In re Estate of Raphael Kafwa Odanga (Deceased) (Succession Cause 15 of 2000) [2023] KEHC 18086 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18086 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 15 OF 2000

WM MUSYOKA, J

MAY 26, 2023

IN THE MATTER OF THE ESTATE OF RAPHAEL KAFWA ODANGA (DECEASED)

RULING

1. The application, the subject of this ruling, is the summons, dated November 3, 2017. It seeks confirmation of a grant made herein on 1st February 2017, to Fredrick Odhiambo Kafwa and Nicholas Odanga Kafwa, who I shall refer to hereafter, corporately, as the administrators. The application is brought at the instance of Nicholas Odanga Kafwa, who I shall refer hereto after as the applicant.

2. According the affidavit that the applicant swore in support, on November 3, 2017, the deceased was survived by 5 individuals, whose relationship with the deceased is not disclosed, being Nicholas Odanga Kafwa, Fredrick Odhiambo Kafwa, John Odanga, Thomas Sunday Kafwa and Oliver Ndubi Sikuku. 1 asset is disclosed as what the deceased died possessed of, being Bukhayo/Kisoko/1285. It is proposed that the estate be shared between the 5 individuals, in the following terms: Nicholas Odanga Kafwa – 8.90 HA, Fredrick Odhiambo Kafwa – 4.04 HA, John Odanga Kafwa – 3.44 HA, Thomas Sunday Kafwa – 3.03 HA, and Oliver Ndubi Sikuku – 2.83 HA. A Form 37, dated 3rd November 2017, was filed simultaneously with the application, executed by 3 individuals, being John Odanga, Thomas Sunday Kafwa and Oliver Ndubi Sikuku, consenting to the proposed distribution.

3. Antony Mark Wafula swore an affidavit on 26th January 2018, in protest. I shall refer to him hereafter as the 1st protestor, as there is another protestor. He avers that he bought a portion of land from Peter Odanga Kafwa and Nicholas Odanga Kafwa, measuring 0.971 hectares, and they executed an agreement, dated 4th November 1997. He states that when the grant, held by the previous administrators, was confirmed, he was factored in, and his name was in the certificate of confirmation of grant. Following that confirmation process, transmission was done, and his share was transmitted to him, and he got a title deed in his name. He complains that after the grant, on which that distribution was done, was revoked, he has discovered, to his surprise, that the new administrators seek confirmation of the fresh grant without disclosing his interest. He asserts that he is entitled to 2½ acres. He has attached a copy of a handwritten sale agreement dated 4th November 1997, between Regina Nakhumicha Kafwa, on behalf of Nicholas Ekesa Kafwa and Peter Odanga Kafwa, on one hand, and

Anthony Mark Wafula, on the other, for disposal of 2 acres out of Bukhayo/Kisoko/1285. There is also a copy of a payment schedule, relating to sale of 2 acres by Peter O. Kafwa and 2½ acres from Nicholas O. Kafwa. A copy of certificate of confirmation of grant is also attached, dated 29th January 2007. The final document is a title deed for Bukhayo/Kisoko/7602, in the name of the 1st protestor.

4. There is a bundle of affidavits filed on 26th April 2021, by John Odanga, Fredrick Odhiambo Kafwa and Peter Kafwa Wesonga, all sworn on even date. What emerges from these affidavits is that the deceased died a polygamist. He had 2 wives, Regina Nakhumicha and Mathilda Sokoni. He had 7 daughters and 7 sons with the 2 wives. The children of Regina Nakhumicha are Florence Auma, Juliana Nabwire, Constatina Kafwa, Victorine Kafwa, the late Mary Naliaka, Elizabeth Kafwa, Nicholas Odanga Kafwa and Peter Kafwa. The children of Mathilda Sokoni are the late Joseph Ndubi Kafwa, Fredrick Odanga Kafwa, John Odanga Kafwa, Thomas Kafwa, the late Emmanuel Kafwa and Margaret Kafwa. The deceased died possessed of Bukhayo/Kisoko/1285, and died before sharing it out amongst his sons. The 2 deceased sons had been survived by wives and children. The applicant is accused of disposing of portions of the estate without consulting his co-administrator, Fredrick Odanga. The 3 would like the estate shared equally amongst the sons.

