/Shikoti/5814; Butsotso/Shikoti/XXXX; Kisa/Mundombelwa/1576; Kisa/Mundombelwa/1577; motor vehicle xxxx; money in accounts held by the deceased in Family Bank, IG Bank, Kenya Commercial Bank, National Bank and Standard Chartered Bank in branches in Kakamega; money in MPesa mobile telephone line xxxx, AON Minet death benefits, pension benefits and gratuity, the rental income collected from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814 by the 2nd administratrix, after the demise of the deceased, and other assets not yet disclosed by the 2nd administratrix.
6. In the distribution proposed by the applicant, Rachael Khatievi Waswa gets 4 units out of Kakamega Municipality/Block II/58; East Wanga/Isongo/2816; the whole of Butsotso/Shibeye/1478 and Butsotso/Shibeye/1482; equal share of xxxx; and equal share of the moneys held by the banks, MPesa, outstanding salaries, death benefits, pension benefits and gratuity, the rents due from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814 collected by the 2nd administratrix after the demise of the deceased. Hosea Opindi Buliba is allocated 4 units out of Kakamega Municipality/Block II/58; East Wanga/Isongo/2816, the deceased's share of Kisa/Mundombelwa/1576 and Kisa/Mundombelwa/1577; equal share of xxxx; and equal share of the moneys held by the banks, MPesa, outstanding salaries, death benefits, pension benefits and gratuity, the rents due from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814 collected by the 2nd administratrix after the demise of the deceased. Christina Eshikumo Buliba is allocated 4 units out of Kakamega Municipality/Block II/58; East Wanga/Isongo/2816, the whole of Butsotso/Shibeye/1480 and Butsotso/Shibeye/1481; equal share of xxxx; and equal share of the moneys held by the banks, MPesa, outstanding salaries, death benefits, pension benefits and gratuity, the rents due from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814 collected by the 2nd administratrix after the demise of the deceased. Mirriam Kahenda Wilunda is allocated 2.0 acres out of Butsotso/Indangalasia/810, ½ share of Butsotso/Shikoti/5714, equal share of the money in IG Bank, and unaccounted shares of the rental income collected by her from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814. Wilbur Buliba is allocated ½ share of Butsotso/Shikoti/5714, 2.0 acres out of Butsotso/Indangalasia/810, the whole of Butsotso/Shikoti/5714 jointly with Mirriam Kahenda Wilunda, equal share of xxxx; and equal share of the moneys held by the banks, MPesa, outstanding salaries, death benefits, pension benefits and gratuity, and the rents due from Kakamega Municipality/Block II/58 and Butsotso/Shikoti/5814 collected by the 2nd administratrix after the demise of the deceased. The liabilities are identified as Peter Buliba, Philip Omach and Joshua Omuganda. Peter Buliba and Philip Omach are allocated the whole of Kisa/Mundombelwa/1576, on account of joint



proprietorship with the deceased. Joshua Omuganda, who is said to be survived by Sheldon Zachary Muganda, is allocated Butso/So/Shibeye/1277 and 1479, in consideration of exchange with East Wanga/Isongo/2816. The said proposals are consented to by the applicant and Hosea Opindi Buliba and Christina Eshikumo Buliba, in Form 37, dated December 19, 2019, and filed contemporaneously with the summons for confirmation of grant. The said consent form is not signed by the 2nd administratrix, and Wilbur Shikuku Buliba and Arlene Ayiera Aswani. In the Form 37, the only liability catered for is that in respect of Sheldon Omuganda.

7. A protest was raised to the proposals, by way of an affidavit of protest, sworn on March 23, 2021, by Mirriam K Wilunda, the 2nd administratrix, who I shall refer to, for the purpose of the application for confirmation of grant as the protestor. She alleges that the application is defective, to the extent that it was brought by the applicant alone, instead of jointly with her as co-administratrix. She avers that the 2 did not consult on the proposals, and there was no consensus on the distribution proposed. She states that the distribution was skewed, was not rational and was not based on any valuations. She asserts that she was a widow of the deceased, with whom they had 1 child, Wilbur Shikuku Buliba. She avers that the deceased was buried at their home. She avers that she was a widow on account of prolonged cohabitation with the deceased, and a marriage ought to be presumed, and that she and her child were survivors of the deceased. She also asserts a customary law marriage with the deceased, on account of section 3(5) of the *Law of Succession Act*. She states that she and the deceased took several loans jointly, and they invested the money in the business of building and renovations, from 1999 until the deceased died. She points out although Arlene Ayiera Aswani is listed by the applicant as a daughter of the deceased, nothing has been allocated to her in the proposals placed before the court. She avers that the deceased recognized Arlene Ayiera Aswani as his daughter, and that it was her, the protestor, who took care of her, and continued to provide for her after the demise of the deceased. She asserts that she knows that the deceased would have liked to have Arlene Ayiera Aswani provided for out of his estate. She states that the deceased had severed his relationship with the applicant, and that up to his demise it was her, the protestor, that the deceased lived with. She puts that period of exclusive cohabitation to be 20 years. She asserts that she does not support the proposals made by the applicant, and makes her own proposals on the distribution of the estate. She proposes that Kakamega Municipality/Block II/58 should be shared equally between Wilbur Shikuku Buliba and Wilbur Shikuku Buliba, which I believe is an error. She agrees that East Wanga/Isongo/2816 should go to the applicant and Hosea Opindi Buliba. She proposes that Butso/So/Shibeye/1478 should be shared equally between Wilbur Shikuku Buliba and Christina Eshikumo Buliba. She agrees that Butso/So/Shikoti/5814 should go to the protestor and Wilbur Shikuku Buliba. She says that, on legal advice, that Kisa/Mundombelwa/1576 and 1577 did not form part of the estate, as they were jointly registered in the names of the deceased and his brother Philip Omach, and upon the demise of the deceased, the survivorship of Philip Omach meant that he became the sole proprietor. She agrees that Butso/So/Shibeye/1277 and 1479 be devolved upon Sheldon Omuganda. She proposes that Butso/So/Shibeye/1482 should be allocated to Christina Eshikumo Buliba. She agrees that Butso/So/Shibeye/1480 and 1481 should be given to Christina Eshikumo Buliba. She also agrees that the share of the estate out of Kisa/Mundombelwa/1577 should be allocated to Hosea Opindi Buliba. She says that the motor vehicle xxxx did not form part of the estate, as it was registered in her name. She further avers that Butso/So/Indangalasia/810 was registered in her name, since 2005, and, therefore, it did not form part of the estate. She agrees with the proposals on the distribution of the money in various account, save that she says that the account at National Bank of Kenya was jointly owned by the deceased and her, and that the proceeds were utilized to cater for the expenses for the interment of the remains of the deceased, and to cater for the education of her child. On the rental income from Kakamega Municipality/Block II/58 and Butso/So/Shikoti/5814, the protestor does not deny the fact that she has been collecting it, but she contests the figures by the applicant of Kshs 6, 700, 000.00. She says that she



has been using the rental income to maintain the property and to pay school fees, and other expenses for Wilbur Shikuku Buliba and Arlene Ayiela Aswani. She challenges the applicant to account for the income that she has been collecting from the 30 or so acres of land that have been under her control, where she has been planting sugarcane. She says that she was the next of kin with respect to the AON Minet death benefits, that she was left out of the pension benefits and gratuity, even though she had been listed as a next of kin. She proposes that Butsotso/Shibeye/1483 should be included as an asset of the estate, and proposes that the same be shared equally between Arlene Ayiela Aswani and Christina Eshikumo Buliba. She invites the court to decline to confirm the grant.

8. The protestor has attached several documents to her affidavit. There is a marriage affidavit, sworn on May 11, 2005, by the deceased. There is a document, headed 'The Dowry Payment,' dated January 2, 2006, and signed by several individuals. There is an affidavit, sworn on May 9, 2003, by the deceased, alluding to the separation between the deceased and the applicant. There is a photograph, which is not captioned. There are 3 bank documents. There is a registration certificate for motor vehicle xxxx, dated November 26, 2013, depicting the protestor as registered owner. There is a title deed for Butsotso/Indangalasia/810, dated September 22, 2005, and a certificate of official search in respect of the same property, depicting the protestor as the registered proprietor. There is also a copy of a title deed for Butsotso/Shibeye/1480, dated December 22, 1972, depicting the deceased as proprietor.
9. The protest provoked a response from the applicant, vide an affidavit, erroneously headed 'replying affidavit,' instead of further affidavit, that she swore on April 1, 2021. She asserts to be the only lawful widow of the deceased, having married him at the civil registry on September 22, 1989. She adds that their union was blessed with 3 issues, being Hosea Opindi Buliba, the late Paul Shelly Buliba and Christina Eshikumo Buliba. She states that all the surviving children are adults. She asserts that the marriage was not dissolved at any time, nor had any separation been decreed by a competent court. She describes the protestor as a consort or mistress of the deceased, with whom she had one child, Wilbur Shikuku Buliba. She avers that the protestor was still married, under customary law, to one Alfonse Muhambi, with whom they had 3 children, that she has named in the affidavit. She avers that that customary law union with Alfonse Muhambi was never dissolved at any time, and that the protestor has at all times been supporting the said Alfonse Muhambi. She asserts that Arlene Ayiela Aswani was never a daughter of the deceased, as she was born in Mombasa, to Connie Aswani Wanekea and Edith Shianyisa Sorobea. She asserts that the motor vehicle xxxx was acquired by the deceased for valuable consideration on July 17, 2006, from a Francis Kungu Kariuki. She asserts that despite registration of the motor vehicle in the name of the protestor, it remained an asset of the estate of the deceased. On Butsotso/Indangalasia/810, she avers that the same was previously registered in the name of Joshua Amido Agesa, before it was transferred to the name of the deceased. The said Joshua Amido Agesa had given it as security for a loan with a bank, which loan he did not repay, and the security was foreclosed, whereupon the deceased bought it at an auction, and he was subsequently registered as such on September 21, 2004. She avers that it was to avert any challenge from the said Joshua Amido Agesa, over the transfer to him, that he registered the property in the name of the protestor. She asserts that the said property was registered in the name of the protestor as a trustee, and that the remains of the deceased were buried on that parcel of land to cement his rights of ownership over the same. She argues that under Luhya customs, the remains of an adult male could not be buried on land that he did not own, or which was owned by a mistress or consort. Regarding Butsotso/Shibeye/1483, she avers that that land had the graves of the parents of the deceased and of the late son of the deceased called Paul Shelly Buliba, and was her matrimonial home with the deceased, and should be given to her and her son, Hosea Opindi Buliba. On the AON Minet benefits, she asserts that the protestor was not entitled exclusively to those benefits under that scheme as she was a mere next of kin, and she should account for the said moneys. On the account with the National Bank of Kenya, she protests that after



the deceased died, the protestor continued to operate the account, and she should account for that. On the unaccounted rent, she avers that she had accounted for the figure of Kshs 6, 700, 000.00, citing the valuation report that she has lodged herein. She asserts that she was not aware of any renovations made on the property after the demise of the deceased. On the lands that she controlled, and especially on the issue of cane, she avers that she had been contracted by West Kenya, with respect to the cane, long before the deceased died. She says that the returns were insufficient to sustain her and her children, and had been accounted for. She asserts that the estate be disposed of as per her proposals.

