

SUCCESSION AFTER DEATH

Highlights:

- a) *The Law in Kenya caters for the administration of the estate of a person who dies with or without having made a valid will*
- b) *A will left by a deceased person may be valid or invalid (void) under certain circumstances as stipulated by the Law of Succession Act, Cap 160, Laws of Kenya*
- c) *The Law empowers the immediate and extended family members of a deceased (dead) person to inherit his/her estate and clearly specifies the circumstances under which each category of relatives may benefit from the deceased's estate*
- d) *The Law recognizes polygamous households in the administration of a deceased's estate*
- e) *Married and unmarried daughters of a deceased person are entitled to the deceased's estate*
- f) *The Law does not consider age of sons or daughters of the deceased in determining each child's share of the deceased's estate*
- g) *It is highly advisable for people to make wills in order to ease the burden of their surviving dependents in the administration of their estates in the event of death*

Main Article:

Introduction

When a person dies having made a **valid** will, then he is said to have died **testate**. When a person dies without having made a will, then he is said to have died **intestate**. The emphasis on a valid will is in consideration of the fact that if a will is found to be invalid, that is, it is not genuine, then the deceased person is considered to have died intestate and the law relating to intestate succession applies. The effect is that the will is not considered in the disposing of the deceased's property.

Applicable law

In Kenya, the applicable law with regard to issues of succession is the *Law of Succession Act, Cap 160, Laws of Kenya*, which came into force on the 1st day of July 1981. Previously there were four systems of succession law which applied to the four different socio – ethnic groups of the people in Kenya; that is, the Africans, Muslims, Hindus and Europeans.

Sections 2(1) and (2) of the Act provide as follows:

*“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, **all** cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”*

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

Basically, the above provisions provide that other systems of law of succession may apply but as exceptions to the Law of Succession Act. Therefore where different laws apply, the same must be provided for in the Law of Succession Act itself or through any other written law.

Customary Law

The position with regard to African customary law, which many people ascribe to or are forced to consider it owing to pressure from relatives and the community in general is as follows:-

Firstly, it is important to note that the Judicature Act, Chapter 8 of the Laws of Kenya provides for African customary law as one of the sources of law in Kenya. However, it only applies for as long as it is applicable and **not repugnant to justice and morality or inconsistent with any written law.**

The Law of Succession Act has also embodied the African Customary Law of Succession with the intention of providing Kenyans with a statute that translates the Kenyan customary beliefs and practices into law.

More specifically, the Law of Succession Act allows for the application of African Customary Law in the following instances:

- (i) Estates of persons dying before the application of the Law of Succession Act;
- (ii) Testamentary dispositions in accordance with African Customary Law;
- (iii) The application of African Customary Law by Section 33 in the event of intestacy.

Section 33 provides as follows:

“The law applicable to the distribution on intestacy of the categories of property specified in Section 32 shall be the law or custom applicable to the deceased’s community or tribe as the case may be.

Section 32 provides as follows:

“The provisions of this Part shall not apply to –

- (a) agricultural land and crops thereon; or*
- (b) livestock,*

situated in such areas as the Minister may, by notice in the Gazette, specify.

Islamic Law

With regard to the issue of Islamic Law, it is important to note that Islamic Law is also a source of law in Kenya. The root of the application of Islamic Law in Kenya is the Constitution of Kenya. Section 82 of the Constitution allows the application of different personal laws as an exception to the general prohibition of discrimination. Islamic Law is

considered a limited source of law since it only applies when all the parties profess the Islamic Religion.

In 1990, an amendment to the Law of Succession Act through Statute (Miscellaneous Amendment) Act (Act No. 2 of 1990) exempted Muslims from the **substantive** provisions of the Law of Succession Act – those relating to testamentary or intestate succession, thereby subjecting the estate of a deceased Muslim exclusively to Islamic Law.

TESTATE SUCCESSION

Testate succession occurs when a person makes a **valid** and **enforceable** will which ensures that upon the death of that person, his property passes to a person/s of his choice. By preparing a will, a person indicates that he is desirous of retaining absolute or limited control over his property after death and it is therefore absolutely necessary to ensure that he prepares a will that will be considered **valid** and **enforceable** in accordance with the provisions of the law. It is normally prudent to engage the services of an advocate when preparing a will to ensure it complies with the provisions of the law.