5. There is another affidavit of protest, by the second administrator, Fredrick Odhiambo Kafwa, sworn on 14th October 2021. I shall refer to him as the 2nd protestor. The affidavit of protest is a replica of his earlier affidavit, sworn on 26th April 2021.

6. Those affidavits prompted a response from the applicant, vide an affidavit sworn on 4th April 2021, and filed herein on 7th April 2022. He concedes that the deceased had married twice. The 1st house was said to compose of Florence Kafwa, Juliana Kafwa, the late Mary Kafwa, Victorina Kafwa, Elizabeth Kafwa, Nicholas Kafwa, Peter Kafwa and Clementina Kafwa. The late Mary Kafwa was survived by 4 "dependants." The 2nd house is comprised of the late Joseph Ndumbi Kafwa, Frederick Odanga Kafwa, Thomas Kafwa and the late Emmanuel Kafwa. The late Emmanuel Kafwa is said to have been survived by 2 children, while the late Joseph Ndumbi is said to have been survived by 1 daughter. The deceased had demarcated his land between his 2 wives, before he died. He denies disposing of the land to third parties. He avers that he had not included the daughters of the deceased in the distribution, and urges that should the court decide to distribute the land, it should consider sharing it amongst all the children of the deceased, equally, including the daughters. He urges that the children of the late Mary Kafwa, the late Joseph Ndumbi Kafwa and the Late Emmanuel Kafwa be provided for.

7. Directions were given on 1st February 2023, for canvassing of the confirmation application by way of written submissions. Both sides complied with those directions, by filing their respective written submissions, which I have read through, and noted the arguments made. The applicant argues for equal distribution amongst the sons, and cites no authority. The 2nd protestor argues for equal distribution of the estate amongst all the children of the deceased, including daughters, and cites section 38 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Stephen Gitonga M'Murithi vs. Faith Ngira Murithi [2015] eKLR (Waki, Nambuye & Kiage, JJA).

8. Confirmation of grants is provided for under section 71 of the *Law of Succession Act*. It provides for confirmation of the administrators to complete administration, based on, according to section 71(2)(a), whether they were properly appointed, had administered the estate in accordance with the law upon their appointment, and would continue to administer the estate in accordance with the law upon their confirmation. Where it is found that the administrators were not properly appointed, or they had not administered the estate according to law, or were unlikely to continue to administer the estate in accordance with the law, the court may remove the administrators from office, appoint fresh ones, and confirm their grant. Alternatively, it may postpone confirmation of the grant, and require the

administrators to take such steps as the court may consider necessary. Secondly, the court deals with distribution of the estate, based on the criteria mentioned in the proviso to section 71(2) of the *Law of Succession Act*, which provision is echoed in rule 40(4) of the *Probate and Administration Rules,* and is about ascertaining the persons who are beneficially entitled to a share in the estate, and allocation of shares to such persons. This business of ascertaining beneficiaries and their shares is so critical that proceeding to make orders on confirmation, before the court is satisfied on the same, would be illegal, according to *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)*, Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported). See also *In re Estate of Mutialo Silwali (Deceased)* [2021] eKLR (Musyoka, J).

9. For avoidance of doubt, section 71(2) states as follows:

> "71. Confirmation of grants
>
> (1) ...
>
> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
>
> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
>
> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
>
> (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
>
> (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:
>
> Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares."

10. I have set out the proviso to section 71(2) above, so here below is what rule 40(4) says:

> " Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined."

11. Regarding the first limb of section 71(2), on confirmation of administrators, the protestors have not raised any issue with the manner the administrators were appointed, nor with the manner they were administering the estate, nor with whether they would administer the estate in accordance with the law upon their confirmation. I have also looked at the record, and I have found nothing untoward with the

way they were appointed, and how they have administered the estate since appointment, and I believe they would continue to administer it in accordance with the law. It was alleged that the applicant was disposing of assets to third parties, but no evidence was provided. There is the issue of the sale to the 1st protestor, but that happened in 1997, well before the appointment of the applicant as administrator in 2017. I shall, therefore, confirm the 2 administrators to complete administration.