10. The applicant has attached to her affidavit: a copy of a certificate of marriage, serial number xxxx, showing solemnization of marriage between her and the deceased on September 22, 1989; a copy of a document dated April 30, 1988, showing Thomas Wilunda Lubutse, receiving dowry from Alfonse Muhambi, on account of his marriage to Miriam Wilunda; a copy of a national identity card for Arlene Ayiera Aswani; a copy of a certificate of birth in respect of Arlene Ayiera, serial number xxxx, depicting her parents as Connie Aswani Wanekeya and Edith Shianyisa Sorobea; a copy of an agreement for sale of a motor vehicle xxxx, dated July 12, 2006, between the deceased and a Francis Kungu Kariuki; a copy of an acknowledgement of payment of a balance of the purchase price, dated July 12, 2013, purportedly with respect to the same motor vehicle, signed by Victoria Nduta and Joseph Otunga; a copy of greencard for Butso/Indangalasia/810, showing movement of ownership of the property from Joshua Omido Agesa, to Stanley Paul Buliba, to Miriam Kahenda Wilunda; a copy of a statement of account from National Bank of Kenya, in the name of Stymar Enterprises; copies of statements of account from West Kenya Sugar Company Limited, with respect to cane supplied by Rachael Waswa; a copy of statement of account with respect to expenses on Christina Buliba's education and upkeep, prepared by Racheal K. Waswa; and a copy of a statement on expenditure on Mabanga Farm and Plot No 1478 Eshisiru, prepared by Opindi Hosea.
11. Directions on the disposal of the application were given on March 24, 2021, to effect that the application, dated December 19, 2019, was to be disposed of by way of viva voce evidence.
12. The oral hearing began on November 11, 2021, with the applicant on the witness stand. She testified that she had been married by the deceased, and was never divorced. She stated that the protestor was not a wife of the deceased, and she only recognized her son, Wilbur Shikuku, as a survivor of the deceased. She asserted that the protestor was lawfully married to another man, and it was not possible that she could have 2 husbands at the same time. She said she recognized the protestor as a mistress or dependant of the deceased, and Wilbur Shikuku as a survivor of the deceased, and that it was on that account that she had made proposals including both as beneficiaries. On Butso/Indangalasia/810, she asserted that it did not belong to the protestor, for the deceased had bought it, but deposited the land with the protestor for security reasons. She said that the deceased was buried on that land, and that he could not be buried on land that did not belong to him. On xxxx, she said the same belonged to the deceased, for he had bought it. She explained that he had previously bought vehicles, which he registered in her name for security reasons, and, similarly, he must have bought that vehicle and registered the same in the name of the protestor. She stated that the protestor had conceded, when they appeared before the lower court, before the matter was transferred to the High Court, that the deceased had other assets, and she was ordered to disclose them, which she had failed to do. On Kakamega Municipality/Block II/58 and Butso/Shikoti/5814, she stated that the 2 comprised apartments and hostels, and the rental income was collected by the protestor, who had never accounted for the amounts collected and how they were expended. She also stated that she had received demands for rates from the County Government, but the protestor had never given accounts on whether she had ever cleared the rents outstanding on the 2 plots. She said that the bank had declined to give her details of the bank accounts despite her providing them with proof that she was an administratrix, yet the protestor had continued to operate the accounts after the demise of the deceased, and that she had never accounted for the



moneys withdrawn from those accounts. She said that she wished that the protestor accounted for the moneys prior to distribution being ordered. She stated that after the deceased died, she took over the farm at Makunga, East Wanga, 2817, where she was growing cane, since 2018, and disclosed that she had a contract over the same with West Kenya Sugar Company Limited. She said that her late son, Paul, died while a student at university, and was buried at the property at Eshisiru, but his body was initially taken to the home on Butso/Indangalasia/810, and she asserted that that would not have happened if the property did not belong to the deceased. She said that some assets had been exchanged with various persons. She mentioned Sheldon Omuganda. She explained that the deceased had obtained consent of the Land Control Board to transfer the land to him. She said that Wilbur and Christina were adults in college, while Hosea was working, and that all 3 were entitled to a share in the estate. She said that the late Paul was not survived by a child.

13. During cross-examination, she stated that she did not know when the relationship between the deceased and the protestor started, but she first saw her at the burial of Paul in 2015, and that was when she knew that there was a relationship. She said that the protestor sat close to the deceased at that burial ceremony. She said that she did not know whether she was a wife or a mistress. She said that the late Paul was buried at Plot No 1478 Eshisiru; while the deceased was buried at Butso/Indangalasia/810, where the protestor resided. She said that he was buried at Butso/Indangalasia/810, for security reasons. She said that Butso/Indangalasia/810 was transferred to the protestor for security reasons, although it was the deceased who had bought the property. She explained that according to the greencard, the deceased bought the property in 2004, then transferred it to the name of the protestor in 2005. She asserted that she was not giving Butso/Indangalasia/810 to the protestor, saying that the same ought to be shared. She, the applicant, said that she wanted to share it with the son of the protestor, Wilbur. She said that she would not have complained when the deceased transferred Butso/Indangalasia/810 to the protestor, until the deceased died, and the property came up for distribution. She conceded that xxx was in the name of the protestor and not that of the deceased, but asserted that the deceased bought the vehicle, and it ought to be shared equally. On the 2 properties from which the protestor collected rent, she said that she had no evidence on how much was collected from the property. She said that she had never collected or received rent from the 2 assets, and that it was the deceased who used to collect the rents, and, upon his demise, the protestor took over. Regarding Arlene Adongo, she said that she got to know about her after the late Paul died. She said that she had no relationship with the deceased, and it was for that reason that she did not give her anything. She said that the Chief had invited persons who were the survivors of the deceased, and Arlene came forward, and she had a letter, but she, the applicant, discovered later that she had no relationship with the deceased. About the marriage of the protestor to Alfonse Muhambi, she said that he was since deceased, but she got the document on the dowry that he paid for the protestor from him before his demise. According to her, he said that he had married the protestor, and that she was his wife, and then he gave her the document. She said that she did not know whether the 2 ever lived together. She said that she recognized Wilbur as a stepson, being a child of the deceased, who was equal to her own children. She said that she was giving him Butso/Shikoti/5714, equally with her children. She said that she was not sharing Kakamega Municipality/Block II/58 equally amongst the children, for reasons of convenience, as they were stepchildren, although she had no problem with Wilbur getting a share there. Regarding the protestor getting a share in the estate, she left the matter in the hands of the court. She conceded that the deceased was buried on the parcel of land, where he was living with the protestor. She said that the protestor had not accounted for the rental income, to facilitate distribution. She stated that she had not been separated from the deceased. She said that she was the one who went to the offices of the County Government, and established that rates for Kakamega Municipality/Block II/58 and the other plot were not being paid. She said that she had not gotten access to the 2 municipality plots, although she did visit them on a casual basis. She said that the deceased had bought vehicles, which



he would register in her name. She gave an example of xxxx. She conceded that she never disclosed the vehicles that the deceased had registered in her name. She said that she got to know of the National Bank account after the deceased died, and added that she never operated it. She said that the death and pension benefits ought to be shared equally. She said that although Butsotso/Indangalasia/810 was in the name of the protestor, the deceased was buried there, but she did not know whether he lived there with her, and that he only got to see her at his burial.

14. At re-examination, the applicant said that although the protestor was present at the burial of the deceased, she never got to address the mourners as the widow of the deceased. She further stated that she had not seen a schedule of maintenance by the protestor of Kakamega Municipality/Block II/58 and Butsotso/Indangalasia/810, nor proof that she had cleared the outstanding rates. On the details of the account at National Bank of Kenya, she said that she enquired as administratrix of the estate. She said that the valuations that she placed on record would guide the court on distribution, adding that she focused on administration of her own share. She said that the protestor had not exhibited a rent book. She said that she had not seen the sale agreement for xxxx. She said she believed that Kakamega Municipality/Block II/58 and Butsotso/Indangalasia/810 were assets belonging to the deceased, and she believed them to be in his name as at the date of his death. She proposed equal distribution of the AON Minet benefits, MPesa funds and the moneys in the bank accounts. She said that the protestor got the death benefits from AON Minet, and did not share the same, and she did not account for them. She said that she knew why the deceased was buried at Butsotso/Indangalasia/810, as it was his home, for he had bought the property, and put up the house on the land.
15. The case for the protestor opened on February 23, 2022, when she took to the witness stand. She described the deceased as her husband, having married him in 1999, and with whom she had a son, Wilbur Shikuku. She described the applicant as a former wife of the deceased, and the mother of the children that she lived with after she got married. She said that the deceased lived with her at Shikamari, and upon his demise, he was also buried there. The period of the cohabitation was said to be between 1999 and 2017. On Kakamega Municipality/Block II/58, she testified that she bought it together with the deceased, and they developed it. As she was living with him then, she believed that the property belonged to them, and it was their life. She said that the said property had 11 units, 3 of which had 3 bedrooms, while the rest had 1 bedroom. She said that the 3-bedroom units fetched Kshs 16, 000.00 to Kshs 18, 000.00 as rent; while the rent for the 1-bedroom units was in the range of Kshs 6, 000.00 to Kshs 7, 000.00. She said that the units did not always have tenants, and, therefore, they were not always occupied. She said that she maintained the same, did repairs, hired security, among other things. She said that sometimes tenants left without paying rent. She said that the figures given by the applicant were not accurate, for one could not have an estate without maintaining it, She said that the correct total monthly rental income was Kshs 80, 000.00. She explained that the upkeep of her son also came from the said rents. She said that Butsotso/Indangalasia/810 was her property, as it was in her name. She said that the deceased was buried on Butsotso/Indangalasia/810, adding that that was his wish, which the clan fulfilled. She asserted that the property was hers, and was not available for distribution. She also asserted that xxxx was her property, as it was registered in her name, according to the certificate of registration placed on record. She said that her money was in that vehicle. She asserted that she was a widow of the deceased, for she got married to him, lived with him for 21 years, washed his clothes, bore a child with him, invested in property with him, cooked for him, he was the only man that she was sleeping with, and she said that she could not see how she could not qualify to be his wife. She stated that she and the deceased used to manage the cane farm, but when he died, she was told not to set her foot there, and she never went back. She said that she was not able to reach the ancestral home, which she called the matrimonial home, and the only home she knew was the one she was managing. She said that the applicant should have the property that she had before she left in 1999. She said