Further it is necessary to note that a will is chiefly concerned with the disposal of property, but it can be used for other purposes and for incidental matters, such as giving directions as to the manner of disposal of the deceased's body or even appointment of persons to administer the estate of the testator – the person making the will.

The essential characteristics or elements of a will are as follows:-

- (i) the wishes expressed are only intended to take effect upon death
- (ii) a will only takes effect after death
- (iii) a will only operates as an expression of intention
- (iv) a will is ambulatory, that is, it is capable of dealing with property which is acquired after the date of the will
- (v) a will is always revocable

As previously indicated, a will only takes effect, that is, the deceased's property is disposed off in accordance to the provisions of the will, when it has been proved to be a valid testamentary disposition. The process of proving the formal validity of a will is referred to as propounding the will. The formal requirements of a valid will are as follows:-

- (i) whether the testator had **capacity** to make the will

Section 5 of the Law of Succession Act provides as follows:

*“...any person who is of **sound mind** and **not a minor** may dispose of all or any of his free property by will...”*

It is necessary to note that despite being considered to have a **sound mind** that enables a testator to understand the nature of the act of making a will and its effects, it is also necessary for the testator to have a **sound memory** enabling him to have a recollection of

the property of which he is disposing and further he must have a **sound understanding** of what he is undertaking. This includes appreciating the moral claims upon him, that is, he should be able to remember the persons he is morally bound to provide for having regard to their relationship with him. Otherwise, the omission to adequately cater for any dependant may attract an application under Section 26 of the Law of Succession Act which provides as follows:

*“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,... 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.**”*

A dependant is defined at Section 29 of the Act as follows:

- (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, grand-parents, 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
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death

Further Section 5(2) of the Act provides as follows:-

*“A female person, whether **married** or **unmarried**, has the same capacity to make a will as does a male person.”*

In Kenyan law, more specifically, Section 5(3) of the Law of Succession Act, it is presumed that the person making a will is of sound mind unless the contrary is proved. *In the Matter of the Estate of James Ngengi Muigai Nairobi High Court, Succession Cause No. 523 of 1996* (Koome J), the testator was dementing and physically incapacitated due to joint pains and hypertension at the time of making the will. The witnesses who attested the will testified that the deceased looked normal. The court was satisfied that he was of sound mind as the objectors had failed to prove unsoundness of mind at the time of the execution of the will.

- (ii) whether the will was made **voluntarily** without any duress, undue influence or by mistake

A testator must know and approve the contents of their will. A testator approves the terms of the will if he executes it in those terms on his own volition and not because of coercion or undue influence by another person. Where there is a mistake or fraud, the knowledge and approval of the testator may be considered to be absent.

Section 7 of the Law of Succession Act provides as follows:

*“A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the **free agency** of the testator, or has been induced by mistake, is void.*

Further *In John Kinuthia Githinji vs Githua Kiarie and others Nairobi Court of Appeal, Civil Appeal No. 99 of 1988 (Gicheru JA)* stated that it is essential to the validity of a will that at the time of its execution, the testator should know and approve of its contents: for where a will, rational on the face of it, is shown to have been executed and attested in the manner prescribed by law it is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding; but if there are circumstances in evidence, which counter balance that presumption, the decree of the court must be against its validity.

A will is also void if it is forged as there is lack of knowledge and approval by the testator of the contents of the will.

Under Kenyan Law, no specific form of a will is required. Section 8 provides that a will may either be oral or written.

Section 9 provides that an oral will shall be valid in the following instances:-

- (i) when it is made before / in the presence of two or more competent witnesses
- (ii) when the testator dies within a period of three months from the date of making the will

Section 11 provides that a written will shall be valid in the following instances:-

- (i) where the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator
- (ii) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will
- (iii) the will is attested by two or more competent witnesses and each witness must sign the will in the presence of the testator

In conclusion, when a person dies testate, his property is administered and disposed off in accordance to the provisions of his will. The procedure involves having the executor obtain a **Grant of Probate** which ideally gives the executor the authority to deal with the property of the deceased in accordance with the provisions of the will.