12. On the second limb, on distribution of the estate, the guiding principle is in the proviso to section 71(2) and rule 40(4), as to whether the persons who are beneficially entitled to the estate have been ascertained, and if they have, whether they have been allocated the shares due to them. Has the ascertainment of the beneficiaries been done? Yes it has been. Both the applicant and the 2nd protestor have identified all the survivors of the deceased, being his sons and daughters. They have disclosed the children who have passed on, and were survived by their own children, who have also been disclosed. I am satisfied that there is adequate ascertainment of the survivors of the deceased and the beneficiaries to his estate.

13. Have the shares of all the persons, who have been ascertained as beneficially entitled to a share in the estate, been ascertained? No. In his initial affidavit, the applicant only proposed to distribute the estate amongst 5 out of the 14 survivors and beneficiaries of the estate. The 2nd protestor proposes distribution amongst the sons of the deceased only, to the exclusion of the daughters. The applicant revised his proposals only after the 2nd protestor disclosed all the survivors of the deceased and beneficiaries of the estate. He proposes equal distribution between the sons and the daughters of the deceased.

14. The deceased herein died on January 26, 1989, that was after the *Law of Succession Act* had come into force on 1st July 1981. By virtue of section 2(1)(2) of the *Law of Succession Act*, the law to apply to distribution of his estate is the *Law of Succession Act*, and not customary law. See *Rono vs. Rono & another* [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA), *In re Estate of Kiprono arap Ngetich* [2016] eKLR (M. Ngugi, J) and *Joseph Achichi Aburili vs. George Ochola Aburili* [2017] eKLR (Majanja, J). He died intestate. No one has alleged that he had made a will, and none was produced. Indeed, when this cause was initiated, it was letters of administration intestate that were sought, rather than a grant of probate. That would mean that distribution of his estate ought to be based on Part V of the *Law of Succession Act*, which provides for intestate distribution. There are exceptions to Part V, which allow the application of customary law, to estates of persons dying after July 1, 1981. These are stated in sections 32 and 33. However, the exceptions do not apply to estates of persons resident in Busia County.

15. For avoidance of doubt, section 2(1)(2) states as follows:

> "2. Application of Act
>
> (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
>
> (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

16. On the other hand, sections 32 and 33 of the *Law of Succession Act* state as follows:

> "32. Excluded property
>
> The provisions of this Part shall not apply to-
>
> (a) agricultural land and crops thereon; or
>
> (b) livestock, in the various Districts set out in the Schedule:
>
> West Pokot, Wajir, Turkana, Garissa, Marsabit, Tana River, Samburu, Lamu, Isiolo, Kajiado, Mandera and Narok.

17. The dispositive provisions in Part V are sections 35, 36, 38, 39 , 40 and 41. Those that are relevant for the purpose of the instant case are sections 38, 40 and 41. Section 38 applies where the deceased was survived by children only, that is where the deceased was not survived by a spouse, but had surviving children. According to that provision the estate is shared equally between the children. Section 40 applies where the deceased died a polygamist, like in this case, it spells out how the estate is to be shared out between the houses. However, where there are no surviving spouses, then section 40 ought to be read together with section 38. The effect of sections 38 and 40, read together, is that the estate is shared equally between the children, and there would be no need to apply section 40, as the net effect would be the same, equal distribution between the children, for the estate of a polygamist is shared out first as spelt out therein, after which distribution follows the patterns set out in sections 35 to 38. Section 41 covers situations where some of the children of the deceased are dead, as at the date of distribution, but they had been survived by children of their own, the said surviving children of the dead children of the deceased, who would be grandchildren of the deceased, step into the shoes of either dead parents, and take the share that would have gone to their dead parents, had they been alive. See *In re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (Musyoka, J), *In re Estate of Francis Waita Mbaki (Deceased)* [2018] eKLR (Muriithi, J) and *In re Estate of Imoli Luhatse Paul (Deceased)* [2021] eKLR (Musyoka, J). That is how I should proceed to handle the estate herein.