Arlene Ayiera was a child of the deceased. She stated that she had quarrels with the deceased over that child, saying that she had accepted the children of the applicant, as she knew their mother, but as she did not know the mother of Arlene she was not willing to accept her. The deceased, however, took over her schooling, in 2006, and when he died in 2017, she was in college, and the protestor paid her college fees. She complained that when the applicant came to court, she did not include Arlene as a survivor, although she had all the documents. She said that she did not know why the applicant turned against Arlene. She said that Arlene wanted to take the rentals, adding that both Arlene and Wilbur were entitled to take something from their father's estate. She proposed that Kakamega Municipality/Block II/58 be shared equally between Arlene and Wilbur. She said that Butsotso/Shibeye/1478 was where the applicant lived, before she left the deceased, and the same should be given to her. She said that most of the other portions were too small, and added that the applicant knew them better, but she said Arlene and Wilbur were entitled to a share in them. She lamented that the applicant did not want her children to share the same with her children, although, at the end of it, she appeared to agree with the applicant that that ought to be so, due to the animosity between the 2 houses. On Butsotso/Shikoti/5714, she stated that she developed it with the deceased, and that she was managing it after the deceased died. She asserted that the applicant never managed that property. She said that the same had 30 rooms, but it was never full, and it could not raise the amounts alleged by the applicant. She proposed that she and Wilbur should get that property. She said that during Covid-19, the property was not occupied, yet there were bills and utilities to be paid, and maintenance to be done. She said that she built a septic tank, among other amenities. She said that the National Bank account was jointly operated by her and the deceased. It was a business account, and when he was ill, the proceeds of the account were ploughed to cater for his bills, and when he died, to meet burial expenses. She asserted that she buried him using money from that account. She conceded that she was initially married to Alfonse Muhambi, but she realized that her life was at risk in that marriage, and left, and went back to her parents. She said that she lived together with Alfonse between 1987 and 1995. She married the deceased in 1999. She asserted that she never communicated with Alfonse after she left him in 1995, and she did not even attend his funeral. She said that after she married the deceased, he paid her dowry. She said that she had 3 children with Alfonse, and she left them with him, explaining that, under custom, dowry was not paid for the woman, but for the children. Regarding Philip and Joshua, she explained that Philip was her brother-in-law, but she had a problem with him getting what the applicant was proposing. She said that he was not reliable, yet the land he was proposed to get, Plot No 1572, was where the mother of the deceased was buried, together with his grandparents. She proposed that some of the plots in Shibeye were adjacent to Plot No 1572, and he should be given one of those instead. Regarding Butsotso/Shibeye/1277, she explained that the deceased had a dispute with his brother, and so he agreed to exchange the property with someone else. The deceased transferred his property to the name of that other person, but the other person did not transfer his to the name of the deceased. She said that they were processing the matter. Regarding pension, she said that the deceased had named her as the next of kin, but the applicant accessed the records, and incited the Chief not to sign documents to allow her, the protestor, access the funds. She said that she was resigned to the applicant getting the pension and gratuity, saying that she could be acknowledged as the only in-law for the purpose of the pension and gratuity. She said that she lived with applicant's children, after she left. The applicant left with Christina, leaving Paul and Hosea behind. She accused the applicant of always interfering with her marriage to the deceased, and making their life miserable. She stated that the applicant knew her very well. She said that the deceased had told Hosea that he was not going to bring his mother back, but he, Hosea, was at liberty to buy her land. She said that the applicant had not come back to the matrimonial home, for she lived in her own home, and rented out the matrimonial home. She asserted that the applicant ought to respect what the protestor had built with the deceased.



16. During cross-examination, she stated that the applicant lived in her own home, but she did not know the land registration details of the property. She said that the matrimonial home for the applicant was at Eshisiru, and that the late Paul was buried there. She said that the applicant knew her all along as a wife of the deceased, although she insisted on referring to her as a mistress. She said that the deceased avoided Eshisiru, as there were many attacks there, and that was why he was not in good terms with his brother, Philip. She said that in one incident, he was nearly killed, in 1994. She said that he and Philip had joint ownership of the ancestral land at Kisa. She said that the applicant was proposing that Philip takes the ancestral land at Kisa, although he lived at Eshisiru. She explained that the deceased moved out of Eshisiru on account of insecurity. She said that her father received dowry for her from Alfonse Muhambi, and that the dowry was never returned. She said that efforts to reconcile them were made, but they failed. She said that she left Alfonse in 1995, and that she did not obtain a decree thereafter, for she never filed divorce proceedings. She said that he died in 2021, and she acknowledged that she was the mother of his 3 children, born in 1987, 1991 and 1992. Regarding Arlene, she said that she had not seen the certificate of birth, placed on record, that she had not met or known the persons indicated in the document as her biological parents, and that she had not seen any other document contradicting that birth certificate. She said that she had no documents to show that she obtained loans, whose proceeds she used to buy land, and to develop it. She also conceded that the marriage affidavit that she placed on record was only signed by the deceased, she did not sign it herself. She said that she was not present when the document was made, that it was dated January 2, 2006, and that it did not refer to 1999. She conceded that the marriage between the deceased and the applicant was civil, and registered, and she never saw a decree dissolving it. She said that there was also evidence of a customary law ceremony after the civil ceremony, but dowry for the applicant was never returned. She said that she did not know that Alfonse did not have property. She said that she bought land, and built a house on it, but she left him with everything. She described him as jobless. When he died, he was buried on the land that she had bought. She said that she had never seen the sale agreement placed on record for xxxx, and that she was seeing it in court for the first time. She said that her name did not appear in the agreement. She said that she did not have any document showing that xxxx was gifted to her by the deceased. Regarding Butsotso/Indangalasia/810, she said that the same was registered in her name, and the greencard showed that it was transferred from the name of the deceased to her name. She said that she had no document to show that the same was either sold or gifted to her by the deceased. She also said that she did not have any documents to show that she had paid Kshs 300, 000.00 for transfer of the land to her. She said that Joshua Omido Agesa was troubling the deceased, to have him transfer the land back to him. She said that she did not know why the deceased gifted the land to her. She said that Joshua Omido died. She said that the deceased was buried on that land, and it was his wish that he be buried there. She said that there were hostels on Butsotso/Indangalasia/5857, 30 rooms in number. She said that the same had never been taken over by Masinde Muliro University. She said that as a landlady, she knew that she was required to maintain a rent book, she had one, but she did not have it in court. Kakamega Municipality/Block II/58 was 11 units, but she did not have the rent book in court. She denied that she collected rent of up to Kshs 3, 000, 000.00. She said that she did not keep records of what she had been paying by way of maintenance of the property, and that she had never gotten notice from the County Government to show that there were rates arrears. She said that she cleared the rates, and had been given a rates clearance certificate. She said that the applicant did not pass the rates notices to her, and so she was not able to clear the rates. She said that her documents did not refer to the cost she incurred in putting up a septic tank, toilet, and other amenities. She said that she and the deceased run a bank account at National Bank, but she could not tell the bank balances standing on that account as at the date of his death. She said that the only transaction done after the death was Kshs 70, 000.00, for college fees for Arlene and Wilbur, but the applicant came in and blocked the account. She said that the money that was paid into the account had nothing to do with the land, but



came from business. She said that she had the mobile phone handset that belonged to the deceased, but the applicant blocked the MPesa funds. She said that she received Kshs 400, 000.00 from AON Minet, which she used to paint the house. She got Kshs 400, 000.00 for the shares in IG Sacco, adding that there was a nomination in her favour. She said that the valuations done on her land were exaggerated, and that she had since caused another valuation to be done. She said that she had no problem with Hosea getting his bicycle, but that she was not going to release the clothes of the deceased. She said that she did not know of any other property of the deceased. She said that she did not want anything else from the estate, and if there would be any other asset, discovered after the grant was confirmed, let it be given to the applicant.

17. At re-examination, she said that any other asset not placed before the court, she was not interested in it, as she needed peace. She asserted that Butsotso/Indangalasia/810 was registered in her name while the deceased was alive, and the applicant was not in the picture then, and that she only came out after the demise of the deceased. She said that Wilbur was born in 2000. She described the late Paul as having been the heart of the deceased, so that when Paul died, the deceased died too. She said that Alfonse wanted to kill her, after she left him in 1995, and, therefore, she did not get into any relationship until 1999. She said that xxxx was bought in 2013, and was registered in her names, and at that time the applicant was not in the life of the deceased.
18. At the close of the oral hearings, the parties opted to file written submissions. Only the applicant filed written submissions, on October 21, 2022, dated June 28, 2022; or, at least, those are the only written submissions that I have traced in the record before me. She identified 4 issues for determination, being whether the protestor was a widow of the deceased, whether Arlene Ayiela Aswani was a child of the deceased or a dependant of the deceased, whether the assets registered in the name of the protestor constitute part of the estate of the deceased, and how the estate is to be distributed. It is submitted that the material on record does not establish that the protestor was a widow of the deceased, and, at best, it only establishes that she was a dependant or beneficiary, but without proof of the extent of dependency. It is submitted that, from the evidence on record, there was no proof that Arlene was a child or dependant of the deceased. It is further submitted that the assets that are registered in the name of the protestor are held by her as a trustee, as the same were acquired by the deceased, but registered in the name of the protestor. It is finally submitted that the estate ought to be distributed in the manner proposed by the applicant.
19. Confirmation of grants is provided for under section 71 of the *Law of Succession Act*, and Rules 40 and 41 of the *Probate and Administration Rules*. There is no dispute here on whether the administratrices should be confirmed. The contest revolves around who the beneficiaries are, the assets available for distribution, and how the same ought to be distributed.
20. The provisions that should be relevant, in the circumstances, are the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules*, which state as follows:
 - ' 71(2) The court to which application is made, or to which any dispute in respect thereof is referred, may—
 - (a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
 - (b) If it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of



letters of administration in respect of the estate, or so much thereof as may be unadministered; or

- (c) Order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
- (d) Postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.'

