



FREQUENTLY ASKED QUESTIONS ON SUCCESSION AND INHERITANCE

TI-Kenya's Advocacy & Legal Advice Centres (ALACs) seek to answer some of the questions on succession and Inheritance that many Kenyans grapple with in their everyday lives:

What is succession?

- Succession is the right and transmission of the rights and obligations of the deceased to his heirs.
- The Kenya law of succession prescribes the rules which determine what ought to happen to a person's estate after his or her death. It is also referred to as the law of inheritance i.e. transmission of property rights from the dead to the living.
- The rules of succession identify the beneficiaries entitled to succeed to the deceased's estate and the extent of the benefits they are to receive. The Kenya law of succession determines the different rights and duties that persons (for example, beneficiaries and creditors) may have in a deceased's estate.

What is the importance of succession?

The main function of succession is to provide mechanisms for the transmission of property from the deceased to those who survive him. It involves:

- Identifying the legal/rightful claimants of the deceased's property.
- The procedures of which is to be taken by the claimants to enable them acquire the property of the deceased.
- Tools for dispute resolution are provided to resolve any encounters between persons who claim to be rightful claimants.

Who has the right to inherit a deceased person's property?

The Law of Succession Act Cap 160 provides for persons that can inherit the property of a deceased person under section 29 as dependants which include:

- ✓ 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;
- ✓ 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; and
where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Is a woman allowed to inherit property?

Yes. Both men and women have equal rights to inherit property. Reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters

Can parents inherit the property of their deceased child?

Yes. Parents can inherit their deceased children's property if:

- ✓ The child included them in a will as beneficiaries and/or dependants;
- ✓ Where there is no will, if the parents prove that they were dependants of their child prior to his/her death;
- ✓ Where the deceased has no surviving wife or children and no will, then they (parents) will be given the first priority.

What is intestate succession?

Intestate succession is where a person dies without having made a will or the will is invalidated.

How is intestate succession done?

There are various things that are considered when one dies intestate. Below is what is considered.

✓ ***If you're married and have children***

Your surviving spouse shall be entitled to personal and household effects absolutely. Further, to a life interest in the remaining property of the deceased person. The spouse will also have an *interest* in property which will terminate upon his/ her death. If the surviving spouse is a widow, that interest shall come to an end if she marries another person. The children will get the entire estate upon the termination of the life interest of the surviving spouse.

✓ ***If you're married with no children***

Your surviving spouse will receive all personal and household effects absolutely up to the first Kshs.10, 000/- or 20% of the residue estate whichever is greater. The spouse will also have an *interest* in property which will end if she gets married to another person.

✓ ***If you're not married and have children***

In such a case, your children will receive the proceeds of your entire estate at age 18.

✓ ***If you're not married have no children***

Here, your entire estate will go to the following family members, in this order:

- Father, if dead;
- Mother, if dead;
- Brothers and sisters and children of deceased brothers and sisters in equal shares, if dead;
- Step-brothers and sisters, if deceased their children in equal shares, if dead;
- Relatives who are closely related to you.
- If you have no living relatives and die intestate, your estate will go to the state.

What is the importance of a will?

A will enables you to have control over your property even after you are deceased. For instance, how your estate should be distributed. If you die without a will, your estate will be distributed to your relatives according to a certain legal formula. This can be very different from what you wanted or intended to happen. It can also cause complications, delays and extra costs for those you leave behind. If you die without having written a will and you don't have any relatives, your estate will go to the government.

How can I write a will? Do I need a lawyer for me to write a will?

Any person can write a will. One does not need to have a lawyer to write it, but the lawyer can be present for purposes of witnessing it. However, to write a valid will, you must be in a good state of mind to understand the nature of your actions.

- ▶ A will can be oral or written.
- ▶ For an oral will to be valid, it has to be made before two or more witnesses of sound mind and full age);
- ▶ A written will is valid only if it is signed and witnessed by two or more competent witnesses.

My father died last year. One month later, his brothers (my uncles) want to sell off his land and lay claim to his property. Is this lawful?

- This is unlawful. Interfering with the property of a deceased person is referred to as Intermeddling. To intermeddle means to interfere wrongly with property, or the conduct of business affairs, officiously or without right or title - Black's Law Dictionary 6th edition
- In law, the intermeddler has no legal authority or power to transfer ownership of the property of a dead person. This is an illegal transaction that can be reversed and set aside. You cannot invoke a defence that you were ignorant of the death.
- In order to protect the estate and or the property of the deceased, intermeddling is a crime under Kenyan law.
- Section 45 (1) of the act provides that Any person who contravenes the provisions of this section shall be guilty of an offence and liable to a fine not exceeding Ksh 10, 000 or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and be answerable to the rightful executor or administrator, to the extent of the assets

with which he has intermeddled after deducting any payments made in the due course of administration.

I am a Muslim. Is my succession process any different?

Yes, the succession process is slightly different as it is in accordance with Muslim law. The power of Kadhis' courts is limited to decide on issues of Muslim law relating to personal status, marriage, divorce or inheritance where all the parties are of the Muslim faith. However, Muslims can still choose to go to the High Court since the High court can entertain any dispute relating to a deceased Muslim. The law applicable will still be Muslim law and not the Law of Succession Act.