18. For avoidance of doubt, sections 38, 40 and 41 state as follows:

> "38. Where intestate has left a surviving child or children but no spouse
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> Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."
>
> "40. Where intestate was polygamous
>
> (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be 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.
>
> (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."
>
> "41. Property devolving upon child to be held in trust
>
> Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in

equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

19. It will be noticed that sections 38, 40 and 41 talk of "child" or "children," not "sons" or "daughters." There is no provision in the *Law of Succession Act* which provides that reference to "child" or "children" should be construed to mean sons. The words or terms "child" and "children" are naturally gender neutral, they refer to both sons and daughters. That would mean that Part V is gender neutral, when it comes to distribution of the estate of an intestate under Part V. The estate should be shared out between all the children of the deceased, regardless of their gender and marital status. The *Law of Succession Act* came into force in 1981, and that means that sections 38, 40 and 41 began to apply then, and the estate of any intestate dying after 1st July 1981 must be shared out equally to the sons and daughters of such an intestate. The *Law of Succession Act* does not allow discrimination of children of the deceased who happen to be of the female gender. See *Naomi Watiri Githuku vs. Naphtali Kamau Githuku & another* [2006] eKLR (Koome, J), *Mwongera Mugambi Rinturi & another vs. Josphine Kaarika & 2 others* [2015] eKLR (Waki, Nambuye & Kiage, JJA), *Ludiah Chemutai Bett vs. Joseph Kiprop Tanui* [2017] eKLR (M. Ngugi, J) and *In re Estate of Pius Tembete Kwayiya (Deceased)* [2020] eKLR (Musyoka, J).

20. What sections 38, 40 and 41 of the *Law of Succession Act* do, with respect to non-discrimination of the female children of the deceased, is boosted by the provisions of *the Constitution* of Kenya at article 27, which outlaws discrimination based on gender, and asserts that men and women are to be treated equally in all spheres of life. See *Michael Mwangi Joram vs. Robin Njue Njagi* [2016] eKLR (Muchemi, J), *Joseph Achichi Aburili vs. George Ochola Aburili* [2017] eKLR (Majanja, J), *John Kipkorir Ronoh vs. Mary Chepkemei Rugu*t [2017] eKLR (M. Ngugi, J), *In re Estate of Chepleke Chemusany (Deceased)*[2020] eKLR (Sitati, J) and *In re Estate of Nyambia Mukaya (Deceased)* [2022] eKLR (Odero, J).

21. The distribution proposed by the 2nd protestor not only flies in the face of sections 38, 40 and 41, it is inconsistent with article 27 of *the Constitution* of Kenya 2010, which says:

"27. Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) ..."

22. So, what happens to laws and acts that are inconsistent with *the Constitution* of Kenya, 2010? The proposals by the 2nd protestor are, no doubt, influenced by customary law, which excludes women from succession to the estates of their parents. That was tolerated in the past, on the basis of section 82 of *the Constitution* that was retired on August 27, 2010. Such discrimination has no place under the new Constitution. Any law, including customary law, which does not even apply to the estate herein, is rendered null and void by Article 2 of *the Constitution* of Kenya, 2010, and any act which violates or contravenes or is inconsistent with *the Constitution* of Kenya, 2010, is invalid by virtue of the same provision. See In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of Stanley Mugambi M'Muketha (Deceased) [2019] eKLR (Gikonyo, J) and Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). The proposal to share out the estate herein, to the sons, to the total exclusion of the daughters, violates or contravenes or is inconsistent with Article 27 of *the Constitution*, and to that extent it is an act or omission which cannot stand, by virtue of Article 2(4). If I go ahead and confirm the distribution proposed by the 2nd protestor, the resultant order on confirmation would be invalid. The court does not exist to make invalid orders, and, therefore, I shall not distribute the estate herein in a manner that shall exclude the daughters of the deceased, for such order would be unconstitutional and invalid, and, by granting it, I would be violating *the Constitution*, which I swore, on my appointment, to uphold. The net effect of this is that the distribution proposed by the 2nd protestor is wholly unacceptable.