INTESTATE SUCCESSION

Section 34 of the Law of Succession Act provides as follows:

*“A person is deemed to die **intestate** in respect of all his free property of which he has not made a will which is capable of taking effect.”*

It therefore follows that intestacy occurs in the following instances:-

- (i) when a person dies without having made a will
- (ii) when a person's attempt to die testate, fails upon the invalidation of his will
- (iii) when a person revokes his will and subsequently dies without reviving his earlier revoked will or without having made another will

The rules of intestacy determine the question of who is entitled to the property of the estate of an intestate. Provisions relating to intestacy are contained in Part V of the Law of Succession Act. It is important to note that the intestacy rules only benefit people who also have a **direct blood link** with the intestate apart from **spouses**. In the absence of blood relatives, the estate passes on to the state *bona vacantia* (for lack of an heir).

The rules of intestacy only apply to property that is capable of being disposed off by a will. The said rules do **not** apply in the following instances:

- (i) when property is jointly owned as it passes by **survivorship** e.g. where the matrimonial home is held by a husband and wife as joint tenants and the husband predeceases the wife, the house will pass to the wife because of the survivorship
- (ii) **nomination** – This involves the direction by a person, called the nominator, to another who is holding an investment on the nominator's behalf, to pay the funds on the nominator's death to a third party, called the nominee, nominated by the nominator during his lifetime. The said direction only takes effect upon the death of the nominator.
- (iii) **Gift in contemplation of death** – *Donatio mortis causa*
This is provided for in Section 31 of the Law of Succession Act
- (iv) **Life policies written in trust**

The Law of Succession Act makes provisions for both monogamous and polygamous situations and the nature of devolution of property upon intestacy depends on whether the deceased was monogamous or polygamous. Section 35 and 36 deal with the monogamous situations, Section 40 deals with the polygamous situation while Sections 37 to 39 are general provisions.

As aforesaid herein, under the heading "*Customary Law*", the rules of intestacy do not apply to the provisions of Section 32 of the Act.

Intestacy provisions

(a) where intestate leaves one spouse and child or children (Section 35)

The surviving spouse is entitled to:

- (i) the personal and household effects of the deceased absolutely
- (ii) life interest in the whole residue of the net intestate estate



In the event that the surviving spouse dies, or, in the case of a widow, she re-marries, then the whole residue of the net intestate estate devolves upon the surviving child (if there is only one) or is **equally** divided among the surviving children.

Life interest only entitles the surviving spouse to the use and utility of the property, the subject of the life interest. The surviving spouse holds the property during their life interest as a **trustee** and stands in a fiduciary position in relation to the property. The property does not pass to the surviving spouse absolutely.

(b) where intestate leaves one spouse and no children (Section 36)

The surviving spouse is entitled to:

- (i) the personal and household effects of the deceased absolutely
- (ii) the first ten thousand shillings out of the residue of the net intestate estate or twenty per centum thereof, whichever is greater
- (iii) life interest in the remainder

Upon determination of the life interest aforementioned, that is, if the surviving spouse dies, or, in the case of a widow, she re-marries, then the property subject to the life interest shall devolve in the order of priority set out in Section 39 of the Act.

Section 39(1) of the Act provides as follows:-

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –

- (a) father; or if dead*
- (b) mother; or if dead*
- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none*
- (d) half – brothers and half – sisters and any child or children of deceased half – brothers and half – sisters, in equal shares; or if none*
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree in equal shares.*

(c) where intestate leaves a surviving child or children but no spouse (Section 38)

In this instance, the net intestate estate devolves upon the child, if there be only one, or be **equally** divided among the surviving children.

(d) where intestate leaves no surviving spouse or children (Section 39)

In this instance, the net intestate estate shall devolve upon the kindred of the intestate in accordance to the provisions of Section 39, which provisions have been stated hereinabove.

(e) where intestate was a polygamist (Section 40)

In this instance,

- (i) his personal and household effects and the residue of the net intestate estate should in the first place be divided among the houses according to the number of children in each house
- (ii) distribution of the estate should thereafter follow the provisions in Sections 35 to 38 of the Act

In the Matter of the Estate of Benson Ndirangu Mathenge (deceased) Nakuru High Court Succession Cause No. 231 of 1998 (Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while the second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.

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

Further it is absolutely necessary to note that reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters.

In conclusion, when a person dies intestate, his property is administered and disposed off in accordance to the aforementioned provisions. The procedure involves having the administrator obtain a **Grant of Letters of Administration** which ideally give the administrator the authority to deal with the property of the deceased in accordance with the provisions of the law.

In conclusion the survivors of a deceased person are advised to work with their lawyer to obtain a Grant of Letters of Administration to the estate of the deceased.

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