



**In re Estate of Silas Buhilu Alasi (Deceased) (Succession Cause  
91 of 2021) [2023] KEHC 3881 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
SUCCESSION CAUSE 91 OF 2021  
WM MUSYOKA, J  
APRIL 28, 2023  
(FORMERLY KAKAMEGA HCSC NO. 39 OF 2012)  
IN THE MATTER OF THE ESTATE OF SILAS BUHILU ALASI (DECEASED)**

**JUDGMENT**

1. The application for determination is dated May 19, 2014. It is an application for confirmation of grant. I have noted that the court gave directions, on October 27, 2014, for disposal of a summons for confirmation of grant, dated January 13, 2013. I have ploughed through the file of papers herein, and I have not encountered any summons bearing the date of January 13, 2013, and I shall presume that the directions given related to the summons dated May 19, 2014, and the reference to a summons for confirmation, dated January 13, 2013, was by error.
2. The deceased herein died on January 24, 2010. There is a certificate of death, serial number 181xxx, to that effect. A letter from the Chief of Central Maragoli Location, dated January 18, 2012, indicates that he was survived by 1 widow, Esinasi Makungu Buhilu; 2 sons, Benard Mulekani Buhilu and Stephen Mutange Sila; and 5 daughters, Esther Iminza Sila, Florence Mudola Luhazo, Taphrother Sayo Buhilu, Edith Kamonya Njoroge and Theresiah Nzavaye Kulecho. Representation to his estate was sought by a petition filed herein on January 29, 2012, by Esinas Makungu, in her capacity as widow of the deceased. She listed the survivors of the deceased as the 8 individuals named in the letter from the Chief. The deceased was said to have had died possessed of South Maragoli/Buyonga/1191, 1282, 1343 and 1441; South Maragoli/Logovo/1113, 1336, 1366, 1367 and 1420; South Maragoli/Lusiola/580; South Maragoli/Madzuu/175, 624 and 724; South Maragoli/Magui/330; and South Maragoli/Mahanga/912 and 1255; and shares in Kenya Planters Cooperative Union Limited, Wamondo Cooperative Society, Centon Securities and Kenya Power and Lighting Company Limited. Esinas Makungu died on February 28, 2012, before representation had been granted, and she was substituted by Maggy Mulaya, a daughter-in-law, and Esther Iminza Sila and Florence Mudola Musola, vide an order made on December 19, 2012. Letters of administration intestate were made to Margie Lyne Mulaya, Esther Iminza Sila and Florence Mudola Luhazo on



December 19, 2012, and a grant was duly issued to them, dated January 13, 2013. I shall refer to the 3, corporately, as the administratrices.

