



# Executorship and Accounts of the Executor

equity and trust (University of Nairobi)



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## **EXECUTORSHIP AND ACCOUNTS OF THE EXECUTOR**

Executorship refers to the arrangements under which an executor takes the charge of the deceased's estate and fulfills the deceased's desires as expressed in his will. The law of succession prevailing in any country deals with various aspects of executorship. In Kenya, the law relating to succession is contained in the law of Succession Act (Cap. 160). This Act deals with testate and intestate succession and administration of the estates of the deceased persons.

## **TYPES OF SUCCESSION**

There are basically two types of succession, namely testate succession and intestate succession. There is also the mixed category of partial testacy (or partial intestacy). These are explained as under:-

Testate (Testamentary) Succession:

When a person dies, leaving a valid will i.e. an instrument in writing containing his directions regarding his affairs after his death he said to have died testate. Succession to his property is thus described as testate succession, or testamentary succession. The incidents of this type of succession are governed by the law relating to wills and also, generally by the Succession Act. Since very few people in Kenya make wills, this type of succession is very rare here.

Intestate Succession:

Intestate Succession is the opposite of testamentary succession. "A person dies intestate in respect of all property, which has not been disposed of by a valid testamentary disposition." The vast majority of people in Kenya die without making a will and therefore intestate succession is predominant.

Partial Testacy (or Partial Intestacy):

This is a hybrid between testamentary and intestate succession. It is a situation whereby part only of the deceased's property is disposed of by a valid will, the deceased having died intestate in respect of the rest of his property.

## Provision of the Law of Succession Act (Cap. 160)

In Kenya since July 1, 1981, we have a uniform law of succession which is now consolidated into the Law of Succession Act (Cap 160).

The main provisions of this Act are stated as under:-

- (i) Provisions relating to the capacity of making wills and necessary formalities for both oral and written wills (S. 8-10 of the Act). This also covers revocation and attestation of wills.
- (ii) Types of testamentary dispositions e.g. legacies, bequest i.e. a gift of personal property in a will.
- (iii) Provisions for dependents (S. 29-32). These define purposes of this Act in respect of dependents and children.
- (iv) Personal representatives i.e. executors and administrators etc. The choice of a personal representative will depend on whether a person dies testate, in which case a named executor will be stated or whether a person dies intestate in which case the court appoints a person to administer the estate of deceased. The powers and the duties of personal representatives have been also given.
- (v) Sections 32 to 42 of the Law of Succession Act (Cap. 160) relate to the rules governing succession on intestacy. These rules apply when a person dies without leaving a will, or leaving a will which is invalid.

Where an intestate leaves one surviving spouse and a child or children, the surviving spouse is entitled to:

1. The personal and household effects of the deceased absolutely ; and
2. A life interest in the whole residue of the net intestate estate:

If the surviving spouse is a widow then the interest is determined on her re-marriage to any person.

Where the intestate has left one surviving spouse, but no child or children, the surviving spouse is entitled out of the net intestate estate to:

1. The personal and household effects of the deceased absolutely; and
  2. The first sh. 10,000 out of the residue of the intestate estate or 20% thereof, whichever is the greater, and
- (vi) Section 31 of the Law of Succession Act (Cap. 160) provides that a gift made in contemplation of death shall be valid, in spite of the fact that there has been no complete transfer of legal title, subject to certain conditions.

## WILLS

A will is a declaration made by a person during his lifetime regarding certain matters which he desires to take effect on or after his death. Such matters primarily relate to the disposition of his property. Property disposed of by wills is called legacy and its recipient is called a beneficiary or a legatee. Besides the disposition of property; a person may by his will give certain directions intended to satisfy his wishes, e.g. regarding the manner in which he should be buried. A person who makes a will is called a testator (or testatrix in the case of a female).

What is important to note is that a will does not take effect during the testator's lifetime. This means that someone else must take charge of the deceased's estate and fulfill the deceased's desires as expressed in the will. Such a person is called a personal representative. A personal representative appointed by will is called an executor (or, in the case of a female, an executrix). Where there is no executor the personal representative may be appointed by court and he is then known as an administrator (administration in the case of a female).

But while it is true that a will takes effect after the testator's death, whereupon it serves as the testator's mouth-piece, its powers are not absolute but are confined and restricted by law. The law imposes certain restrictions on testamentary freedom. The statement that a will is a device by which a dead man may rule the living from his grave is therefore, a half – truth.

Characteristics of a Will:

(i) Dispositive Nature:

A will may (inter alia) dispose of the testator's property. It is therefore, said to be dispositive in nature or character.

(ii) Declaration of Intention

A will operates only as a declaration of intention. It does not negate the testator's right to deal with his property 'inter vivos' i.e. in his life time. He may, therefore, still sell or otherwise deal with the property, notwithstanding that he has by his will made a gift of it to some other person. Moreover, the legatee may for one reason or another become disqualified from sharing in the testator's estate, e.g. where he murders the testator. It is because a will operates merely as a declaration of intention that it may be altered or revoked by the testator any time before his death.

(iii) Formalities

A will must generally be in the form prescribed by law. As we shall presently see, the formalities required include the need for writing and attestation. Where it is desired to explain, alter or add to a will, this may be done by an instrument in writing. Such subsequent instrument is called a codicil and is taken to form part of the will.

(iv) Revocability

A will may always be revoked by the testator.

(v) Posthumous Effect:

A will becomes effective only on the death of the testator. But as long as the testator continues to live, the will is ineffective and he has full discretion in his affairs, regardless the provisions of the will.

(iv) Ambulatory Nature:

A will is said to be ambulatory. This means that it is capable of dealing with property acquired by the testator after making his will as long as it is owned by the testator after making his will as long as it is owned by him at his death. For example, a testator makes his will in 1991 making a gift of all his property to 'A' and dies ten years later acquiring a lot

more property. In this case, 'A' will be entitled not only to the property owned by the testator in 1991 but also that subsequently acquired during the ten years before his death.

