



SUCCESSION LAW

THE INTRICACIES OF SUCCESSION LAWS IN KENYA Distributing Estates of the Deceased Among Survivors

Understanding Succession

Succession, the transfer of property or estate from one person – usually a deceased person – to another (others) – usually the living or surviving relatives of the deceased is governed by the Law of Succession Act Cap 160 of the Laws of Kenya. This may take two major directions – testate and intestate succession. A Testate Succession or Probate is where a person dies and leaves behind a valid Will dictating how his or her property is supposed to devolve to his descendants. Intestate on the other hand is where the person dies leaving behind property but without a will or if there is a purported will, the will is invalid or declared invalid by a Probate & Administration Court.

What makes a will invalid? When the will is not executed by two independent individuals of sound mind and disposition, when the Testator is coerced, forced or put under duress to execute the will. A Will may also be declared invalid if it can be established that the testator was not in his or her rightful mind at the point of signing or executing or dictating the will to the drawers. Where the Will is declared valid, the rules of Probate takes cause, but here the Will is declared invalid or where there is no will, the rules of intestate succession takes place.

In Kenya, and indeed most parts of Africa, most succession is the Intestate Succession. There are improvements anyway that are taking shape in the practice of succession as more individuals are welcoming and adopting the practice of Will writing which makes the work easier for courts.

For intestate successions, the Act guides on the proper persons to be appointed as the administrator(s) of the estate of the deceased if the deceased has not left a will identifying executors. In most cases a number of people related to the deceased may be eligible for such appointment. The appointees/executors may for various reasons prove not to be competent administrators after such an appointment.

The administrator/executor may be fraudulent and grab assets of the estate behind the knowledge of the beneficiaries. He may unreasonably delay the administration of the estate, fail to adhere to statutory timelines or otherwise prejudice the estate. This article guides beneficiaries on the removal of difficult or problematic administrators in such circumstances.

Rule 73 of the Probate and Administration Rules provides for the inherent power of the court as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

In re Estate of Elijah Mbondo Ntheketha (Deceased) [2017] eKLR it was held:-

“The removal of an administrator amounts to revoking his appointment. Revocation of grants is provided for under section 76 of the Law of Succession Act. An applicant seeking to obtain such revocation must build a case founded on section 76.”



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Section 76 (d) of the Law of Succession Act gives the Court the powers to annul or revoke a grant on an application of a party or suo moto on the grounds stipulated therein. The Section provides that:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court may order or allow; or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.”

In *re Estate of William Nzioka Mutisya (Deceased)* [2018] eKLR Hon. Justice GV Odunga aptly observed:-

“It is however my view that the administrators may be removed from their duties where, due to wrangles and disagreements amongst themselves, it is impossible for them to proceed diligently with the administration of the estate... In my view if the Court finds that the administrators are unable to properly administer the estate due to their disagreements, nothing steps the Court from removing them from the administration and appointing new administrators notwithstanding the issue of priority or preference. This must be so because section 66 of the Law of Succession Act provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made.”

Personal Representatives of an estate are subject to supervision of the court and the court has the power to remove them from administration of the estate where necessary. In *re estate of Njue Kamunde (Deceased)* [2018] eKLR it was held:-

“The applicant contends that the respondent has acted contrary to the law in carrying out her duties as the administratrix and feels that on account of that, she should be suspended and leave her as the sole administratrix of the estate of the deceased who is her late son...I agree with the applicant that Section 47 Law of Succession Act and Rule 73 Probate and Administration Rules can be invoked to remove or suspend him/her...I also agree that personal representatives are subject to supervision of this court and this court will not shy away from making any orders that may be expedient and necessary for the ends of justice and to prevent abuse of powers conferred to them under Sections 53 and 79 of the Law of Succession Act.”

In *Re Estate of Wilson Ndumbi Kathesye (Deceased)* [2016] eKLR Hon. Justice W. Musyoka held:-



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“The application for determination is a summons dated 17th August 2015. It seeks rectification of the grant so as to remove the name of one of the administrators on the grounds that she has refused to cooperate with the applicant to complete administration of the estate...Consequently, I do hereby grant it in the terms proposed.”

An application for removal of an administrators is supposed to be supported by consent of all other beneficiaries. In *re Estate of Stephen Chege Kimari (Deceased) [2016] eKLR* Hon. Justice W. Musyoka held as follows:-

“The application seeks removal of an administrator. The process of removal is akin to that of appointment. The consents of all concerned must be obtained, particularly if they rank equal or higher to the applicant in terms of entitlement to appointment. From the certificate of confirmation of grant, I have counted ten (10) survivors. None of them has filed any papers in support of the application.”

Where the court acts on its own motion (*suo motu*) in the removal of the administrator such consent of the beneficiaries may be overlooked. These are instances where there is no likelihood that the estate shall be administered to conclusion based on the conduct of the impugned administrator.