3. The summons dated May 19, 2014 is at the instance of Margie Lyne Mulaya, one of the administratrices. I shall refer to her as the applicant. Her affidavit in support was sworn on May 19, 2014. It identifies the survivors of the deceased to be the late Esinas Makungu Buhilu, Benard Mulekani Buhilu, Stephen Mutange Sila, Esther Iminza Sila, Florence Mudola Luhazo, Taphroser Sayo Buhilu, Edith Kamonya Njoroge and Teresa Nzavaye Kulecho. The deceased is said to have died possessed of South Maragoli/Buyonga/1191, 1282, 1343 and 1441; South Maragoli/Logovo/1113, 1330, 1336, 1366, 1367 and 1392; South Maragoli/Lusiola/580; South Maragoli/Madzoo/175, 624 and 724; South Maragoli/Magui/330; and South Maragoli/Mahanga/175, 912 and 1255. She proposes that the estate be shared out as follows:
  - a. To Benard Mulekani Buhilu, South Maragoli/Logovo/1113 and 1392, and South Maragoli/Madzoo/624 and 724;
  - b. To Stephen Mutange Sila, South Maragoli/Logovo/1366 and 1367, and South Maragoli/Magui/330;
  - c. To Esther Iminza Sila, South Maragoli/Logovo/1330;
  - d. To Florence Mudola Luhazo and Teresa Nzavaye Kulecho, South Maragoli/Mahanga/175;
  - e. To Taphroser Sayo Buhilu, South Maragoli/Logovo/1420;
  - f. To Edith Kamonya Njoroge, South Maragoli/Lusiola/580;
  - g. To Isaac Adeka, South Maragoli/Mahanga/912 and 1255;
  - h. To Benard Mulekani Buhilu and Stephen Mutange Sila, South Maragoli/Buyonga/1282;
  - i. To Esther Iminza Sila and Taphroser Sayo Buhilu, South Maragoli/Buyonga/1343;
  - j. To Esther Iminza Sila, Florence Mudola Luhazo, Edith Kamonya Njoroge and Teresa Nzavaye Kulecho, South Maragoli/Buyonga/1441.
4. The application, dated May 19, 2014, attracted protests by several individuals.
5. There is an affidavit of protest by Julius Masiva Obuga, sworn on October 13, 2014. I shall refer to him hereafter as the 1<sup>st</sup> protestor. He does not disclose, in clear terms, how he is related to the deceased, save that the deceased had given him a power of attorney, in 2008, which enabled him to transact certain matters relating to his affairs. He avers that he was the one who prepared the petition filed herein, and thus he does not dispute the contents with regard to identification of the survivors of the deceased and the assets that he died possessed of. He complains that the applicant had isolated her co-administratrices, with regard to administration of the estate. He states that there were orphans who were not listed, being the late Kidovosi, the late Simon, the late Guku, the late Kanguha and the Alasi, said to have been sons and daughters of the deceased. He has also added other assets to the list in the petition and the summons for confirmation of grant. He avers that the deceased had given directions on what was to be done with his property after his death. He objects to the distribution proposed and makes his own proposals, as follows:
  - a. To Mulekani, South Maragoli/Madzoo/624;
  - b. To Teresa Nzavaye Kulecho, South Maragoli/Logovo/1392;
  - c. To Taphroser Sayo Buhilu, South Maragoli/Logovo/1420;



- d. To the surviving grandchildren of the deceased, South Maragoli/Mahanga/125, equally;
  - e. To Stephen Mutange, South Maragoli/Lugovo/1366;
  - f. To Esther Iminza Buhilu, South Maragoli/Lugovo/1330;
  - g. To Ruth Kamonya Njoroge, South Maragoli/Lugovo/580;
  - h. To Florence Mudola Luhazo, South Maragoli/Lugovo/1113;
  - i. To the family of the late Alasi, South Maragoli/1336, in exchange for South Maragoli/Mahanga/912; and
  - j. The remaining assets to be surveyed, valued and sold to raise money for development of Majengo, Lotego and Navuhi.
6. The 1<sup>st</sup> protestor has attached to his affidavit a number of documents. There is a handwritten document in what I presume to be Ki-Maragoli. There is no accompanying translation in English, the language of the court. I do not understand Ki-Maragoli, and, therefore, that annexure is of little utility. There is a purported power of attorney, made on April 4, 2008, by the 1<sup>st</sup> protestor, alleging that he had been given authority by the heirs of the estate of the deceased herein to represent them in these proceedings. There is a letter written by the 1<sup>st</sup> protestor, dated July 3, 2008, addressed to the District Commissioner, Vihiga. Among others.
7. The other affidavit of protest is by Esther Iminza Sila, sworn on October 23, 2014. I shall hereafter refer to her as the 2<sup>nd</sup> protestor. She lists the survivors of the deceased, without disclosing how they were related to him. The names she gives are Esther Iminza Sila, Florence Mudola Luhazo, Benard Mulekani Buhilu, Taphrother Sayo Buhilu, Edith Kamonya Njoroge, Teresa Nzavayo Kulecho, Stephen Mutange Sila, Christopher Filibo Buhilu, Wycliff Alasi and Florence Gayanzi widow of Oscar Alasi. The assets listed are those listed in the petition. She avers that part of the estate had been distributed during the lifetime of the deceased, as follows:
- a. Benard Mulekani - South Maragoli/Madzuu/624 and 724;
  - b. Eric Keya Mutange - South Maragoli/Lugovo/1367;
  - c. Ruth Njenga - South Maragoli/Lusiola/580;
  - d. Stephen Mutange - South Maragoli/Magui/330;
  - e. Dominik Mulekani - South Maragoli/Lugovo/1113 and 1366; and
  - f. Aginga Anzere - South Maragoli/Lugovo/1420.
8. The 2<sup>nd</sup> protestor proposes distribution of the rest of the assets that she claims were not distributed by the deceased during lifetime as follows:
- a. South Maragoli/Lugovo/1330 and South Maragoli/Buyonga/1282, to Esther Iminza Sila and Florence Mudola Luhazo, equally;
  - b. South Maragoli/Lugovo/1366, to Esther Iminza Sila 3.5 acres, Florence Mudola Luhazo 3.5 acres and Esau Alasi Kimanya 1 acre;
  - c. South Maragoli/Mahanga/175, to Esther Iminza Sila and Florence Mudola Luhazo, equally;
  - d. South Maragoli/Mahanga/912 and 1255, Wycliffe Alasi and Christone Filibo Buhilu, equally;