### **CAPACITY TO MAKE A WILL**

Section 5 of Law of Succession Act (Cap. 160) provides that any person who is of sound mind and not a minor may dispose of all or any of his free property by will and may thereby make any disposition by reference to any secular or religious law that he chooses. A woman, whether married or unmarried has the same capacity to make a will as a man.

Any person making a will is considered to be of sound mind at the time of execution of the will unless he is in such a state of mind that he does not know, what he is doing. This state of mind may arise from mental or physical illness, drunkenness, or from any other cause. The burden of proving that the testator was not of sound mind lies on the person who alleges it.

A will or any part of a will be void, if the making of the will has been caused by fraud or coercion, or has been induced by a mistake.

The capacity to make a will can be affected by old age, illness, blindness and illiteracy. The court has to be satisfied that a testator suffering such disabilities not only had the intention to make a will but was also aware of the will before execution.

## FORMALITIES OF A WILL

A will must be in the form prescribed by law. Formalities of a valid will have been contained in sections 8 to 16 of the Law of Succession Act (Cap 160). These are described as under:

- (i) A will may be made either orally or in writing.
- (ii) No oral will shall be valid unless:
  - (a) It is made before two or more witnesses and;
  - (b) The testator dies within a period of three months from the date of making the will.

An oral will made by a member of the armed forces or merchant marine during a period of active service is valid if the testator dies during a period of active service is valid if the testator dies during the same period of active service inspite of the fact that he died more than three months after the date of making the will.

- (iii) No written will is valid unless:
  - a. The testator has signed by some or affixed his mark to the will, or if has been signed by some other person in the presence and by the direction of the testator.
  - b. The signature or mark of the testator, or the signature of the person signing for him, must be so placed that it appears that it was intended thereby to give effect in the writing as a will.
  - c. The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, in the presence and by the direction of the testator or have received from testator a personal acknowledgement of his signature or mark, or of the signature of that other person and each of the witnesses be present at the same time, and no particular form of attestation shall be necessary.
- (iv) If a testator refers to another document in a will or codicil, then actually written and expressing any part of his intentions, will be considered as forming part of the will or codicil, provided it is clearly indentified to which document the will refers.
- (v) A bequest in a will to an attesting witness or to his or her spouse is valid, provided the will is also attested by at least two additional competent and independent witnesses.

- (vi) An executor can be also a witness to a will.
- (vii) Wills executed before the commencement of the Law of Succession Act (Cap 160) will be treated as properly executed if executed according to the requirements of the law in force at the date of such execution, but the administration of such estates will proceed as far as possible in accordance with the provisions of this Act.

## **PROBATE**

Probate is legal recognition of a will. Although, the will itself gives the authority to the executor to operate but he cannot prove this authority until he has obtained the probate. An application for a grant of representation is made by the executor to the court. A court may give the legal recognition to a will where it is proved that a deceased person has left a valid will in respect of the property to which the will applies. In case of the intestate estate, the letter of administration is issued by the court.

## **REVOCATION, ALTERATION AND REVIVAL OF A WILL**

Section 17 of the Act states that a will may be revoked or altered by the maker of it at any time when he is competent to dispose of his free property by will. A will can be expressly revoked by another will, or by burning, tearing or otherwise destroying of the will with the intention of revoking it by the testator, or by some other person at his direction. A written will cannot be revoked by an oral will.

A will is also revoked by the marriage of the maker, provided that a will expressed to be made in contemplation of marriage with a specified person shall not be revoked by the marriage so contemplated.

No alteration, interlineation or other alternation made in a written will after execution is valid unless such as alteration is signed and attested as a written will, as explained above.

Section 21 of the Act provides that once a will has been revoked, it can only be revived by the re-execution of the said will.



## **PROVISIONS FOR DEPENDENTS**

Sections 26 to 30 of the Act relate to the provisions for dependents of a deceased for the purposes of this Act include:

- a) The wife, wives and the children whether or not maintained by the deceased immediately prior to his death.
- b) The deceased's parents, step-parents, grandparents, grandchildren and other children who the deceased has taken into his family as his own; brothers and sisters who 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.

Under this Act, the court can make a reasonable provisions for a dependant from a deceased's property on the application by or on the behalf of the dependant, provided it is not contrary to the disposition of the deceased's estate effected by his will or gift in contemplation of death and the law relating to intestacy in making provision for a dependent the court shall have complete discretion to order a specific share of the estate to be given to the dependent. The court can also order the periodical payments or a lump sum payment to be made to the dependant. The court can also impose some conditions in this regard.

In order to make an order regarding making any provision for dependant out of deceased's property, the court will give the consideration to the following factors:

- a) The nature and amount of the deceased's property.
- b) Any past, present or future capital or income from any source of the dependant.
- c) The existing and future means and needs of the dependent.
- d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime.
- e) The conduct of the dependant in relation to the deceased.
- f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.
- g) The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

## GIFT IN CONTEMPLATION OF DEATH

“Donatio Mortis Causa,” Gifts in anticipation of death)

Section 31 of the Law of Succession Act (Cap. 160) provides that a gift made in contemplation of death shall be valid, inspite of the fact that there has been no complete transfer of legal title, subject to the following conditions:

- a) the person making the gift is, at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger;
- b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and
- c) There is delivery to the intended beneficiary of possession or the means of possession of such property or of the documents or other evidence of title thereto; and
- d) A person makes a gift in such circumstances as to show that he intended it to revert to him should he survive the same illness or danger; and
- e) The person making such gift dies from any cause without having survived the same illness or danger; and
- f) The intended beneficiary survives the person who made the gift to him.

Provided that:

- (i) No gift made in contemplation of death shall be valid if the death is caused by suicide;
- (ii) The person making the gift may, at any time before his death, lawfully request its return.