My father had two wives. Will they both get equal shares?

In determining the shares by each wife, one will need to determine at what point the marital property was acquired. Property acquired before the second marriage is owned equally by the husband and first wife. Property acquired after the second marriage is considered owned by the husband and both wives (taking into account each wife's contribution).

What can I do if our relatives deny us the right to inherit our parents' property?

There are 3 ways of handling this depending on the situation as follows:

- If the property in question is land and there is no case that has been filed in court, you can place a caution/caveat at the Land Registrar's office so as to prevent further dealing on the land.
- For any other property, you can go to court to seek for an injunction to stop any transfer, sale, lease or any transaction on the property until the dispute is resolved in court.

If a succession matter has already been filed in court, you can institute objection proceedings in court to oppose the application and state the grounds of your objection, which in this case include being excluded from the list of beneficiaries. You need to file P & A Form 61 in the High Court registry. The matter will be heard first by the Judge handling the case.

How do I start the succession process?

Starting the succession process depends on whether succession is testate & intestate.

In testate succession, you need to file the following documents

- Form P.A 78 (petition)
 - Form P & A 3 (affidavit)
 - the original will plus 2 photocopies of the will &
 - original death certificate.
 - a. In intestate succession, there are various things that should be considered. This includes whether there are beneficiaries and the value of the deceased's property. For property less than Kshs. 300,000/- file the matter in the magistrate court and if more than Kshs. 300,000/- file the matter in the high court. You need to file the following documents A search on the property;
 - b. A letter from the chief stating the surviving beneficiaries;
 - c. The death certificate (original)
- ▶ After obtaining the above stated documents, the applicant is to file four forms in the court:
- ▶ One, to identify proposed administrators and at least three witnesses;
 - ▶ Two, to list of the deceased person's property (shares in a company, money held in account, moveable property and immovable property (land), liability);
 - ▶ Three, list of beneficiaries and dependants;
 - ▶ P & A 80 - The main petition that is accompanied by the above stated forms. It contains the prayers, if one wants to be an executor or administrator.
- ▶ The cost of filling the succession petition is three to four thousand.
After the filling, the petition will need to be gazetted which one is required to pay for it Kshs.2700/-. Thereafter, you need to wait until it is printed in the gazette within three (3) months form the date of filling the matter.
- ▶ Once printed, you will need to have a copy of the gazette notice. Therefore, you can print it or buy it at fifty Kenya shillings (Kshs.50/-). You are required to attach the gazette notice to an application for a hearing date of the petition. This will be a hearing for letters of administration.
- ▶ After you are granted the letters of administration, you will wait for six months then file an application for confirmation of grant. Here, you can also file a schedule of the sub-division among the beneficiaries and/or dependants.

After that, you get a confirmation of letters of administration from the court. The confirmation is a monitoring mechanism of the court that confirms that the personal

representatives have been administering the estate and empowers the personal representative to distribute any capital assets, including land.

- ▶ For land, you take the certificate of confirmation to the land registry and file an application for transmission of the land. Details that will be required in the transmission form include:
 - ▶ The details of the parcel of land;
 - ▶ How much you are transferring and to who;
 - ▶ Photos (three (3) passport size) of the administrator and beneficiary;
 - ▶ One form for each beneficiary.

The local chief has requested for Kshs 10,000 as facilitation money to assist us in the succession process. Is it okay to give him?

No. this is a bribe. It is not right to facilitate the chief as he is a public officer who has the duty to render service to members of the public, including offering advice, with due diligence, without asking for favours. There are also non-governmental organisations which can guide you through the process without paying any fee.

Apart from land what else can I inherit from my parents?

Apart from land, one can inherit Mpesa Account, shares, bank accounts, sacco savings, Pension, life insurance etc.

In the case of transfer of shares from the Estate of a deceased shareholder to a beneficiary, the following would be required:

- A certified copy of the Confirmation of Grant of Probate / Grant of Letters of Administration.
- Share Transfer form duly signed by both the Executor / Administrator of the Estate of the deceased and beneficiary, in the presence of an advocate (Commissioner for Oaths)
- A certified copy of the Death Certificate
- Original Share Certificates
- A certified copy of the Executor's / Administrator's passport
- A certified copy of the beneficiary's passport (if not the same as the executor/administrator)

My father had a case in court relating to our land before he passed on. What do I do now?

- To continue the case, the law provides that within 90 days of death, a notice of death and a copy of the death certificate be filed with the court requesting that a successor to the case be appointed. A failure to do so could result in the case being dismissed. The court will grant you or any other suitable person the power to continue with the case.

Can Transparency International Kenya assist a person who is experiencing corruption in the land sector?

Transparency International Kenya has four Advocacy and Legal Advice Centres in Kenya - Mombasa, Nairobi, Eldoret and Kisumu. ALAC officers receive complaints on land corruption from members of the public and give appropriate legal advice. ALAC officers can help by forwarding the complaints to the relevant Authority, either the National Lands Commission or the Ministry of Lands. If it is a matter that requires court resolution, ALAC can refer the complainant to an advocate from TI-Kenya's network of partners.

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