- e. South Maragoli/Buyonga/1191, 1343 and 1441, and South Maragoli/Lugovo/1392, to be shared equally; and
  - f. The shares in the firms and the money in the bank, to be shared equally amongst the 2 houses.
9. It is further averred that the applicant ought to account for rent collected since the demise of the deceased; and that Isaac Adeka was not a child, nor dependant nor debtor of the estate.
  10. Directions were given on December 3, 2014, for disposal of the summons for confirmation of grant, by way of oral evidence.
  11. The oral hearing happened on September 20, 2016. The 2<sup>nd</sup> protestor was the first to take to the witness stand. She stated that the deceased was her father, who was a polygamist, having married 2 wives. She explained that the first wife was her mother, and the late Esinasi Makungu Buhilu was the second wife, who was married after her mother died. She said that her mother had 3 children. Dominick Liviri Mulekani followed. He was a grandson of the deceased. He said that the deceased had 9 children. One had died, said to be Oscar Alasi, who was survived by a widow. He said that the deceased had shared out his lands before he died. He said that Wycliffe Alasi and Christone Filibo were children of the deceased, born out of wedlock. He said that his own father was Benard Mulekani, who was still alive. She said that Esinas was his grandmother, and she lived with the deceased on South Maragoli/Logovo/1336.
  12. Christone Filibo Buhilu testified next. He stated that the deceased was his father, and that he met him for the first time in 1984. He said that he was circumcised in 1983 at Kisumu, and that his mother was still alive. He said that his name was omitted from the funeral programme. He said that he used to visit the deceased during his lifetime. Isaac Kigadi Magaga was next. He stated that Wycliffe Alasi Amulega and Christone Filibo Buhilu were children of the deceased. He identified himself as a cousin of the deceased. He claimed that the deceased had 3 wives, then he revised the number to 4 wives. He said that it was the deceased who introduced him to Wycliffe Alasi Amulega and Christone Filibo Buhilu.
  13. Berita Ehenzo Elavuka followed. She said that the deceased was her brother, and Wycliffe Alasi Amulega and Christone Filibo Buhilu were children of the deceased. She said Christone Filibo Buhilu was born in 1977, at Vagina. She said that Wycliff was brought to the home of the deceased by his mother. She testified that the 2 used to visit their father, the deceased, during school holidays. Lucas Galiavo Magaga was next. He said that Wycliffe Alasi Amulega and Christone Filibo Buhilu were children of the deceased. Wycliffe Alasi Amulega followed. He said that his mother was called Elizabeth, and was alive. He described the deceased as his father. He saw him for the first time in 1989, when he was taken to his home by his mother, but the wife of the deceased chased them away.
  14. The case for the other side opened on November 8, 2016. The applicant, Margie Lyne Mulaya, was the first to take the stand. She identified herself as a daughter-in-law of the deceased. She said that the deceased had shown the beneficiaries pieces of land where to put up houses. They developed those portions, and put up homesteads. She said that she was collecting rent from some of the plots developed. She stated that the deceased had sold South Maragoli/Logovo/1392 prior to his death, to Adele. She stated that the other parcels remained intact. She said that Esther and Florence could take South Maragoli/Logovo/1330, but not South Maragoli/Buyonga/1191, South Maragoli/Mahanga/1255 and South Maragoli/Logovo/1336. She proposed that South Maragoli/Mahanga/912 and 1255 be given to Isaac Adeka, as the said parcels of land were sold to him by the family, being by Stephen, Benard, Berita, Mary, Margie, Florence, Ruth, Teresa, John and Kefa. She said that there was a sale agreement signed by some of the family members. She said that she was not opposed to deoxyribonucleic acid (DNA) tests being conducted to establish paternity of Wycliffe Alasi Amulega and Christone Filibo Buhilu. She said that Dominic was a stepson of the deceased, and the deceased had