'40(4) where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.'

21. The two provisions are about the duty of the administrators and the court, when it comes to confirmation of grant. The administrators have a duty to ascertain the persons who are beneficially entitled to a share in the estate of the deceased, and the share due to each one of such persons. It was said, in *In the Matter of the Estate of Ephrahim Brian Kawai (Deceased) Kakamega HCSC No 249 of 1992* (Waweru J) (unreported), that the discharge of that duty is so crucial that where the ascertainment has not been done, the court ought not go on to confirm the grant; and that any orders, at confirmation, made where there was no proper ascertainment, would be illegal.
22. The issues, as framed by the applicant, address 3 key areas: who are the survivors of the deceased, which assets are available for distribution, and how are the said assets to be distributed. I shall deal with the matter before me along those 3 thematic areas.
23. The first theme is on the survivors of the deceased, or, to use the language in the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules, the persons who are beneficially entitled to a share in the estate. From the affidavit in support of the application, the applicant has identified a number of those individuals. They fall in 3 categories. There are surviving spouses, children and others. The persons flagged as surviving spouses are the applicant and the protestor. The children are listed as Christina, Hosea, Wilbur and Arlene. The others are said to be Peter Buliba, Philip Omach and Joshua Omugunda. The applicant and the protestor are not on all fours regarding all these categories of beneficiaries.
24. I will start with considering who are the widows of the deceased for the purpose of succession. The applicant asserts that the protestor was not a widow of the deceased, but a consort or mistress, and that she could only be treated as a dependant or beneficiary for succession purposes. It is not at all clear to me what the latter bit of that submission means, but there it is. The protestor, on her part, states that the applicant was not a wife of the deceased, as at the date of his death, for she had left, and she was not in his life for over 20 years.
25. So, was the applicant a surviving spouse of the deceased, as at the date of his death, to allow her to be treated as such for purposes of Part V of the *Law of Succession Act*? What emerges from the evidence is that the applicant and the deceased had contracted a statutory marriage, at the civil registry. There is also some evidence that either thereafter or prior to that they had also engaged in a customary law ceremony, where dowry was paid. It would appear that the 2, therefore, had 2 marriages, one under the



civil system, and the other under customary law. It also emerges that the 2 separated, and lived apart for a long time. The applicant did not say much about this, or, to put it differently, she did not allude to it at all, by either denying it or confirming it, but it came out clearly from the evidence adduced by the protestor. She was absent from the life of the deceased, and that is how the protestor appears to have had property acquired either jointly with the deceased, or developed jointly with him, and also the incidences of assets being seemingly acquired by the deceased, and registered in her name. The biggest fight appears to be about Kakamega Municipality/Block II/58, Butsotso/Indangalasia/810 and Butsotso/Indangalasia/810 and 5857. The protestor is in control of these, and they appear to be the more valuable of the assets. The applicant has zero control over them. How did it happen, that the woman married statutorily was edged out by another whose status is hazy? The answer appears to lie in what the protestor says, that the applicant left, she was away, and it is during that time that property was acquired, in the presence of the protestor, and she was placed in charge. The applicant appears to have come in after the demise of the deceased, and lodged a campaign to reclaim her position, which she appears to have succeeded only to the extent of the sugarcane farm. The protestor says that she is the one who raised or lived with the 2 sons of the applicant, after she left. The applicant herself did not say a word about that. After hearing the protestor, I believed her.

26. There is evidence, therefore, that the deceased and the applicant were separated or lived apart for a long time, and remained apart until he died. However, there is no evidence that the 2 marriages, the one under statute and the other under customary law, were dissolved. Under both law, separation by itself is not evidence of a dissolution of marriage. Of course, when parties live apart for a long time, it may be deduced, ipso facto, that that is proof that there was no marriage, for cohabitation is at the core of marriage, and where there is no cohabitation, one cannot seriously talk of any marriage. That is, however, the de facto position. If the marriage was valid under civil or customary law, the fact that the parties ceased cohabitation, seemingly permanently, that of itself would not bring the marriage to an end, for a valid marriage, that is one where the requisite ceremonies that make it valid were observed, as opposed to one presumed from cohabitation, can only be ended through the processes decreed by the law or system under which the marriage was contracted. For a civil marriage, it would be a decree of divorce by a competent court of law. For the customary law marriage, it would be through the processes of the relevant customary law, prescribed for the purposes of ending or terminating the customary law marriage. One of such processes include return or refund of dowry. The other way of ending or terminating a customary law marriage, is by way of a judicial decree of divorce. No evidence was placed before me to the effect that the civil marriage had been terminated by a judicial decree of divorce. Similarly, no evidence was adduced to establish that the customary law marriage had been terminated, either through the customary law processes or by way of a judicial decree of divorce. Consequently, it will be my conclusion, that, despite the long separation between the applicant and the deceased, the applicant was still a spouse of the deceased, as at the time of his demise. She, therefore, survived him, and she was a surviving spouse for the purpose of the intestacy provisions in Part V of the *Law of Succession Act*.
27. Let me now advert to the position or status of the protestor. The applicant asserts that she was not a wife of the deceased. On her part, the protestor asserts, from her affidavit and oral testimony, that she was a wife of the deceased. The case by the applicant is that the protestor could not possibly have been married to the deceased, given that she had previously been married to another man, called Alfonse Muhambi, under customary law, which marriage had not been dissolved, to free the protestor to marry another man. She placed on record a document which was purported to be an acknowledgement of dowry by the father of the protestor, from the alleged Alfonse Muhambi. The production of that document was not protested by the protestor. Indeed, she conceded, in her testimony, that Alfonse Muhambi did, indeed, exist, and that he had married her under customary law, and paid dowry, they



had children together, she even bought land and built a house on it, while cohabiting with him, but she left him for her own security, leaving her children and her property behind. It was after that that she married the deceased. She conceded that dowry was not returned to Alfonse Muhambi, and she argued that traditionally dowry is paid for the children, hence there was no need for it to be returned after she left Alfonse Muhambi. She said that it was after she left Alfonse in 1995, that she married the deceased in 1999. She placed on record a document, dated January 2, 2006, showing that dowry was paid for her by the deceased. Her other argument was that there was a marriage affidavit, commissioned on May 11, 2005, which she conceded she did not sign, and that she was not present when it was commissioned, but the execution of that affidavit by the deceased was not contested by the applicant. Her third argument is that she lived with the deceased for 21 years, washed his clothes, bore him a child, invested in property with him, cooked for him, and he was the only man that she was sleeping with. She was, in effect, submitting that there was marriage that could be presumed from prolonged cohabitation.

28. From the material placed on record by the applicant, she does not dispute that the protestor and the deceased cohabited. Her argument is that the protestor had no capacity to contract a marriage with the deceased, given that she was still married to another man. The fact that she says that she did not recognize her as a wife of the deceased, but as a mistress or consort, is testimony that the applicant accepted that there was a relationship between the deceased and the protestor, no doubt arising from their cohabitation, but the same did not reach the threshold of a marriage. Was the protestor a wife of the deceased? There is no doubt at all that the protestor was in a customary law marriage with Alfonse, which had not been dissolved by the time she was moving in with the deceased in 1999, and, indeed, by the time Alfonse died in 2021. He had paid dowry, which was never returned. Of course, none of the parties led any evidence on the relevant customary law on the subject, but they were on all fours that there was a customary law marriage, which was not dissolved in any of the legal ways before the husband, Alfonse, died. It could be that the deceased paid dowry, and swore a marriage affidavit, and had a prolonged cohabitation with the protestor, but all those could not sanitize the fact that the protestor was in a subsisting customary law marriage, which had not been lawfully terminated. What the deceased was purporting to do was to marry a married woman, and that is what bigamy is about. I take judicial notice that, in Kenya, polygamy is allowed or tolerated or practiced, but not polyandry. There could be constitutional or human rights issues around that, as to whether that situation does not discriminate against women, but that is not what I am called upon to address. The protestor had no capacity to marry the deceased, at customary law, before she had terminated her own customary law marriage to Alfonse Muhambi. Of course, on account of her separation from Alfonse, which she apparently intended to be permanent, she could not legally get into a cohabitation with another man, but human beings being who they are, she still went ahead to get into a cohabitation with the deceased, which Alfonse would have been entitled to contest, but such cohabitation could not mature to a marriage, for as long as her customary law marriage to Alfonse had not been terminated. She, therefore, had no capacity to enter into a marriage with the deceased, and whatever she had with the deceased was not marriage, indeed, her relationship with him could be characterized as adulterous, in view of her subsisting marriage to Alfonse. See *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka and another Supreme Court Petition No 9 of 2021* (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported).
29. Can she be deemed to be a wife by dint of section 3(5) of the *Law of Succession Act*? That provision states as follows:

' Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes



of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.'