Such gifts can be made by the donor in his life when he is of the opinion that he will die soon. The gifts can only be made of the moveable property and is perfected on death. Immovable property cannot be given in this way because the giving of a title deed to land by the donor to the done will not transfer the title to the done.

## INTESTACY

Sections 32 to 42 of the Law of Succession Act (Cap. 160) relate to the rules governing succession on intestacy. These rules apply when a person dies without leaving a will, or leaving a will which is invalid.

Section 32 of the Act provides that the rules relating to intestacy succession donor apply in case of some specific areas to:

- a) Agricultural land and coops thereon; or
- b) Livestock.

These specific areas are identified by the minister (Attorney General) through a notice in the gazette. The following districts were excluded by a legal notice in the gazette. The following districts were excluded by a legal notice in 1981 under section 32 of the Act: west Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, tana River, Lamu, Kajiado and Narok. In these districts the law applicab;e to the distribution on intestacy of a deceases's estate will be the law or custom application to the deceased's community or tribe in relation to agricultural land, crops or livestock. Other property will be dealt with in accordance with the provisions of the Act on intestacy succession.

Where a intestate leaves one surviving spouse and a child or children the surviving spouse is 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;

If the surviving spouse is a widow then the interest is determined on her re-marriage to any person.

The surviving spouse has a power of appointment of all or any part of the capital of net intestate estate by way of gift taking immediate effect among the surviving child or children. This power refers to a power to determine the disposition of property. This power cannot be exercised by will or to take effect at any future date. Any child aggrieved by the exercise of the power, may apply to the court for this appointment with or without variation of any appointment already made. In this case also, the court shall give the consideration to the following factors.

- a) The nature and amount of the deceased's property;
- b) Any past, present or future capital or income from any source of the applicant and of the surviving spouse;
- c) The existing and future means and needs of the applicant and the surviving spouse;
- d) Whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
- e) The conduct of the applicant in relation to the deceased and to the surviving spouse;
- f) The situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will if any; and
- g) The general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did.

The whole residue of the net intestate estate devolves upon the surviving child, or if more than one it will be equally divided, in case of the death of the surviving spouse or re-marriage in the case of a widow.

Where the intestate has left one surviving spouse, but no child or children, the surviving spouse is entitled out of the net intestate estate to:

- a) The personal and household effects of the deceased absolutely; and
- b) The first sh. 10,000 out of the residue of the intestate estate or 20% thereof, whichever is the greater, and
- c) A life interest in the whole of the remainder.

A surviving spouse entitled to a life interest with the consent of all co-trustees and all adult children, or with the consent of the court, has power to sell any of the property, subject to such interest, if such is necessary for his/her own maintenance. In the case of immovable property, the exercise of such power is always subject to the consent of the court.

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the other relatives 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 share; or if none.
- d) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

Failing the survival of any of the above named, the net estate devolves upon the State and is paid into the consolidated fund.

Where the intestate was polygamously married, his personal and household effects and the residue of the net intestate estate is, in the first instance, divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. This protects the wife who has no children.

The distribution of the personal and household effects and the residue of the net intestate within each house shall be in accordance with the rules as set out above in the case of monogamous marriages.

Whenever property devolves upon a child, it will be held on trust (in equal shares if more than one) until the age of eighteen years or being female, marry under that age, if the child dies, the issue of that child will take the shares which the parent would have taken had he not predeceased the intestate.

Where an intestate has during a lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house, or property has been the subject of a power of appointment (as indicated above), such property is taken into account in determining the share of the net intestate estate finally accruing to such child, grandchild or house.

When a deceased has died intestate, application has to be made to the court for letters of administration so that the estate can be wound up by the administrator.

## LEGACIES

A legacy is a gift by will. Where it relates to movable property, it is called a bequest (hence to bequeath) and where it relates to immovable property, it is called a 'devise' (hence "to devise").

## TYPES OF LEGACY

Various types of legacies have been defined in section 3 and first schedule of the law of Succession Act. These are under:-

### 1. Special legacy:

“Special legacy” means a testamentary gift of a particular part of the property of the testator, which identifies that part by a sufficient description, whether in specific or in general terms, and manifests an intention that part shall be enjoyed or taken in the state and condition indicated by that description. For example, a gift of national T.V. set and of a golden watch to Edward and Peter respectively.

### 2. General legacy

“General legacy means a testamentary gift, whether specific or general, of property described in general terms to be provided out of the general estate of the testator, whether or not also charged on any specific part of his estate. For example, a gift of Toyota Car to John.

### 3. Demonstrative Legacy

“Demonstrative legacy “means a testamentary gift which is in its nature general but which manifests an intention that the gift shall be primarily satisfied out of a specified fund or a specified part of the property to the testator, but shall, upon failure of that fund or property to the testator, but shall, upon failure of that fund or property, be met from the general estate. For example, sh20,000 out of the account with Barclays Bank falls within the definition of a demonstrative legacy.

### 4. Pecuniary Legacy

“Pecuniary legacy” includes and annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the specified fund or property , and any other general direction by the testator for the payment of money, including all death duties free from which any gift is made to take effect. For example, “sh 50,000 to my cousin Kamau”

### 5. Residuary Gift:

A residuary gift consists of the surplus or residue of the testator estate after all debts and other liabilities, expenses and other legacies have been paid. A beneficiary entitled to the residuary estate is called a residuary legatee. For example, “to pay the residue to my wife.”

#### 6. Conditional Bequest

A conditional bequest (or legacy) is one whose vesting or enjoyment is made subject to some condition imposed by the testator e.g. where the will “imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed”.

#### 7. Vested Legacy

A vested legacy is one in respect of which the legatee is entitled to be paid and has a right to enforce immediate payment. Generally, a legacy becomes vested at the time of the testator’s death; but a provision in the will might defer its vesting to some other time.