given him South Maragoli/Lugovo/1113. She said that South Maragoli/Logovo/1336 was occupied and utilized by Stephen and Benard.

15. The 1<sup>st</sup> protestor, Julius Masiva Obuga, testified last. He said that the deceased was married to his aunt, and that he had given him a power of attorney, which lapsed after he died. He explained that the deceased had 2 wives. Kezia was the first wife, and she died in 1954, whereupon the deceased married Esinas in 1955. The first wife had 2 children, Iminza and Mudola; and he had 7 children with Esinas, being Benard Mulekani, Stephen Mutange, Truphoza Sayo, Edith Kamonya and Teresa Nzavaye. He had property, which he said should be distributed as per the [Law of Succession Act](#), Cap 160, Laws of Kenya. He proposed that the property acquired during the first marriage should go to the children of the first marriage, and that acquired during the second marriage should go to the second family. He said that he had identified the lands acquired during each of the 2 marriages. He said that there were strangers on the land. Florence Ngayazi Masiba had encroached on South Maragoli/Logovo/1336 after the deceased passed on. Jackson Kavere had illegally occupied South Maragoli/Lugovo/1420. He said that Aggrey Ndega had ploughed on South Maragoli/Logovo/1330, and had sold part of it to the County Government of Vihiga, where they have put up a water tank. During cross-examination, he conceded that he was not entitled to benefit from the estate.
16. At the close of the oral hearings, the applicant and the 1<sup>st</sup> protestor filed written submissions, which I have read through, and noted the arguments.
17. The matter is for confirmation of grant, which is provided for under section 71 of the [Law of Succession Act](#). The confirmation process is about confirming the administrator to carry on with the process of administration, and to confirm the distribution proposals placed on record. The administrator is confirmed, by virtue of section 71(2)(a), if he had been properly appointed, and went about administering the estate in accordance with the law, and where it appeared that he would continue to administer the estate, upon confirmation, in accordance with the law. Distribution would be either in accordance with the law or based on what the parties have agreed upon. Where there is consensus amongst the beneficiaries on how they would like the estate distributed, then the court ought not concern itself with the distribution provided for under the law. Where there is no consensus, the court is bound to apply the law as it is. See [Justus Thiora Kiugu & 4 others vs Joyce Nkatha Kiugu & another](#) [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and [In re Estate of Juma Shiro – Deceased](#) [2016] eKLR (Mwita, J).
18. The deceased died in 2010, after the [Law of Succession Act](#) had come into force on July 1, 1981. Consequently, the law applicable to distribution of the estate is the [Law of Succession Act](#), by virtue of section 2(1) thereof. Secondly, he died intestate, the relevant provisions are in Part V, which govern intestate succession. Thirdly, he died a polygamist, and section 40 of the [Law of Succession Act](#) will govern the distribution.
19. One of the issues that came up is whether the deceased had distributed his estate before he died, so that if he had so distributed the property then the court should distribute the estate according to that *inter vivos* distribution by the deceased, except for the assets that the deceased did not distribute. If the deceased had truly distributed his land before he died, there would be no need for the court to hold or conduct these succession proceedings, for the estate would have been distributed *inter vivos*. Succession, in accordance with the [Law of Succession Act](#), happens where there has been no *inter vivos* distribution. This cause was initiated by the parties themselves, it was not imposed upon them by the court, and the very fact of its filing is testimony that there was no *inter vivos* distribution. An *inter vivos* distribution would mean that the deceased caused his land to be subdivided, and new titles created and transferred or registered in the names of the children. That would mean the property would cease to be in the name of the deceased, and would be in the names of the children, following that *inter*