30. My understanding of section 3(5) is this, that a woman who gets married to a married man, who had previously or subsequently contracted a marriage either in church or at the civil registry, and which was still subsisting, would be regarded, upon the death of the man, as a widow of the dead man, for succession purposes, provided that she contracted a marriage with him under a system of law that allowed polygamy, which would mean that such a man died a polygamist, in terms of section 40 of the *Law of Succession Act*. A man who contracts a marriage in church or at the civil registry gets into a monogamous marriage, under which he loses capacity to contract another marriage with any other woman under any system of law, during the pendency of that monogamous marriage. Section 3(5) provides a respite for women who find themselves married to such a man, whether before or after the statutory monogamous marriage, by offering protection to them, for succession purposes. Section 3(5) only applies in the event of death, otherwise, during the lifetime of the man, the relationship between him and the women married under the system of law allowing polygamy would not be recognized in law. Such marriages would only be valid for succession purposes. See *In the Matter of Michael Kamau Kaigai (Deceased) [2013] eKLR* (Musyoka, J), *Loise Selenkia vs. Grace Naneu Andrew & another [2017] eKLR* (Muigai, J), *In re Estate of John Macharia Ngethe (Deceased) [2019] eKLR* (Nyakundi, J) and *In re Estate Dominicus Odhiambo (Deceased) [2020] eKLR* (Aburili, J).
31. The question is, is the protestor such a woman, who can seek refuge under section 3(5) of the *Law of Succession Act*? She presented evidence to show that her father received dowry from the deceased. The applicant also presented evidence to show that the father of the protestor had also received dowry, earlier on, from Alfonse Muhambi. The protestor confirmed that her father did indeed receive the dowry, and added that the same was never refunded, and she never got a decree of divorce to terminate that marriage to Alfonse. The effect of it is that she ended up contracting two customary law marriages with 2 men. To put it differently, the deceased married her under customary law, when she was already in a subsisting customary law marriage with another husband. Under customary law, that is not permissible. The deceased could not validly contract a customary law marriage before her customary law marriage to Alfonse Muhambi had been terminated. Her father ought not have received dowry from the deceased, if at all he did. There was no valid customary law marriage between her and the deceased, and, therefore, for the purposes of section 3(5), she did not enter into any customary law marriage with the deceased, while he was in a subsisting statutory monogamous marriage. She could not take advantage of section 3(5) in the circumstances, and, therefore, she was not a wife of the deceased by dint of section 3(5) of the *Law of Succession Act*.
32. The protestor has argued that she had cohabited with the deceased for 21 days, and suggested that a marriage could be presumed on the basis of prolonged cohabitation, based on the principles stated in *Hottensiah Wanjiku Yawe vs Public Trustee [1976] eKLR* (Wambuzi, P, Mustafa & Musoke, JJA) and *Njoki vs Muthuru [1985] KLR 871 [1985] eKLR* (Madan, Kneller & Nyarangi, JJA), and more recently in *Mary Nyambura Knagara alias Mary Nyambura Paul vs Paul Ogari Mayaka and another Supreme Court Petition No 9 of 2021* (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported). In *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka and another Supreme Court Petition No 9 of 2021* (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported), the Supreme Court laid out the parameters within which a presumption of marriage can be made, which are that the parties must have lived together for a long period of time, must have had the right or capacity to marry, must have intended to marry, must have consented to the marriage, and must have held themselves out to the outside world as being a married couple. The protestor and the deceased met all those parameters, set out in *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka and another Supreme Court Petition No 9 of 2021* (Mwilu



DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported), except for one, that she, the protestor, had no capacity to marry the deceased, as she was in a subsisting customary law marriage with Alfonse Muhambi. The court, in *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka* and another Supreme Court Petition No 9 of 2021 (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported), had found that the cohabitation, in that case, had not resulted in marriage, as the woman was found to have been in a customary law marriage with another man, which had not been terminated, and the court declined to presume marriage. Similarly, in this case, as the protestor did not have capacity to marry the deceased, it could not be presumed that the 21-year relationship and cohabitation gave rise to a marriage.

33. From the material on record, and in view of what I have stated above, the protestor was not a wife of the deceased, and, whatever relationship she had with him, did not and could not amount to a marriage. She is, therefore, not a survivor of the deceased, as she was not his spouse, for the purposes of Part V of the *Law of Succession Act*.
34. It was submitted by the applicant that she could only be treated as a dependant of the deceased or a beneficiary of the estate. I am not too sure what the applicant would mean by this, given that the deceased died intestate, and distribution in intestacy is to the persons who are clearly identified in Part V of the *Law of Succession Act*. The persons entitled to shares in intestacy are family members, up to and including the sixth degree in consanguinity. The non-family members would be creditors and the State. The protestor can only, therefore, access the estate as either a family member or survivor of the deceased, within the meaning of Part V of the *Law of Succession Act*, or a creditor, that a person who has same valid claim of some sort against the estate.
35. The protestor cannot possibly be a dependant of the deceased. I say so because the issue of dependency only arises where an application has been mounted, under section 26 of the *Law of Succession Act*, for reasonable provision out of the estate. The application before me is not premised on section 26 of the *Law of Succession Act*, and the protestor does not have such an application pending, and, therefore, the issue of dependency, and of anyone being categorized as a dependant, should not arise. Section 26 provides as follows:

' Provision for dependants not adequately provided for by will or on intestacy.

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.'

36. A dependant is a person, who the court, on the basis of an application under section 26, declares to be a dependant of the deceased. The application under section 26 is mounted by a person who claims to fall within the definition of a dependant, so that the court can declare him or her to be one, and to, thereafter, make provision for him or her. The definition of dependant is in section 29, and it states as follows:

' Meaning of dependant

For the purposes of this Part, 'dependant' means-



(a)	The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
(b)	Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
(c)	Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.'

37. From the definition in section 29, a dependant can only be a member of the family of the deceased. Under section 29(a), a dependant has to be a wife or former wife of the deceased. If not coming as a widow or former wife or child of the deceased, under section 29(b), a dependant would be a parent or step-parent or grandparent or grandchild or stepchild or a child that the deceased had taken in to his family as his own or a brother or sister or half-brother or half-sister of the deceased. Under section 29(c), a widower of the deceased is also a dependant. I have already found and held, above, that the protestor was not a wife of the deceased, and, therefore, she cannot be a dependant of the deceased under section 29(a) of the *Law of Succession Act*. She is not a parent, step-parent, grandparent, grandchild, child under whatever category, a sibling or half-sibling of the deceased; neither is she a widower of the deceased. She cannot, therefore, fit in the category of 'dependant' defined in section 29(b)(c) of the *Law of Succession Act*. In summary, the protestor cannot be a dependant of the deceased under the definition of 'dependant' in section 29 of the *Law of Succession Act*. In any case, the issue of anyone being a dependant of another does not even arise, in this cause, for the reasons that I have given above.
38. It may be worth underscoring, that sections 26 and 29 of the *Law of Succession Act* are housed in Part III of the Act. That Part is not of universal application to all estates. The provisions in Part III are invoked only where an application has been brought under section 26 for reasonable provision, and that the issue of anyone being a dependant of the deceased should only arise in that context. Where there is no application brought under Part III or section 26, the question of anyone being a dependant of the deceased should not arise, for 'dependant,' as used in the *Law of Succession Act*, is in the limited sense of Part III. Furthermore, 'dependant' is a legal or technical term, not to be confused with 'dependent.' Not everyone who was dependent on the deceased, during his lifetime, qualifies to be a 'dependant,' unless they fall within the meaning of that term as defined in section 29, in the context of Part III of the *Law of Succession Act*. It was said, in *In the Matter of the Estate of Ashford Njuguna Nduni (Deceased), Nairobi High Court Succession Cause Number 1589 of 1994* (Waweru, J)(unreported), that a 'dependant' coming under section 26, is not in the same standing as a beneficiary under a will or an heir in intestacy, and that the term 'dependant' is a technical one, whose utility is limited to Part III of the *Law of Succession Act*, where the court is faced with an application brought under section 26 of the Act. See *In re Estate of Jafeth Birabu Rukokhe [2020] eKLR* (SM Githinji, J).



39. Is the protestor a beneficiary of the estate? 'Beneficiary' refers to that person who takes a benefit under the will of the deceased or is beneficially entitled to a share in the intestacy of the deceased. The deceased herein died intestate, and I should ascertain whether the protestor herein could qualify to be a beneficiary of the intestate estate of the deceased. The law on this is the proviso to section 71(2) of the *Law of Succession Act*. It places a duty on the administrator, applying for confirmation of grant, to ascertain the persons beneficially entitled to a share in the estate, and to identify those shares. For avoidance of doubt, it says:

' Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.'

40. So, is the protestor a person who is beneficially entitled to a share in the estate? Persons who are beneficially entitled to a share in an intestate estate fall into 2 categories. The first category is that of family members, the persons identified in Part V, as the survivors of the deceased, in sections 35 to 39 of the Act. They include the surviving spouse or spouses of the deceased, any surviving children of the deceased, the surviving parents of the deceased, the surviving siblings of the deceased, and other relatives of the deceased up to the sixth-degree of consanguinity. In short, survivors are family members, and except for the spouse and any adopted children, they ought to be blood relatives of the deceased. The protestor does not fall into any of these categories, as found and held above, and, therefore, she is not a person beneficially entitled to the estate of the deceased in that context. The second category of persons beneficially entitled would be creditors, by dint of section 66, of the *Law of Succession Act*. Section 66 is not about distribution upon intestacy, but on entitlement to administration, and creditors are listed therein as persons who have a claim against the estate. They would be entitled to administer the estate of the deceased, based on any legitimate claims that they may demonstrate to have in the estate. Under section 83(d) of the *Law of Succession Act*, administrators are obliged to settle all the debts of the estate, before they propose distribution of the estate at confirmation. Under Part V of the Act, the estate due to the family or survivors of the deceased is the net intestate estate, that is what remains after settlement of debts and liabilities. That would then make creditors, and other persons with claims against the estate, critical actors in succession proceedings. They are entitled to be settled first, before the estate is distributed. These are persons known as creditors, and they are beneficiaries of the estate, to the extent that they have a beneficial interest in or claim against the estate.

41. Does the protestor have a beneficial interest in the estate of the deceased? There is uncontroverted evidence that the protestor and the deceased lived together. They had a child together. Property was acquired, during the period of their cohabitation and relationship, which was registered in the name of the protestor. There are other assets that are said to be in the name of the deceased, but are under the control of the protestor, and which appear to generate considerable income. I have in mind the apartments and the hostels. The protestor is, no doubt, in the estate, and controls a substantial portion of it. She was brought into the estate by the deceased, or she is within the estate courtesy of her relationship with the deceased. She and the deceased thought themselves to be married, and so people might have regarded them as such, and that was how she got into the estate. She has not imposed herself on the estate, or intruded upon it, or forced her way into it. She is certainly not a trespasser. She did not force anyone out of the estate, or forcibly displace anyone. If anything, she is the one who was stopped from utilizing certain assets after the deceased passed on. The applicant recognizes this fact; hence she describes her as either a consort or a mistress. In ordinary English, a consort is a spouse or a companion; while a mistress means a woman, other than a wife, that a married man has sexual relationship with, and it was in the past used to mean a Mrs See *Concise Oxford English Dictionary*, Oxford University



Press, 12th edition. In short, both terms refer to a woman who is more or less the spouse to the man. The deceased was living with the protestor at a property, that he bought and registered in her name, he died there, and was buried there. For all practical purposes, the protestor has a stake in the estate. That stake amounts to a beneficial interest in the estate.