### FAILURE OF TESTAMENTARY DISPOSITIONS

Testamentary gifts can fail for some reasons. These reasons are described as under:

#### 1. Disclaimer:

A beneficiary can refuse to take the gift bequeathed to him. The law cannot force a man to take an estate against his will. Disclaimer can be made either by deed or by conduct. A person can refuse to take the gift due to any potential liability or any unfavourable condition.

#### 2. Lapse:

The vesting of a legacy presupposes the continued existence of the legatee up to the time of the testator’s death. A legacy can only vest if the legatee is proved to have survived (i.e. lived longer than) the testator. But where the legatee predeceases (i.e. dies before) the testator, the legacy will lapse. A legacy is said to lapse where it cannot take effect by reason of the legatee having died during the lifetime of the testator. This is known as the doctrine of lapse. Where the doctrine of lapse applies, property contained in a specific devise will form part of the testator’s residuary estate. If there is no provision for a residuary legatee, it will devolve upon intestacy.

#### 3. Ademption:

If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is deemed. It means it cannot take effect by reason of the subject matter having been withdrawn from the operation of the will. For example, if the testator devised, “my house in Nairobi to Z” and the house was sold during the testator lifetime, the devise is said to be adeemed. Even if the testator had to put the proceeds of the sale into a deposit account at his bank ‘Z’ is still not entitled to it.

#### 4. Abatement:

If after payment of all debts and other liabilities, the testator’s estate is insufficient to pay all legacies will abate, i.e. the legacies will terminate or diminish in value so that the legatees get either nothing at all from the testator’s estate, or only a part of their legacy. Thus the extent of the testator’s debts and liabilities necessarily affects the interest of the legatees; if the testator the legatees will get little or nothing at all from his estate; and if there is only a moderate indebtedness on the part of the testator the legatees will get the whole or substantially the whole, of their legacy as long as no Ademption has in the meantime taken place. The personal representative has no right to pay one legatee neither in preference to another nor to retain any money on account of a legacy to himself or to any other person for whom he is a trustee. However, if the personal representative is entitled to a priority in respect of his remuneration, that priority is upheld.

#### 5. Uncertainty

A gift or disposition can fail if it does not satisfy the uncertainty of legatee or legacy. For example, if a testator leaves his four houses to his four sons in Nairobi then this disposition can fail due to the reason that it was impossible to determine which of the house intended to be given to which son.

### SATISFACTION

If a debtor bequeaths a gift to his creditor and this gift is equal to or greater than the debt then it is assumed that his gift is intended to satisfy the debt. Similarly, if a person is under an obligation by contract to provide a portion of his estate for his child or any other person and fails to do so, but makes a gift to that child or other person by will then it is assumed that this gift is intended to



satisfy that portion so far as the gift extends, however a gift made by will is not assumed that the gift is intended to satisfy or take the place of a gift, neither or not of equal amount, previously made to the same person by the testator in contemplation of death.

## POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

An executor derives his powers from the will and the deceased's property comes under his control on the death of the testator. An administrator obtains his powers from the court and the deceased's property comes under his control from the date of the grant of letter of administration. The main powers and duties of personal representatives are described as under:-

### POWERS OF PERSONAL REPRESENTATIVES

Section 82 of the succession Act (Cap. 160) states the following powers of the personal representatives.

- (a) To enforce all causes of action which survive the deceased or arise out of his death for his estate.
- (b) To sell all or any of the assets at best possible price.
- (c) To assent to the vesting of a specific legacy in the legatee at any time after the confirmation of the grant.
- (d) To appropriate the assets in the satisfaction of the legacies bequeathed by the deceased in just and reasonable manner.

### DUTIES OF PERSONAL REPRESENTATIVES

Section 83 of the Act states the following duties of the personal representatives:-

- (a) To provide and pay the reasonable funeral expenses for the deceased out of his estate.
- (b) To get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death.
- (c) To pay all expenses of obtaining the grant of representation or administration, out of the estate of the deceased.
- (d) To ascertain and pay all the debts of the deceased, out of his estate.

- (e) To produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings up to the date of account within six months from the date of the grant.
- (f) To distribute or retain on trust all assets remaining after the above payments according to the respective beneficial interests under the will or an intestacy.
- (g) To complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration within 6 months from the date of the grant or any longer period as allowed by the court.

## DISTRIBUTION OF ESTATES

The personal representative must distribute assets of the deceased's estate to the person's entitled to them in the following order of priorities.

- (a) Secured creditors as far as they can be paid out of the proceeds of their securities.
- (b) Reasonable funeral expenses for the deceased.
- (c) Reasonable testamentary and administration expenses.
- (d) Unsecured creditors and secured creditors for their balances, if any. In this regard, the order of priorities will be under:-
  - (i) Specially preferred creditors.
  - (ii) Preferential creditors
  - (iii) Ordinary creditors
- (iv) Interest on the debts of preferential and ordinary creditors from the date of death.
- (v) Deferred Creditors
- (e) Beneficiaries in the following order of priorities:-
  - i. Specific Legatees
  - ii. General legatees
  - iii. Residuary Legatees.

## Marshalling

The term "Marshalling" refers to the marshalling of assets. It means establishing an order of precedence amongst the various classes of the legacies. When the testator does not direct that all

debts, expenses and legacies are to be paid before ascertaining the amount available to the residuary legatees then the provisions of Section 34 of Administration of Estates Act (1925) U.K. apply. In this case, the lowest ranking legacies are applied first in discharging the liabilities of the estate.

### Solvent and insolvent estates

Solvent estates are those estates which have enough assets to discharge all the liabilities of the estate. An insolvent estate is that estate which cannot discharge all of its liabilities. Section 89 of the Succession Act states that the provisions of the Bankruptcy Act (Cap. 53) apply to the insolvent estates.