- vivos* distribution. It would mean that there would be no property in the name of the deceased, to be subjected to succession proceedings. See [Lucia Karimi Mwamba vs Chomba Mwamba](#) [2020] eKLR (Gitari, J) and [In re Estate of Muchai Gachuika \(Deceased\)](#) [2019] eKLR (Gikonyo, J). Being shown where to build, or where to cultivate or graze cattle, without more, does not amount to *inter vivos* distribution. At best, it can only be an indication of an intention to distribute property during lifetime, which is not carried to fruition.
20. I have seen the certificates of official searches in respect of South Maragoli/Buyonga/1191, 1282, 1343, 1441; South Maragoli/Lugovo/1113, 1336, 1366, 1367, 1420; South Maragoli/Lusiola/580; South Maragoli/Madzuu/175, 624 and 724; South Maragoli/Magui/330; and South Maragoli/Mahanga/912 and 1255. All of them are dated December 29, 2011. All these assets were in the name of the deceased as at that date. The parties have not filed fresh certificates of official searches, and I shall presume that that registration status has not changed. If the assets had been distributed, they would have ceased to exist as such. The fact that they are still in the name of the deceased is indicative of the fact that there was no *inter vivos* distribution by the deceased, as claimed by some of the parties. If the deceased had intended to distribute the property *inter vivos*, he would have approached the relevant land control board, under the provisions of the [Land Control Act](#), Cap 302, Laws of Kenya, and sought permission or consent of the Board, to subdivide and transfer the land to beneficiaries. Upon obtaining that consent, he would have had a surveyor prepare a mutation for the purpose of subdivision. After the mutation of the land, he would then have had the subtitles created transferred and registered in the names of the persons he intended to benefit from the *inter vivos* distribution, and title deeds issued. If nothing of that sort happened, during the lifetime of the deceased, then there was no *inter vivos* distribution.
  21. The parties have not led any evidence to demonstrate that the deceased had obtained consent of the relevant land control board, to have properties allegedly distributed *inter vivos* transferred and registered in the names of the persons that the deceased intended to benefit from the said distributions. If that had been done, then the principle that was stated in [In re Estate of Gedion Manthi Nzioka \(Deceased\)](#) [2015] eKLR (Nyamweya, J) would have applied, and the court would find that the lands were distributed *inter vivos*. If some steps in that direction had been taken, but the deceased died before he had completed the exercise, the court would presume that there was an intention to have *inter vivos* distribution, which was frustrated by the death, and would honour what the deceased was trying to do. However, in this case, there is no evidence that the deceased had attempted to obtain consent of the land control board to transfer his lands to his children during his lifetime, but died before he could do so. Consequently, no intention to distribute properties, the subject of the alleged *inter vivos* transfers, was evinced by the deceased, and what emerges is that he had only shown his children where to cultivate and put up houses. There was no intention to permanently distribute the land to them. If he had desired to do that, then he would have either made a will distributing his lands in that manner, or obtained consent to transfer the lands, and had signed transfer forms. See [In re Estate of Phylis Muthoni M'Inoti \(Deceased\)](#) (2019) eKLR (Gikonyo, J), [In re Estate of Nyachieo Osindi \(Deceased\)](#) [2019] eKLR (Ougo, J) and [Lucia Karimi Mwamba vs Chomba Mwamba](#) [2020] eKLR (Gitari, J).
  22. From what I have discussed so far, it should be plain that the distribution of the lands belonging to the deceased was not predetermined by the deceased, and all these lands ought to be available for distribution by the court, in terms of Part V of the [Law of Succession Act](#).
  23. However, before I venture to discuss distribution, I need to advert to the proviso to section 71(2) of the [Law of Succession Act](#) and Rule 40(4) of the [Probate and Administration Rules](#). These provisions require the court to be satisfied that all the persons who are beneficially entitled to a share in the estate have been ascertained, and allocated their shares. This exercise is critical. It was stated, in [In the Matter of](#)