42. So, what is the nature of her interest, now that she was not a spouse of the deceased? That should take me back to *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka* and another Supreme Court Petition No 9 of 2021 (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ) (unreported). That cause was not about succession to the estate of an intestate, but division of property purportedly acquired during matrimony. The Supreme Court found that there was no marriage between the man and the woman, although there was lengthy cohabitation, for the woman was married to another man during the cohabitation, hence she lacked capacity to contract a marriage with the man. The court was persuaded that the property in question was acquired during that cohabitation, and there was contribution by either party to its acquisition or improvement, and the court proceeded to hold that there was a resulting trust in the property, in favour of the party whose name did not appear in the title document. The respective interests of either party were determined, on the basis of the contribution proved by each party. I am persuaded that the protestor and the deceased were in such a situation, and the interest of the protestor in the assets registered in the name of the deceased could take the form of a resulting trust in her favour. She had beneficial interest in that manner, and she should be treated as such for the purposes of the distribution of the estate herein.
43. On the children, there is no dispute on the status of the 3 biological children of the applicant and the protestor, that is to say Hosea, Christina and Wilbur. The applicant and the protestor are both agreed that these were the biological children of the deceased. The applicant said that Wilbur was her stepson, being a child of her husband, and he was entitled to a share in his father's estate, equally with her own children. The protestor said that she lived with and raised the 2 sons of the deceased, together with the deceased, after their mother, the applicant, left. She recognizes Christina as a child of the deceased. So, regarding these 3, there is no contest that they are surviving children of the deceased.
44. The contention is around Arlene. She is not the biological child of either the applicant or the protestor. Her name appears in the Chief's letter and the petition, and the applicant even listed her as a child in her application for confirmation, but she did not allocate any share to her. She asserts that she was not a child of the deceased, and she has produced a birth certificate to that effect, which indicates the name of another man as her father. The protestor says that the deceased brought her in to the home, and introduced her as his child, despite objections from the protestor, and he provided for her. After his demise, the protestor continued to care for her, in that belief, and she asserts that she should be provided for equally with the other children of the deceased. Arlene herself did not testify, neither did her biological mother, they would have provided some useful background, surrounding the circumstances of her birth, and the role of the deceased in it. The birth certificate was not contested by the protestor, when confronted with it, she merely said that she was seeing it in court for the first time. It is a document issued by the Government, and where its contents are not contested, the court has no option, but to take it at its face value, and presume its genuineness. Section 12 of the *Births and Deaths Registration Act*, Cap 149, Laws of Kenya, and sections 83 and 118 of the *Evidence Act*, Cap 80, Laws of Kenya, provide basis for that presumption. See In *Fredrick Omondi Okumu v Maria Akello Otiemo [2016] eKLR* (Maina, J). That presumption is, however, not irrebuttable, for it can be displaced by evidence to the contrary. See *In re Estate of the Late Simeon Kiptum Choge [2017] eKLR* (Chemitei, J) and *In re Estate of Peter Muraya Chege alias Muraya Chege (Deceased) [2019] eKLR* (Ndung'u, J). Upon the birth certificate being placed on record, no counterevidence was presented to displace the presumption that the birth certificate was genuine. I shall, therefore, conclude that Arlene was not a biological child of the deceased, and, therefore, she shall get nothing out of the estate.



45. The protestor testified that the deceased had taken Arlene in, and had provided for her. That would suggest that she was seeking to bring her within section 3(2) of the *Law of Succession Act*. The protestor did not provide adequate evidence on this, in my view. She did not state when that happened and the circumstances under which it happened. She did not provide any concrete proof of the nature of support that the deceased provided for Arlene, to provide basis for me to determine whether or not the deceased assumed permanent parental responsibility over her. I, therefore, have no basis upon which to conclude that Arlene was a child, within the meaning of section 3(2). It would have helped if Arlene had come in, and spoken for herself.
46. The other persons beneficially entitled to a share of the estate mentioned are Peter Buliba, Philip Omach and Joshua Omugunda. Peter Buliba and Philip Omach are persons who were joint proprietors of Kisa/Mundombelwa/1576 and 1577 with the deceased, or they are survivors or successors of such persons; while Joshua Omugunda is a son of a person who had exchanged Butso/so/Shibeye/1277 and 1479 with the deceased. The applicant and the protestor agree that these individuals have a beneficial interest in the estate. They disagree, however, on whether Kisa/Mundombelwa/1576 and 1577 form part of the estate. The protestor argues that the fact of joint proprietorship meant that the property no longer formed part of the estate on account of the survivorship of Peter Buliba and Philip Omach. The applicant did not address the court on the issue. They, however, agree that Joshua Omugunda should get what was due to his father. All these individuals have a beneficial interest in the subject assets, the issue as to whether the assets should be placed on the table should be considered elsewhere.
47. The next consideration is with respect to the assets that the deceased died possessed of, basically what the estate comprises of. This is critical as it is these assets that are up for distribution. The administratrices had an obligation, stated in section 83(b) of the *Law of Succession Act*, to get in all the free estate of the deceased. There is no serious dispute on the assets that make up the estate, and it would appear that the applicant and the protestor agree on the bulk of the estate. The protestor has disclosed one asset that was not in the schedule placed before the court by the applicant. She argues that Kisa/Mundombelwa/1576 and 1577 do not form part of the estate, as they had passed to the surviving joint proprietor or proprietors, on account of the principle of *jus accrescendi*. She asserts exclusive entitlement to the death benefits on account of her nomination by the deceased. She also says that the National Bank of Kenya account was operated jointly by her and the deceased, and that it was even a business account.
48. The distribution proposed by the applicant is on the basis that the protestor was not a widow of the deceased, and, therefore, she is not entitled to a share in the estate, and she has proposed distribution only between herself and the 3 children. However, she has still allocated some assets to the protestor, principally on grounds that the deceased had placed her on the estate and she was in occupation. However, what is allocated to her is the property that is already in her name. In her protest, the protestor largely agrees with the proposed distribution, except for a few assets, which are under her control, and in respect of which she proposes that they be given to her.
49. However, before the court embarks on a distribution of assets, it must be satisfied that the said assets exist, and are available for distribution. What is available for distribution is the free property of the deceased. That is to say, assets that are not encumbered, or disputed, and are in the name of the deceased. It is not enough to just list assets, administrators ought to go the extra mile, and provide evidence that the assets proposed for distribution in fact exist, and are free for distribution. Documentation is critical to distribution, for distributing property blindly without knowing whether they exist or are free could be an exercise in futility. Do I have any proof that the assets proposed for distribution exist? My perusal of the record reveals the following:



- a. A certificate of official search for Butsotso/Shibeye/1428, registered in the name of the deceased on January 18, 1993;
 - b. A certificate of official search for Butsotso/Shikoti/6714, registered in the name of the deceased on November 7, 2004;
 - c. A certificate of official search for Kakamega/Municipality Block II/58, registered in the name of the deceased on June 20, 2008;
 - d. A certificate of official search for E/Wanga/Isongo/2816, registered in the name of the deceased on October 1, 2015;
 - e. A certificate of official search for Butsotso/Indangalasia/810, registered in the name of the protestor on September 21, 2021;
 - f. Title deed for Butsotso/Indangalasia/810, registered in the name of the protestor on September 21, 2005;
 - g. Title deed for Butsotso/Shibeye/1483, registered in the name of the deceased, issued on December 23, 1992
 - h. Registration certificate for motor vehicle xxxx, registered in the name of the protestor, on September 21, 2007;
 - i. National Bank statement, dated January 11, 2018, an account operated by Stymar Enterprises; and
 - j. IG Sacco Limited statement, dated January 9, 2018, an account in the name of the deceased.
50. From the material recited above, the assets that are indisputably in the name of the deceased are Butsotso/Shibeye/1428, Butsotso/Shikoti/6714, Kakamega/Municipality Block II/58, E/Wanga/Isongo/2816, Butsotso/Shibeye/1483 and the investment with IG Sacco Limited. Butsotso/Indangalasia/810 and xxxx are registered in the name of the protestor, and they are, therefore, not assets in the estate of the deceased. The statement from National Bank of Kenya Limited indicates that the subject account is not in the name of the deceased, but that of Stymar Enterprises. None of the parties have tried to bring out the link between the deceased and the said entity, and account. I shall, for now, treat the funds held in that account as not forming part of the estate, until the contrary is established. Ownership details of the assets that are allegedly held in joint proprietorship between the deceased and his brother or brothers have not been availed, and, for that reason, I shall not deal with them at the distribution. Neither have any documents of ownership been exhibited on Butsotso/Shibeye/1479, said to have been the subject of an exchange between the deceased and another. I have, though, seen some documents relating to that property, being an application for consent of Land Control Board, dated May 5, 2015, by the deceased, to the Lurambi Land Control Board, with respect to a transaction between him and Sheldon Zachery Muganda; a transfer form, executed on May 5, 2015, by the deceased, in favour of Sheldon Zachery Muganda; and a letter of consent of the Lurambi Division Land Control Board, dated June 11, 2015, consenting to a transfer of that land, by the deceased to Sheldon Zachery Muganda. As there is no dispute on this, I shall deal with the property at distribution. There are no documents relating to the other bank accounts, and I cannot tell whether the said accounts were in the name of the deceased, and I shall not distribute the moneys in the alleged accounts until proof is provided of their existence.
51. The applicant has identified, as an issue for me to determine, the matter of Butsotso/Indangalasia/810 and xxxx, which are registered in the name of the protestor, submitting that these assets were bought



by the deceased, and registered in the name of the protestor as trustee. I will start with Butso/Indangalasia/810. The same is said to have been bought by the deceased at an auction, and was initially transferred to and registered in the name of the deceased, before it was transferred to the name of the protestor thereafter. The years when that happened are significant. It was registered in the name of the deceased on September 30, 2004, and was transferred to the name of the protestor on September 21, 2005. The 2 apparently set up a home on this land, and lived or cohabited there until the demise of the deceased, whereupon his remains were interred here. Both sides appeared to agree, that at the time of the transfer to the protestor, the previous owner might have been piling pressure of some sort on the deceased, and the transfer might have been to secure the property. Am invited to find a resulting trust in favour of the estate, but I am reluctant to do so. My mandate, sitting as a probate court, is to distribute the estate of the deceased. I distribute assets that are in the name of the deceased, and which are not contested or disputed by any party. The property herein, Butso/Indangalasia/810, is not registered in the name of the deceased, but that of the protestor, and I would overstep the bounds of my probate jurisdiction if I were to go on to make pronouncements to effect that the protestor held that property in resulting trust. The jurisdiction to make that determination lies elsewhere, or in separate proceedings, and, for the purpose of these proceedings, I shall treat Butso/Indangalasia/810 as a property which does not form part of the estate.