### Investment of Funds

Seventh Schedule of the Succession Act contains the provisions regarding the investment of funds to provide for legacies and interest on legacies. When a general legacy is given for life, the sum bequeathed should be invested in any authorised investment within a period of one year after the death of the testator. However, when an annuity is given and no fund is charged by the will with its payment then a sum sufficient to produce the annuity should be invested in any authorised investment. When a general legacy is to be paid at a future time, the personal representative should invest a sum sufficient to meet it in any authorised investment. During the period of this investment, the interest from this investment should form part of the residue of the testator's estate unless payable to the legatee or any other person according to the provisions of the will. If no time has been fixed for the payment of a general legacy, the interest will begin to run from the expiration of one year from the testator's death otherwise it will begin to run from the time fixed. In both cases, the interest will form part of the residue of the testator's estate.

The interest will run from the date of death of the testator in the following cases:- (i) The legacy is bequeathed in satisfaction of a debt. (ii) The testator was a parent or more remote ancestor of the legatee or has put himself in the place of the parent of the legatee and the legatee is a minor and no specific sum is given by the will for maintenance. (iii) The legacy is bequeathed to a minor with a direction to pay for his maintenance.

The rates of interest payable will be 6% per annum unless otherwise expressly stated.

## ACCOUNTS OF THE EXECUTORS

The executor or administrator of an estate is called a "Fiduciary". A fiduciary is a person entrusted with another person's property for safekeeping, management and distribution. He is responsible for safeguarding the assets, paying the proper legacies and preparing the accounts of the transactions. The inventory and the accounting statements which are prepared during the operation of the estate are submitted to the court. In this regard, the following procedures are followed:-

- (a) The assets of the deceased are called as the "Principal of the Estate" and are valued at their fair market value at the date of the death. The double entry is made as under: DR: Individual Assets Accounts at fair market values CR: Estate Capital Account at fair market values of all assets.
- (b) Any interest accrued on stocks and dividends declared on shares held by the deceased are also taken as part of the Principal of Estate.
- (c) Life insurance policies that have the estate of the deceased are also included in the inventory of the estate. Any loans obtained on the security of these policies are deducted from the proceeds of these policies.
- (d) The liabilities of the deceased are not recorded initially. These are recorded only when paid.
- (e) Any increase or decrease in the principal assets is considered as principal. If an executor sells an asset for less than the recorded value then loss is a decrease of the estate principal and vice versa. In this case:-

- (i) Loss on disposition:

DR: Loss on disposition of principal assets account

CR: Respective asset account

- (ii) Gain on disposition:

DR: Respective asset account

CR: Gain on disposition of asset account.

(f) Depreciation is not recorded usually unless the will specifies that it should be recorded. This policy is adopted due to cash basis of accounting. If depreciation is recorded, it is charged to income.

(g) Any obligations that existed at the time of the death of the deceased are considered principal and are debited to "Debts of the Deceased Account", when paid.

(h) All the funeral and administrative expenses of the estate are considered obligations of principal unless the will specifies that they are to be charged to income.

(i) Any income received after the date of death that was accrued and recorded as principal is considered as income. It is credited to the "Estate Income Account."

The following accounts are prepared usually by the executor:-

- (a) Distribution Statement
- (b) Estate Capital Account
- (c) Estate Cash Account
- (d) Estate Income Account
- (e) Balance Sheet of the deceased

Any distribution of assets made by an executor is based on the bequests made in the deceased's will or by the law of succession provisions if- the deceased died intestate. In order to record a distribution, an account is debited that reduces either the principal or income of the estate and the distribution is credited to the account containing the asset being distributed. No gains or losses on the distribution of assets are recognised because the assets are credited with their book value.

#### Example 1

After discharging all the expenses, the estate of Mr debts, funeral expenses and testamentary Njoroge deceased comprised the following:

	Sh
Bank balance	316,540

Household furniture	20,000
Motor car	15,000
House	200,000
Building society deposit	163,460
Paintings	100,000
12 ½ % Kenya mortgage bond	150,000
Plot at Kahawa-sukari.	<u>90,000</u>
	<b><u>1,055,000</u></b>

His will provides for the following legacies;

- (i) To his widow Jane sh 500,000 and his personal belongings.
- (ii) To his sister Mary sh 100,000.
- (iii) To his son Alex the plot at Kahawa-sukaro and sh 56,000.
- (iv) To his daughter Lucy sh 150,000 payable out of his loan account with East African Building Society.
- (v) To his friend Mwaura, his ordinary shares in Tembo SACCO.
- (vi) To his brother Kamau sh 150,000.
- (vii) To the local Golf Club, 12 ½ % Kenyan mortgage bond.

All beneficiaries are of full age.

Just before he died Mr. Njoroge had sold his interest in Tembo SACCO for sh 500,000 and all the amount due to him had been discharged.

Mary and Alex had been killed in a road accident six months before Njoroge died. Mary is survived by her son Mark, while Alex is survived by his widow, Alice and daughter Ann. Alex's will left the whole of his estate to his widow Alice.

Required: To prepare a Distribution Account showing the final distribution of the estate.

**Answer:**

### **Distribution Statement**

Estate capital account balance brought forward is sh 1,055,000 which should be distributed as under:-

**Specific Legacies**

	Sh	Sh
Widow Jane:		
- Household furniture	20,000	
- Paintings	<u>100,000</u>	120,000
Alex (Plot)	90,000	
Golf Club	150,000	360,000

**General Legacies**

	Before Abatement sh	Abatement sh	Amount Due to Legal sh
Widow	500,000	91,180	408,820
Alex	50,000	9120	40,880
Lucy-daughter	150,000	27,350	122,650
Kamau-brother 695,000	150,000	27,350	122
	850,000	155,000	1,055,000

Note:

(i) In general legacies if the balance in the estate capital account is not enough to pay to all legatees then abatement is made and balance due to each legatee is calculated accordingly. In this example, the balance in estate capital account is sh 695,000 after specific legacies and this amount is less than the total amount due against general legacies by sh 155,000 ( sh 850,000 - sh 695,000):

The total abatement for widow is calculated as under:-

$$\underline{\text{Sh } 155,000} \times \text{sh } 500,000 = \text{sh } 91,180$$

Sh 850,000

(ii) Sh 100,000 to sister Mary Lapses

(iii) Sh 150,000 to daughter Lucy out of Loan A/C with East African Buildings Society is an administrative legacy which falls into general legacy and it cannot be adeemed.