*the Estate of Ephraim Brian Kavai (Deceased)*, Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), that the proviso to section 71(2) is in mandatory terms, and from its wording, failure by the court to so satisfy itself renders the order on confirmation, made subsequently, and the resulting certificate of confirmed grant, illegal. It was emphasized that confirmation of grant in intestate succession is not a mere formality, but the most important aspect of intestate succession. See also *In re Estate of Benjamin Ng'ono Mbatia (Deceased)* [2019] eKLR (Musyoka, J) and *In re Estate of Joseph Mubwabi Sabayi (Deceased)* [2021] eKLR (Musyoka, J). It was observed that hundreds of disputes would be avoided if the courts, faced with confirmation applications, properly performed their statutory duty under the proviso. I have to do my duty under the proviso, to obviate endless disputes hereafter over distribution of this estate.

24. Have the parties hereto properly ascertained the persons who are beneficially entitled to a share in the estate herein? I do not think so. The deceased herein died in 2010. The *Law of Succession Act* came into force in 1981, 29 years prior to his death. The applicable law, to distribution of this estate, is Part V of the *Law of Succession Act*. Under Part V, distribution of the estate will be dependent on the composition of the family. If the deceased was survived by a spouse and children, section 35 would apply, and there should be a disclosure of the surviving spouse and the surviving children. If the deceased was survived by a spouse, but no child or children, section 36 would apply, and there ought to be disclosure of the surviving spouse. If the deceased was survived only by a child or children but no spouse, then section 38 would apply, and there ought to be disclosure of the surviving child or children. If he was not survived by a spouse nor children, then section 39 would apply, and the surviving close blood relatives, set out in section 39, ought to be disclosed. If he died a polygamist, then section 40 would apply, and there ought to be a disclosure of the households of the deceased, indicating the wife or widow in each house and the children in each household. The configuration of distribution in each case is different, and, therefore, there ought to be a complete disclosure, so that the court is properly guided in the exercise of jurisdiction under either sections 35 or 36 or 38 or 39 or 40. See *In re Estate of Wepukbulu Wanambisi Maundende (Deceased)* [2020] eKLR (Musyoka, J).
25. So what is the scenario here? The impression created, from the disclosures in the filings, is that the deceased had died a monogamist, survived by a spouse and children, and that section 35 was to apply. However, at the hearing, it emerged that the deceased had married more than once. He had 2 wives. He had children from each of the 2 wives. His estate, therefore, comprised of 2 houses, being the first house and the second house. In that scenario, distribution ought to follow the pattern in set out in section 40. The survivors of the deceased should have therefore been classified into the 2 houses. However, that may be water under the bridge, now that the surviving spouse has since died, and the estate is now available for distribution only amongst the children. Section 38 of the *Law of Succession Act* is the provision that ought to apply.
26. The 2 sides are not fully agreed on who the surviving children of the deceased are. Whereas there is consensus, with respect to the blood children of the first wife and the second wife of the deceased, the 2<sup>nd</sup> protestor has introduced a number of individuals, whose relationship with the deceased has not been disclosed. But there are 2 who are said to be sons of the deceased, sired out of wedlock. Wycliffe Alasi Amulega and Christone Filibo Buhilu. Despite the modern age, where there is provision for registration of births, no documentary proof was presented, by way of certificates of birth, to connect the 2 to the deceased. What was placed before me were oral narratives, that the deceased sired these 2 individuals. Certainly, that is not enough. There are, these days, modern, scientific, forms of proving paternity, through DNA testing. That is what the 2 should be subjected to, to settle the issue of paternity once and for all.