52. I am fortified, in arriving at that position, by the decision, in *In re Estate of Kimani Kinuthia [2008] eKLR* (Ibrahim, J), where the court stated that succession proceedings are not the appropriate way to challenge title to assets said to comprise his estate, and that such assets, said to be the subject of a trust, in favour of the claimant, ought to be subjected to separate proceedings. The court further stated that the claimants have to prove the trust, and thereafter seek revocation of the title or partition thereafter, which requires declaratory orders of the existence of the trust. It was emphasized that such is not the function of a succession cause, as succession proceedings are not appropriate for resolution of seriously contested claims around such matters as trust. The court then concluded that it had no jurisdiction to determine the claim of trust or to grant relief related to it.
53. In *Gichobi Mwangi v Simon Irungu Joshua [2016] eKLR* (Waweru, J), it was said that succession proceedings, by their very nature and design, under the *Law of Succession Act*, are very limited, with the aim of expeditious disposal, leading to due distribution of the estate of a deceased person. It was asserted that the mandate of a succession court is precise and limited; to determining the persons beneficially entitled to the estate of a deceased person, and their respective shares therein. There are various formulas set out in the body of the statute to determine who such beneficiaries would be and their shares of the estate. It was stated that the *Law of Succession Act* and the Probate and Administration Rules do not envisage, at all, the adjudication, in succession proceedings, of potentially complex claims in land based on trusts, adverse possession or contracts, without the benefit of proper and adequate pleadings, and without due regard to other laws, for instance the *Limitation of Actions Act* and the *Land Control Act*. Such claims belong in a civil court by properly instituted proceedings. It was noted that to allow such claims to be brought in succession proceedings, often many decades after periods of limitation have lapsed and without due regard to other laws, is to permit lawlessness by abuse of court process, allowing claims to fester for generations, and the same should not be permitted. On the facts of the case, it was held that the claims by the protestor clearly belonged in a civil court, and not in the limited succession proceedings, the court postponed the confirmation proceedings, to afford the protestor time to initiate a civil suit. See also *In re Estate of the Late Jonathan Kinyua Waititu (Deceased) [2017] eKLR* (Ndung'u, J), *Ruth Munyutha Kimonongi & another vs Grace Waitheera Mutitu [2015] eKLR* (Ngaah, J), *In re Estate of James Muiruri Kamau (Deceased) [2018] eKLR* (Ndung'u, J), *In re Estate of Eliud Kiarie Mutembei (Deceased) [2019] eKLR* (Achode, J) and *In re Estate of Alfayo Ambalwa Musungu (Deceased) [2020] eKLR* (Musyoka, J).



54. In addition, the issue as to whether Butso/Indangalasia/810 forms part of the estate of the deceased, on account of a resulting trust, brings it within the realm of Rule 41(3) of the Probate and Administration Rules, which requires that where such an issue arises at confirmation, it would be more appropriate to determine it in separate proceedings. The provision states:

' Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.'

55. The Court of Appeal had occasion to address the issue, where claims of this nature arise, in *Pacific Frontier Seas Ltd vs Kyengo & another (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR)* (M'Inoti, J Mohammed & Kantai, JJA), where it was stated that there are disputes that arise in the context of a succession cause, which have to be resolved through the dedicated institutions or the specific mechanisms provided by the law for that purpose. It was pointed out that Rule 41(3) of the Probate and Administration Rules contemplates situations where it is not possible or convenient to resolve disputes that arise in the course of determining an application for confirmation of a grant, such as identity of persons claiming to be beneficiaries, their share or estate, conditions or qualifications attaching to such share or estate among others. In such instances, the court is empowered, before confirming the grant, to postpone the confirmation to await determination of the question in proceedings under Order 37 rule (1) of the *Civil Procedure Rules*. It was observed that it would not have been necessary to have Rule 41(3) refer to Order 37(1), if the succession court is entitled to deal with all and sundry issues that could arise in a succession cause. See *Naomi Wanjiku Waweru & another v Teresia Nyokabi Njuguna [2015] eKLR* (Musyoka, J), *In re the Estate of Karongi Chomba (Deceased) [2018] eKLR* (Muchemi, J), *In re Estate of Muraguri Murathu (Deceased) [2019] eKLR* (Ndung'u, J) and *Alex Waweru Kibura & 2 others v Teresiah Nyokabi Njuguna [2019] eKLR* (Maina, J). See also *In Re Njoroge Mbote [2002] eKLR* (Khamoni, J) and *In re Estate of Joseph Atang'o Akida alias Otango Achita (Deceased) [2022] eKLR* (Musyoka, J).

56. Furthermore, a declaration of trust over immovable property would amount to determining a question on ownership or title to property. The *Constitution* of Kenya took away jurisdiction, in 2010, from the High Court, on such determinations. Article 162(2) of the *Constitution* provides for establishment of a court, of equal status with the High Court, to determine such issues, and such court was, indeed, created by the *Environment and Land Court Act*, No 19 of 2011. Article 165(5) of the *Constitution* emphatically declares that the High Court has no jurisdiction to entertain any claim that falls with the jurisdiction of the court contemplated in Article 162(2). So, if the *Constitution* declares that I, sitting as Judge of the High Court, has no jurisdiction on matters relating to ownership and title to land, how would I purport to make pronouncement on the status of Butso/Indangalasia/810, as to whether it was a property belonging exclusively or absolutely to the testator, or whether she held it in trust for the deceased, even when that arose in probate proceedings.

57. I believe I have said enough, to demonstrate that the issue as to whether Butso/Indangalasia/810 was held in trust by the testator, for the deceased, should not arise in these proceedings. If the applicant feels strongly, that a trust ought to be declared, then she should seek remedy elsewhere, in appropriate proceedings.



58. The next issue relates to the motor vehicle, xxxx. The vehicle is registered in the name of the protestor, effective from September 21, 2007. The applicant claims that the vehicle was bought by the deceased but registered in the name of the protestor. The protestor accedes to that claim, insisting that the motor vehicle belonged to her. Do I have proof that the deceased bought the vehicle, and gifted it to the protestor? The applicant has placed on record a purported sale agreement, claimed to be evidence that the deceased had bought the vehicle, prior to its registration in the name of the deceased. That agreement purports, at the first page, to have been entered into on July 12, 2006, between the deceased and a Francis Kungu Kariuki. Then, at the second page, the said Francis Kungu Kariuki and the deceased signed it on July 12, 2013. Curiously, the name appearing in the typescript, of the purchaser, is of a Ruth Wangui Mwangi, which is crossed out by biro, and replaced, in handwriting, with the name of the deceased. The crossing out and the writing of the name of the deceased are not countersigned by whoever made the alterations. I do not claim to be a handwriting expert, but I have seen the signature of the deceased in several documents that have been filed herein, and none of them are anywhere close to the signature in the purported sale agreement. In view of what I have pointed out above, I am not of the persuasion that the said agreement is genuine, and I shall treat it as having been created to fit into the narrative that the deceased had bought the subject motor vehicle in 2006, and thereafter had it registered in the name of the protestor in 2007. There is no evidence that the said motor vehicle ever belonged to the alleged seller, Francis Kungu Kariuki. I shall take it that the motor vehicle is the property of the protestor, it does not belong to the estate, and it is not available for distribution. In any event, I am being invited to make a declaration of trust, and I reiterate what I have said above, with respect to Butso/Indangalasia/810, that confirmation proceedings are not the appropriate forum for declaration of trusts.
59. There is some tussle over pensions, death benefits and gratuity. It is not clear to me, save for the benefits held by AON Minet, which entity holds or held the rest of the pensions, death benefits and gratuity. Pensions gratuity and death benefits are subject to legislation. Pensions, gratuity and death benefits for civil servants are governed by the *Pensions Act*, Cap 189, Laws of Kenya. Pensions for civil servants are payable, under the *Pensions Act*, to dependants, and such funds do not form part of the estate of the deceased civil servant or public officer. The scheme of distribution of such pensions is provided for in the *Pensions Act*, and not in the *Law of Succession Act*. The dependants, according to the *Pensions Act*, are the widow or the children. The widow has exclusive entitlement, and the children can only access the pension in the event the widow dies or remarries. This is a scheme that is outside the purview of the *Law of Succession Act*. The only part of these benefits that is payable to the estate is the gratuity. Some confusion often arises, when the pension funds are paid to the Public Trustee, by the Government, suggesting that the Public Trustee is to administer them as an estate of the deceased. That cannot be so, for the *Pensions Act* is clear on the persons entitled to the said pension funds, and the Public Trustee only receives the funds, not as administrator, but for the sole purpose of conveying the same to the dependants named in the *Pensions Act*. I raise all this as I see that the deceased was a teacher. If there are accrued pension funds in his favour, under the *Pensions Act*, then such funds do not form part of his estate, and they ought to be paid out strictly in accordance with the provisions of the *Pensions Act*. If any dispute erupts as to identity or status of the beneficiaries or dependants, then such disputes ought not be resolved within the context of succession proceedings.
60. I note that some of the pension funds were held by AON Minet, a private entity, suggesting that they were not administered by the Government, and, therefore, they were not subject to the *Pensions Act*. Pension funds held or administered by a private entity would not be subject to the *Pensions Act*, but the *Retirement Benefits Act*, No 3 of 1997. Funds managed under the *Retirement Benefits Act* do not form part of the estate of the deceased, by dint of section 36A of the Act. They are subject to a nomination by the deceased, and are paid directly to the person nominated. If the scheme does not



provide for mandatory nomination, and is discretionary, it would be up to the trustees or managers of the scheme, in their discretion, to decide who to pay, in accordance with the rules of the scheme. It would appear that, in this case, the deceased had nominated the protestor, and the scheme managers paid in accordance with that nomination.

61. For avoidance of doubt, section 36A provides as follows:

' Treatment of death benefits

Upon the death of a member of a scheme, the benefit payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules.'