(iv) Ordinary shares to friend Mwaura adeems.

## Example 2

Jackson Kaman died Intestate on, April 19-6, survived by his widow two infant children, Janet and James.

His estate at death consisted of:

	Sh
Sh 280,000. 9% Government stock (Interest 1st February and 1 <sup>st</sup> August	231,000
Sh 240,000 2 ½ % savings bond (interest 1st May and 1st November )	200,200
Policy on his life	300,000
Building Society Deposit at 8% (interest 1st Jan and 1st July )	45,000
Accrued interest threon	900
Balance at bank	47,350
Household furniture and effects	30,000
	854,450
Debts and funeral expenses	<u>6,500</u>
	<u>847,950</u>

Interest on government stocks was received on due dates. Jackson had made no chargeable transfers during his life. In addition, the following transactions took place during the year ended March 19-7:

19-6

31 May	Expenses of sh 111,630 were paid in respect of estate
5 June	The sum assured by life policy was received.
30 June	The Building Society Deposit was repaid to personal representative, together with interest due.
12 July	sh 180,000, 9% government stock was sold ex-int; due to 1 August, the net proceeds amounting to sh 147,600.
10 August	The debts and funeral expenses were paid.
30 September	Bank debited the personal representative's account with



2 October

interest amounting to sh 670 (chargeable to income).  
The effect was given to the widow's statutory rights in the capital of the estate.

19-7

1 January Administration Expenses of sh 4,000 ( all chargeable against capital) were paid.

Required

- (a) Write up the cash book and estate capital account for the year ended 31 march 19-7.
- (b) Prepare the balance sheet as on that date, the widow and children being still alive.

Answer

(a)

Cash book

Estate cash Account

19-6	Income	Capital	19-6	Income	capital
April	sh	sh	May 31	sh	sh
Balance b/f	-	47.350	Estate Capital Accounts		111,630
Aug 1 2 ½%					
Savings bond	500	2,500	Debts and funeral Expenses		6,500
Jun 5					
Life policy		300,000	Sep 30 Personal repress: a/c	670	
June 30 interest on	900				

Building Society Deposit bonds					
July 12		900	19-7 Mar 31 bal c/d	12,130	425,420
Aug 1 9% govt stock interest	8,400	4,200			
Nov 1 2 ½ % of savings bonds - interest	3000				
	12,800	547,550		12,800	547,550

Estate capital Account

19-6	sh	19-6	sh	
Apr 1 Debts and funeral Expenses	650	Apr 1 9% Govt Stock	231,000	
Apr 1 Balance c/d	847,950	Apr 1 2 ½ savings bonds	200,200	
		Apr 1 Life policy	300,000	
		Apr 1 Building Society deposit	45,000	
		Apr 1 accrued interest on building Society deposit	900	

		Apr 1 cash a/c 47,350	47,350	
		Apr 1 Household effects	30,000	
	854,450		854,450	
19-6				
May 31	Cash a/c	111,630	Apr 1 Bal: b/d	847,950
July 12	9% Govt Stock	900	Aug 1 2 ½ % Savings bond	2,500
Oct 30	Household effects	30,000	Aug 1 9% Govt stock	4,200
19-7				
Jan 31	Administration expenses	4,000		
Mar 31	Bal c/d	712,120		
		854,650		854,650
			19-7	
			Mar 31 Bal b/d	712,120

c) BALANCE SHEET

AS AT 31<sup>ST</sup> MARCH 19-7

	sh		sh
Estate Capital Account	712, 120	Sh 100,000 9% Govt Stock	82,500
Income Account (Balance figure)	8,130	Sh 240,000 2 ½ % savings Bonds	200,200
		Cash a/c capital	425,420
		Cash a/c Income	12,130
	720,250		720,250

WORKINGS: 2 1/2 % savings Bond Account

W-1

	Nominal	Income	Capital		Nominal	Income	Capital
19-7				19-6			
Apr 1				May 1 cash a/c		500	2500
Balance b/f	240,000		200,200	Nov 1 Cash a/c		3000	
May 1 estate capital			2,500				
19-7							
Mar 31 Estate Income a/c		3,500		19-7 Bal: Mar 31 c/d	240,000		200,200
	240,000	3,500	202,700		240,000	3,500	202,700

NOTE: it is assumed that price quoted on this 2 1/2 % Bond is cum-int. interese received on may 1, 19-6 is calculated as under:-

$$5/200 \times \text{sh } 240,000 \times \frac{1}{2} = \text{sh } 3,000$$

$$\begin{aligned} \text{Income account (one Month)} &= 1/6 \times \text{sh } 3000 \\ &= \text{sh } 500 \end{aligned}$$

$$\begin{aligned} \text{Capital Account ( 5 months)} &= 5/6 \times \text{sh } 3,000 \\ &= \text{sh } 2,500 \end{aligned}$$

W-2 9% GOVERNMENT STOCK ACCOUNT

	Nominal	Income	Capital		Nominal	Income	Capital
	sh	sh	sh		sh	sh	sh

19-6				19-6			
April cap; a/c estate	280,000		231,000	July 12 cash a/c	180,000		147,600
Aug 1 estate cap; a/c			4,200	July 12 Loss on sale of Stock.			900
19-7				Aug 1 cash a/c		8,400	4,200
Mar 31 income a/c		12,900		19-7 feb 1 Cash a/c;		4,500	
				Mar 31 bal: c/d	100,000		82,500
	280,000	12,900	235,200		280,000	12,900	235,200
Apr 1 Bal;							