27. Before I give final orders, let me address the issue of the 1<sup>st</sup> protestor, Julius Masiva Obuga, and his involvement in these proceedings. He is not a child of the deceased. He claims that the second wife of the deceased was his aunt. That, however, is not enough to have him involved in the matter. He is still an outsider, who should have no business in these proceedings. He says that the deceased was his close friend. That still does not remove the tag of a rank outsider. He says he had a power of attorney from the deceased. He did not exhibit it in his affidavit, neither did he produce it when he testified. The document that was placed on record, purported to be a power of attorney, cannot be one. It is not signed by the deceased, the person purportedly donating his power, but by the person to whom the power is donated, which should not be the case. It takes the form of affidavit, made before a Commissioner for Oaths. That is not what is required for a power of attorney. It is not for execution before a commissioner for oaths. It is not supposed to be an affidavit. Even if it were so, it should have been signed by the deceased himself, and not the 1<sup>st</sup> protestor. In any event, the power of attorney, if ever there was one, passed away with the deceased. The power of attorney only grants the donee authority and power to represent the donor during lifetime, once the donor dies, the power of attorney ceases to be effective. The duties imposed by and the powers exercisable through a power of attorney would, upon the demise of the donor, be vested in the personal representative of the deceased, who would be the administrator of his estate or the executor of his will. The 1<sup>st</sup> protestor is neither an administrator of the estate herein, nor the executor of a will of the deceased. For all practical purposes, the 1<sup>st</sup> protestor is a busybody. He is meddling into affairs that do not concern him. He has no beneficial interest in the estate at all, and he should stay completely clear of the same.
28. The last issue is about the assets being proposed for distribution. As stated above, I have seen the certificates of official searches for some of the assets. Those assets, shown in the certificates of official searches, to be registered in the name of the deceased, are what should be available for distribution, for they are under the name of the deceased. If there is any property listed for distribution for which no certificate of official search has been provided, then that is not available for distribution, for there is no evidence that it belongs to the deceased. The assets, reflected in the certificates that I have seen, all appear to be free from any encumbrances, save for South Maragoli/Buyonga/1282, which appears to be encumbered, by a charge in favour of Barclays Bank of Kenya Limited. There is no evidence that that charge has been discharged. The existence of that charge makes the said property unavailable for distribution, until the charged debt is settled, and the charge discharged. South Maragoli/Buyonga/1282 should, therefore, be removed from the schedule of the assets to be distributed.
29. Regarding the other assets, the shares in the firms and societies, and the money in the bank, no evidence has been placed on record, to prove existence of these assets. The court should not be expected to act blindly, by distributing assets whose existence has not been established. Courts act in certainty, and not in speculation.
30. I feel I have said enough to demonstrate that the summons for confirmation of grant, dated May 19, 2014, is not ripe for determination. It is hereby postponed. Let the administrators address all the issues that I have discussed above, before the matter can be re-listed for confirmation of grant. To facilitate that:
- a. Let DNA tests be carried out, to determine the paternity of Wycliffe Alasi Amulega and Christone Filibo Buhilu, using samples to be provided by the known children of the deceased;
  - b. Let the parties file further affidavits to address all the other issues that I have discussed above; and,



- c. As I will no longer be seized of the matter, after delivery of this judgment, let the matter be placed before my successor or successors at Vihiga, thereafter, for further directions, or otherwise before the Chief Justice for allocation of a Judge to finalize it.

31. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**WM MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Nafuye, instructed by KN Wesutsa & Company, Advocates for the applicant.

Mr. Athung'a, instructed by Athung'a & Company, Advocates for the 2<sup>nd</sup> protestor.

Mr. Julius Masiva Obuga, 1<sup>st</sup> protestor, in person.