The fact that someone has been appointed an administrator/executor of the estate of the deceased does not mean that he can administrate the estate based on whims. The law requires him to adhere to some statutory guidelines. For proper administration of the estate, the administrator must, among other things, do the following:-

- a) Apply for confirmation of the grant within one year of appointment
- b) Proceed diligently with the administration of the estate
- c) Produce accounts as required by law
- d) Cooperate with co-administrators and beneficiaries

Failure to abide by the above entitles the beneficiaries to approach the court through summons for removal of such an administrator/executor. The court also on its own motion may exercise its supervisory power of the estate by removing the administrator/executor.

Who May Inherit

Pursuant to the Law of Succession (Amendment) Act 2021 (the Act) a new term “a spouse” has been introduced for purposes of succession and assigned the same meaning as the one that is in the Marriage Act, 2014. The move was lauded as a milestone in the wake of the Law of Succession Act, Cap. 160 which seemed to have elevated the rights of a wife over the rights of a husband when it came to issues of inheritance of property as it only defined a wife to include:

“a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and widower” shall have a corresponding meaning;...”

A husband will therefore not be required to prove maintenance by and/or from the wife for him to qualify as a dependent as it was the case under Section 29(c) of Cap. 160 pre-amendment. Succinctly, the Act has



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clarified who would qualify to be dependents of a deceased person and has guaranteed protection to the spouse, children and extended family of a deceased person in succession matters.

Under section 6 of the Marriage Act, 2014, Christian marriage, Civil marriage, Customary marriage, Islamic marriage and Hindu marriage are the only recognized marriages. Whereas Christian, Civil and Hindu marriages are monogamous in nature, the Islamic and Customary marriages are (potentially) polygamous. The Islamic polygamy is allowed up to 4 wives while the customary polygamy is endless.

As such, the following categories are the lawfully recognized dependents of the deceased entitled to the deceased person's inheritance:

- a) The spouse and children of the deceased whether or not maintained by the deceased immediately prior to his death shall be entitled to inheritance of the deceased's property.
- b) 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, as were being maintained by the deceased immediately prior to his death shall also be entitled to inheritance.
- c) The amendment also provides that a person not named in the new section 29 shall not be a dependent for the purpose of the Act unless the person proves he/she was maintained by the deceased for a period of two years prior to the deceased's death.

Moreover, the Act has done away with the provision for former wives by introducing the adopting spouse as defined in the Marriage Act, 2014 of the Laws of Kenya and riveted the meaning of Intermeddling under section 45 to mean —

- “(a) taking possession of, disposing off or using the property of the deceased without the authority under this Act or any other applicable law;
- (b) ejecting by force or by coercion a surviving spouse or child from the matrimonial home; or
- (c) any unlawful dealing with the deceased person's estate.”

It is important to note that on devolution of the estate of the deceased, any surviving spouse(s) shall, where the deceased left spouse(s) but no children, be entitled out of the net intestate estate of the deceased to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
- (c) a life interest in the whole of the remainder:

Nevertheless, the net intestate estate of the deceased shall devolve upon the kindred of the deceased, where the deceased has left neither a spouse nor children, in the following order of priority—

- (a) father; or if dead
- (b) mother; or if dead



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- (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.

Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

Conclusion

In conclusion, succession, the transfer of property or estate from one person to another, is a fundamental aspect of legal practice governed by the Law of Succession Act Cap 160 of the Laws of Kenya. This process can take two major directions: testate and intestate succession. Testate succession occurs when a deceased person leaves behind a valid will dictating the distribution of their property, while intestate succession occurs in the absence of a will or when a purported will is invalid. It is crucial to understand the criteria for a valid will and the grounds for invalidity, as outlined in the Law of Succession Act. Intestate succession is common in Kenya and often requires the appointment of administrators to oversee the distribution of the deceased's estate.

However, challenges may arise if administrators prove incompetent or engage in fraudulent activities. Beneficiaries have recourse to the court for the removal of problematic administrators, as provided for under the Probate and Administration Rules. Additionally, the recent amendments to the Law of Succession Act have clarified the rights of spouses and dependents in succession matters, ensuring equitable distribution of assets. In light of these complexities, engaging the services of a qualified legal professional is essential for navigating the intricacies of succession law and protecting one's interests. Ultimately, proper understanding and adherence to legal procedures are vital to ensuring a smooth and fair distribution of estates in Kenya.

About the Author



Silas Akiro is a seasoned legal professional with extensive experience in Family Law & Succession in Kenya. As a dedicated advocate for clients' rights and interests, Silas specializes in guiding individuals and entities through the complexities of Family Law, Child Custody & Maintenance, Adoption, Marriage & Divorce, Probate & Administration, Matrimonial Property among others; ensuring compliance with legal requirements and mitigating risks effectively. With a commitment to excellence and a passion for serving the community, Silas is dedicated to equipping families with the knowledge and resources needed to make informed decisions and safeguard their inheritance rights in the dynamic Kenyan Family Law & Succession Practice.