NOTE: (i)

$$180,000/280,000 \times 231,000 = \text{sh } 148,500$$

$$\text{Loss on sales of stock} = \text{sh } 148,850 - \text{sh } 147,600 = \text{sh } 900$$

$$(iii) \quad 280,000 \times 9/100 \times \frac{1}{2} = \text{sh } 12,600$$

$$\text{Capital a/c } (1/3 \times 12,600) = \text{sh } 4,200$$

$$\text{Income a/c } (2/3 \times \text{sh } 12,600) = \text{sh } 8400$$

### Example 3

Mr. ole Kaparo died on 1<sup>st</sup> February 19-8, leaving the following estates:

	sh
Building society deposit	560,420
Interest accrued to date	390

Balance at bank	49,650
Personal Chattles	36,000
Freehold house	240,000
Sh 60,000- 10%Govt stock	420,000
7,000 ordinary share of sh 10 each I Kenya breweries	100,000
3,000 ordinary share of sh 10 each in B.A.T (K) Ltd.	<u>30,000</u>
	926,460
Debts and funeral expenses	<u>10,460</u>
	<u>916, 000</u>

His will included the following legacies;

- i. To his wife, Jane the freehold house, personal chattles, the ordinary shares in both Breweries and B.A.T and the sum of shs. 150,000.
- ii. To his daughter Swan, his land at Ngong and the sum of sh 216,000.
- iii. To his sons George, Herold and Fredrick the sum of shs 120,000 each.
- iv. To his sister caroline the sul of sh 100,000
- v. To his friend Charles the sum of sh 24,000
- vi. To his brother victor his holding of shs 50,000 saving bond.

His will also directed that the residue and any income arising during the administration of the estate should go to his wife Jane.

The land at ngong was sold for sh 150,000 in 19-6 and the savings bonds encashed in 19-7. His sister Caroline had died in 19-5 and his son Harold died in 19-4, leaving the sons John and Philip. All beneficiaries are of full age.

The following transactions took place during the three months period ended 30<sup>th</sup> April 19-8.

28 <sup>th</sup> February	Received dividends of sh 1 per share for the year ended 31 december 19-7 on shares in breweries Ltd.
31 st March	Received proceeds of sale of government of stock of sh 410,000.
30 th April	Withdrew balance of sh 51,570 from Building Society a/c including interest to date paid debts and funeral expenses.
Distributed all legacies and completed the administration of the estate	

Required:

Estate capital account and cash Account for the period ended 30<sup>th</sup> April 19-8. Showing the administration of the estate.

ESTATE CAPITAL ACCOUNT

19-8	SH	19-8	SH
Feb 1 debt and funeral expenses	10,460	Feb 1 building	50,420
		Society deposit	
		Interest Accrued	390
Bal: c/d	916,000	Cash at bank	49,650
		Personal Chattles	36,000
		Freehold house	240,000
		Govt Stock	420,000
		Breweries Shares	100,000
		B.A.T. Shares	30,000
	<u>926,460</u>		<u>926,460</u>
Govt Stock	10,000	Feb 1 Bal: b/d	916,000
Distribution		Dividends from breweries	7,000
Specific Legacies:			
Wife (Jane)			
House	240,000		
Personal cha	36,000		
Breweries shares	100,000		
BAT Shares	<u>30,000</u>		
	406,000		
General legacies:			
To be shared among the legatees as shown	507,000		

in each a/c			
	<u>923,000</u>		<u>923,000</u>

### CASH ACCOUNT

	INCOME	CAPITAL		INCOME	CAPITAL
19-8	sh	sh	19-8	sh	sh
Feb 1 bal: b/f		49,650	Feb 1 Estate Capital a/c Debt and Funeral exp:		10,460
Feb 28 Dividends Breweries		7,000	Apr 30 General legacies:	760	101,400
Mar 31 govt Stock		410,000	Wife - Jane	760	101,400
Apr 30 Building Society	760	50,810	Daughter Susan		146,020
			Son - George		81,120
			Estate of Harold		81,120
			Son Fredrick		81,120
			Friend Charles		16,220
	760	517,460		760	517,460

### WORKINGS

W – 1 Building Society's Interest

= sh. 51,570 – sh 50, 420- sh 390 = sh 760

W – 2 Abatement of general legacies is calculated as follows:-



Amount available is sh 507,000

AMOUNT DUE	sh		sh
Jane	150,000	$\frac{\text{Sh } 150,000}{\text{Sh } 750,000} \times \text{sh } 507,000$	101,400
Susan	216,000	$\frac{\text{Sh } 216,000}{\text{Sh } 750,000} \times \text{sh } 507,000$	146,020

George      120,000       $\frac{\text{Sh } 120,000}{\text{Sh } 750,000} \times \text{Sh } 507,000 =$       81,120

Harold      120,000       $\frac{\text{Sh } 120,000}{\text{Sh } 750,000} \times \text{Sh } 507,000 =$       81,120

Frederick      120,000       $\frac{\text{Sh } 120,000}{\text{Sh } 750,000} \times \text{Sh } 507,000 =$       81,120

Charles      24,000       $\frac{\text{Sh } 24,000}{\text{Sh } 750,000} \times \text{Sh } 50,700 =$       16,220

Caroline

750,000

507,000

**Note:-**

Sister Caroline died before his brother, Share of Harold will be equally distributed between his two sons John and Philip.

## EXERCISES 16

1. Define executorship. Describe the various types of succession.
2. Describe the main provisions of the Law of Succession Act (Cap. 160)
3. Give a comprehensive view of the powers and duties of personal representatives.
4. Describe the procedure to be followed in the distribution of estates.
5. Write a comprehensive note on the "Investment of Funds".