62. Where disputes arise, relating to funds, the subject of a nomination in a pension scheme, under the *Retirement Benefits Act*, the probate court would have no jurisdiction over the same. See *Rehema Marende Omulisa vs. Mwanaidi Auma Hamisi [2021] eKLR* (Musyoka, J). In *In re Estate of JKN [2021] eKLR* (Onyiego, J), the court stated that the parties ought to exhaust the legal mechanisms provided under the *Retirement Benefits Act*, before moving to the court. It was observed that the *Retirement Benefits Act* has elaborate provisions on how to deal with terminal benefits and management by trustees. See also *In re Estate of Tabitha Njoki Ngigi (Deceased) [2020] eKLR* (Onyiego, J). It was said, in *Jimmy R Kavilu and 16 Others vs Stanbic Bank Kenya Ltd and 7 Others (2019) eKLR* (M Onyango, J), that the court has no jurisdiction to determine matters concerning pension schemes and trustees of such schemes, unless brought by way of Judicial Review, contesting the decision of the Retirement Benefits Tribunal. Similar sentiments were expressed in *Joseph Kimani Kamau vs Sundeep K Raichura and 5 Others (sued as trustees of Alexander Forbes Retirement Fund (Provident Section 3) (2019) eKLR* (Muchelule, J), that any dispute between a party and the pensions fund should be dealt with by complaining to the Executive Officer of the Retirement Benefits Authority, and, if not satisfied with a determination by the Executive Officer, to the Retirement Benefits Tribunal set up under section 47 of the *Retirement Benefits Act*, and thereafter to the High Court for Judicial Review.

63. The net effect of it all is that I have no jurisdiction, sitting as a probate court, to venture into matters that revolve around pension benefits, whether governed by the *Pensions Act* or under the *Retirement Benefits Act*.

64. Section 42 of the *Law of Succession Act* is applied in cases where a survivor had benefited from an inter vivos transfer or settlement during the lifetime of the deceased. It could be argued that the protestor benefited from Butso/Indangalasia/810 and xxxx, during the lifetime of the deceased. However, section 42 only applies to a child or grandchild or house of the deceased. The protestor is neither. Section 42, therefore, does not apply to this case, and there would no basis of bringing Butso/Indangalasia/810 and xxxx to the hotchpotch. For avoidance of doubt, section 42 of the *Law of succession Act* provides as follows:

' 42. Previous benefits to be brought into account

Where—

- (a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken



into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house'

65. I should next move to the distribution of the assets. I have already held that the protestor was not a spouse of the deceased, and, therefore, her status in this matter is not that of a surviving spouse, with the rights concomitant to those of a surviving spouse under Part V of the *Law of Succession Act*. I have found that she is not a stranger to the estate either. She is in the estate, controlling some of the assets of the estate. She is not a trespasser on the property she controls, neither is she an impostor. She has a substantial beneficial interest in the estate, and I shall treat her as a beneficiary, in the same mold as a creditor of the estate. The picture should be that the beneficiaries should be the 1 widow of the deceased, the 3 biological children of the deceased and a person with beneficial interest. The interest of the widow and the children is clearly defined, and is governed by section 35 of the *Law of Succession Act*. That of the protestor, the person with beneficial interest is not defined by the *Law of Succession Act*, and I shall have to define it, guided by the decision in *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka* and another Supreme Court Petition No 9 of 2021 (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported).

66. For avoidance of doubt, section 35(1) of the *Law of Succession Act* provides as follows:

' Where intestate has left one surviving spouse and child or children

1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
 - a. The personal and household effects of the deceased absolutely; and
 - b. A life interest in the whole residue of the net intestate estate:

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

2. .
3. .
4. .

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

67. The interest of the protestor in the estate appears to be limited to 2 properties, namely Kakamega/ Municipality Block II/58 and Butso/5814. They appear to be assets within Kakamega township. They have developments that are generating substantial income, by local standards. The biggest fight in this cause is over them. The protestor is in control. She collects the rent, and the applicant is asking the court to call upon her to render an account of the income that she has collected over the years, after the demise of the deceased. As she was not a wife of the deceased, but a companion, within the principles set out in *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka* and another Supreme Court Petition No 9 of 2021 (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported), she cannot claim a share of the estate as a widow, and her entitlement can only be limited to the assets that the deceased left her in control of, and her interest in them, as against



the interest of the estate, taking the form of a resulting trust, should be ascertained along the lines of *Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka* and another Supreme Court Petition No 9 of 2021 (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)(unreported) too.

68. The protestor claimed that she and the deceased acquired the 2 assets during their cohabitation, and developed the same. She did not give details of the exact date of acquisition, but the registration details are that Kakamega/Municipality Block II/58 was registered on June 20, 2008 and Butso/ Shikoti/5814 on November 7, 2004. I shall presume that the 2 assets were acquired at about the same time. The protestor alleges that she began to cohabit with the deceased from 1999, after the applicant left, and lived with him continuously until he died in 2017. The applicant did not contest nor controvert those allegations. She did not state whether she lived with the deceased during that period, and her case is built largely around the marriage certificate. What the protestor alleges appears to have credence. She said that she lived with and raised the 2 sons of the deceased with the applicant, a contention that the applicant did not contest nor controvert. Indeed, at cross-examination a question was asked about whether she could release the clothes of the deceased and the bicycle of the surviving son of the applicant, Hosea, which suggests that she was living together with both the deceased and Hosea, hence she had custody of the clothes belonging to the deceased and a bicycle belonging to Hosea. The applicant appeared to know very little about the 2 assets, and her attempts to access the same were only made after the demise of the deceased. She conceded that she never collected rent from them, and that she had never set foot on them, except casually. She did not allude to any legal attempts to wrestle control of the 2 assets from the protestor, if the protestor was in control unlawfully. She also did not allude to the protestor storming into the 2 assets, after the deceased died, and taking control of them by force. There is credence, therefore, to the narrative by the protestor, that she and the deceased acquired these assets, during their cohabitation and developed them, and that suggests that it was in the course of that that she came to have control of them. She did not lead concrete evidence of how she contributed to the acquisition or development or improvement of them, neither did the applicant demonstrate that the protestor was not capable, at the material time, of making such contribution. The evidence on record is that all the 3 parties, that is the deceased, the applicant and the protestor were primary school teachers. The applicant was separated from the deceased, at the time, and she could not have contributed in any way to the acquisition of the 2 assets, and she did not allege that she did. She cannot claim indirect contribution, for she was not living with the deceased at the time, she did not care for him, and 2 of her 3 children were living with and being raised by the protestor and the deceased. The protestor lived with the deceased, at the time, they both had income, from which they could acquire and develop the property. As there is no evidence of what each one of them contributed, I shall presume that their contribution was equal, and the property, Kakamega/Municipality Block II/58 and Butso/ Shikoti/5814, should be shared equally between the deceased and the protestor. The 50% share of the deceased is what should be available for distribution in the succession cause, and should be shared out between the applicant and the 3 children. The protestor shall have the first option to buy out the applicant and the children, and, in the event that they are not able to agree on the buy-out of the 2 assets, or the mode of sharing out the said assets as per the formula that I have stated above, the same shall be sold, and the proceeds of sale shared out between the estate and the protestor, on a 50:50 basis, as between the protestor, on the one hand, and the applicant and the 3 children, on the other.
69. Regarding the investment in IG Sacco Limited, it will be noted that investments in cooperative societies are subject to nomination. Investments in a cooperative society that are subject to a nomination do not form part of the estate of the deceased member. See *GAAM & another vs MOAO [2016] eKLR* (Mwita, J) and *In re Estate of Boniface Mutinda Kabaka (Deceased) [2021] eKLR* (Machelule, J). Section 39(1)



of the Cooperative Societies Act, No 12 of 1997, Laws of Kenya, provides that the share or interest of the member in the cooperative society is paid to the person named in the nomination. See Benson Mutuma Muriungi vs CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J), David Gachura Mukuru vs Jackline Mbithe [2016] eKLR (Gikonyo, J) and In re Estate of Japheth Kibunga Baya also known as Japheth Kibunga Baya [2019] eKLR (Nyakundi, J) Where there is no nomination, the share or interest passes to the estate. See In re Estate of Carolyn Acheng Wagah (Deceased) [2015] eKLR (Musyoka, J) and Joyce Kamene Kiswi alias Kamene Keswii & another vs Alice Kamene Nzomo & another [2014] eKLR (Mutende, J). In the instant case, the parties have not indicated whether there was a nomination, so that I can apply section 39. I shall not assume that there was no nomination, and, therefore, I shall not distribute the investment in IG Sacco Limited, to allow the parties to confirm whether there was any nomination. Disputes around nominations, that are subject to the Cooperative Societies Act and the Sacco Societies Act, No 14 of 2008, Laws of Kenya, are not resolved through the court, but through the mechanisms set out in the Cooperative Societies Act. See In re Estate of Boniface Mutinda Kabaka (Deceased) [2021] eKLR (Muchelule, J) .

70. In view of all that I have said above, these are the final orders:
- a. That I declare that the deceased was survived by Rachael Khatievi Waswa, Hosea Opindi Buliba, Christina Eshikumo Buliba and Wilbur Shikuku Buliba;
 - b. That I find that Mirriam Kahenda Wilunda and Sheldon Zechary Muganda have beneficial interest in the estate;
 - c. That I find that the deceased died possessed of Butsotso/Shibeye/1428; Butsotso/Shikoti/6714, Kakamega/Municipality Block II/58, E/Wanga/Isongo/2816 and Butsotso/Shibeye/1483.
 - d. That I find that Mirriam Kahenda Wilunda is entitled to 50% of Kakamega/Municipality Block II/58 and Butsotso/Shikoti/6714, and the other 50% should devolve upon the estate, to be shared equally between Rachael Khatievi Waswa, Hosea Opindi Buliba and Christina Eshikumo Buliba;
 - e. That E/Wanga/Isongo/2816 shall devolve upon Rachael Khatievi Waswa;
 - f. That Butsotso/Shibeye/1428 shall devolve upon Hosea Opindi Buliba;
 - g. That Butsotso/Shibeye/1483 shall devolve upon Christina Eshikumo Buliba;
 - h. That Butsotso/Shibeye/1277 shall devolve upon Sheldon Zechary Muganda;
 - i. That the grant herein is confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly;
 - j. That each party shall bear their own costs; and
 - k. That any party, who may be aggrieved by the orders above, is granted leave of 28 days, to move the Court of Appeal, appropriately.

71. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS.....24TH DAY OF MARCH 2023

WM MUSYOKA

JUDGE



Erick Zalo, Court Assistant.

Mr. Shifwoka, instructed by Nyikuli Shifwoka & Company, Advocates for the applicant.

Ms. Nafuye, instructed by KS Ombaye & Company, Advocates for the protestor.