6. Describe the main aspects of the accounts of the executors.
7. Maisha Mingi died on 31 October 1993 and left his estate as follows:-

	<u>Shs.</u>
Household furniture	45,000
Cash in house	1,000
Cash in Bank	125,000
10,000 ordinary shares of Sh.10 each in	
BAT Kenya Limited, valued at Sh.15 per share	150,000
Investment at 5 per cent on freehold property shares	
(Interest thereon paid to 30 June 1993)	200,000
Share in business of Maisha Mingi & Co. valued at	
date of death	613,200
Sundry debtors	10,000
His liabilities amounted to	2,500
Funeral expenses amounted to	5,000

A legacy of Sh.10,000 was bequeathed to his executor and was paid on 28 January 1994. The residue of the estate was left in trust of this infant son.

The household furniture was sold on 15th December 1993 for h. 48,000. The shares were sold on the same date at h.14.50 ex. div, a dividend being received on 25 January. 1994 at 10% for the year ending 31 December 1993. Interest on investment in freehold property shares was received on 31 December 1993, on which date the share in the business of Maisha Mingi & Co. was received with interest at 5 per cent per annum.

The liabilities and funeral expenses were discharged on 20 December 1993 on which date Sh. 5,000 of the debtors due were received, the balance being unpaid at the date of preparation of the accounts.

**Required:**

- (a) Journal entries to record the above transactions.
- (b) The Estate Cash Book.

(c) The Estate Capital Account.

(d) The Estate Income Account.

(e) Balance Sheet of Maisha Mingi , deceased, as at 31 January 1994.

(C.P.A)

8. Wakili Kali was named executor of the estate of Mzee Bunda, who died on 20 June 1994. On 31 March 1995, the executor prepared the following trial balance.

**ESTATE OF MZEEBUNDA**  
**TRIAL BALANCE 31 MARCH 1995**

	Shs.	Shs.
Investments:		
Shares	185,000	
Bonds	420,000	
Accrued interest receivable	750	
Cash - principal	108,500	
Cash - Income	21,250	
Household effects	23,750	
Loss on realisation	6,500	
Gain on realisation		12,000
Assets subsequently discovered		55,200
Debt of decedent paid	56,000	
Funeral expenses	9,500	
Administration expenses	25,700	
Estate corpus		792,750
Income		35,750
Expenses - Income	3,800	
Distribution of income to beneficiary	9,950	
Legacy - Mtoto Bunda	25,000	
	895 700	895,700

**Required:**

A charge and discharge statement for the estate of Mzee Bunda. (C.P.A.)

9. D. Kimeu died (intestate) on 1 April 1994. He was survived by his widow' and two infant children, Tala and Turi. His estate at death consisted of:

	£
£28,000 , 9% Funding Stock 2,000 - 2002	23,100
(Interest 1 February and 1 August) £24,000 , 2½% Savings Bonds 1998 - 2001 (Interest 1 May and 1 November) .	20,020
Policy on his life	30,000
Building Society deposit at 8% (Interest 1 January and 1 July)	4,500
Accrued interest thereon	90
Balance at bank	4,735
Household furniture and effects	<u>3,000</u>
	<u>85,445</u>
Less: Debts and funeral expenses	<u>650</u>
	<u>84,795</u>

Interest on the Government stocks was received on the due dates: D. Kimeu had made no chargeable transfers during his -life.

In addition the following transactions took place during the year ended 31 March 1994.

#### 1993

31 May	Property taxes of £11,163 was paid by means of a temporary overdraft at the bank.
15 June	The sum assured by life policy was received.
30 June	The Building Society deposit was repaid to the personal representative, together with interest to date.
12 July	£18,000, 9% Funding Stock 2000 - 2002 was sold ex-interest due 1 August, the net proceeds £14,760.
10 August	The debt- and funeral expenses were paid.
30 Sept	The bank debited the personal representative's account with interest

amounting to £67 (chargeable to income)

2 October                      Effect was given to the widow's statutory rights in Lie capital of the estate.

1994

31 January

Administration expenses of £400 (all chargeable against capital) were paid.

**Required:**

- (a) Write up the cash book and estate capital account for the year ended 31 March 1994.
- (b) Prepare the balance sheet as on date, the widow and children being still alive. (ignore income tax). (C.P.A.)

10. (a) Tantu died on 31 October 1994 and was survived only by Mwanda his grandson, the son of his son Maga.

By his will, which barred equitable apportionment and was silent on the date of payment of legacies, he left his estate as follows:

to my cousin Mwamba my beach plot:

to my friend Nyatnbaya my car;

to my nephew Pamba my boat; .

to each of my two sons £10,000;

to my brother-in-law £2,000;

to my housekeeper Awa if still in my employment £20,000;

to the pastor of my church, Charles £5,000;

to my local church £5,000

to buy a piano in memory of my deceased mother;

to my shamba-boy, Akida, if still in my employment £2,000;

to my shamba-boy, Akida, if still in my employment 42,000:

to each of my neighbours Nyawawa, Weru and Langa £1,000;

to the watergarnes club, my outboard engine and to my grandson Mwanda the residue absolutely.

On 30 April 1995, the Executors, having paid all the liabilities of the estate and the ,expenses of administration, were ready to assent to the legacies. The property in their possession and its value at that date was:

Car, Fiat	9,000
Car, Toyota	5,000
Boat	2,500
Furniture, Jewellery etc.	9,500
Farm	4,000
Beach plot	1,200
£150,000, 6% Government Stock	120,000
Balance at bank	68,800

You further obtain the following additional information:

- (i) Pamba died on 30 March 1994.
- (ii) Tantu had two brothers-in-law surviving at 31 October 1994.
- (iii) Awa was still employed at 31 October 1994.
- (iv) During his lifetime, Tantu had provided his local church with a piano in memory of his late mother.
- (v) Akida retired on 31 October 1992.
- (vi) Nyawawa and Langat both predeceased Tantu.
- (vii) The farm had been purchased by Tantu with proceeds of the sale of the outboard engine.

**Required:**

Prepare a schedule showing the distribution of the estate and give your reasons should you decide that the executors should not assent to any of the legacies. Ignore taxation.

(b) (i) What is the rule of lapse?

(ii) Explain what is meant by abatement.

(CPA)