23. The relevant portions of Article 2 of *the Constitution* of Kenya, 2010, say as follows:

> "2. Supremacy of this Constitution
>
> (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
>
> (2) ...
>
> (3) ...
>
> (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
>
> (5) ..."

24. Kenya has international obligations with respect to gender relations, for it is signatory to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW. See Ejidioh Njiru Mbinga vs. Mary Muthoni Mbinga & another [2006] eKLR (Khaminwa, J). CEDAW sets guidelines on how women are to be treated, and those guidelines have been domesticated and reduced into Kenyan law, through Article 27 of *the Constitution* of Kenya, 2010. Being signatory to CEDAW binds Kenya, more so as Article 2(5)(6) of *the Constitution* of Kenya 2010, makes international law and international conventions, to which Kenya has acceded to, part of the law of Kenya. Distributing the estate herein, along the lines proposed by the 2nd protestor, would violate the provisions of CEDAW, and by adopting those proposals I would be aiding and abetting failure by Kenya to meet its international obligations. That would amount to a singular failure by me in the discharge of my duties as Judge of the High Court, something that I am not prepared to do.

25. Article 2(5)(6) of *the Constitution* of Kenya 2010, says as follows;

> "2. Supremacy of this Constitution

(1) ...

(2) ...

(3) ...

(4) ...

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

26. Some of the children of the deceased are dead. They were survived by children of their own. The fact of their death did not extinguish their entitlement, for section 41 of the *Law of Succession Act* provides that their share or entitlement ought to devolve upon their estates, to be shared equally between their children. That is what shall happen in this case. Section 41 envisages that the children step into the shoes of their parents, and take the share due to them, by way of direct inheritance from the estate of their late grandparent. See Martin Munguti Mwonga vs. Damaris Katumbi Mutuku [2016] eKLR (Thande, J) and In re Lenah Wanjiku Gathuri (Deceased) [2021] eKLR (Odero, J). However, I have no way of knowing whether the disclosed grandchildren were the only children of the late children of the deceased, or the only claimants to those estates. To avoid hardship to anyone who may have a claim to the estate of such dead children of the deceased, the best thing would be to avoid devolving the estate directly to their children, and to, instead, devolve the property to their estates, so that causes can be instituted in respect of such estates, where claims by persons who are not apparent in these proceedings, if they exist at all, can be dealt with in such causes.

27. So, who are the survivors of the deceased and the persons beneficially entitled to his estate? They were spelt out in the affidavits of the applicant and the 2nd protestor. They would be the sons and daughters of the deceased. All the sons and daughters are entitled equally. Where any of the sons and daughters are dead, then the share due to them shall devolve upon their estates, to be distributed in succession causes to be initiated in their names.

28. The daughters of the deceased have not been involved in this cause since its inception. That should not be a bar to the court allocating to them the share due to them. It is their right in law, and they do not have to participate in the proceedings for the court to assign to them their share. It is theirs as of right. They do not have to ask for it. It should be up to them to decide what to do with it after it has been allocated to them. See Christine Wangari Chege Gichigi vs. Elizabeth Wanjira Evans & 11 others [2014] eKLR (Emukule, J) and In re Estate of Joyce Kanjiru Njiru (Deceased) [2017] eKLR (Gitari, J).

29. There is a protest by the 1st protestor. He claims that he bought a portion of the estate from some of the children of the deceased, and, therefore, he should be provided for. In short, he would like to be treated as a creditor of the estate. He has exhibited a sale agreement entered into in 1997. The starting point should be that a creditor of the estate can only be a person who transacted with the deceased during his lifetime, but the deceased died before settling him. It would also be someone who dealt with the estate, through the administrators, after the deceased died. Section 79 of the *Law of Succession Act* vests the estate in the administrators, and they can deal with the assets of the estate as legal owners would, by virtue of sections 82 and 83 of the *Law of Succession Act*. See In re Estate of Thiong'o Nginyayu Muthiora (Deceased) [2013] eKLR (Musyoka, J). However, when it comes to disposal of immovable assets, their powers are limited, they can only dispose of such assets after the grant is confirmed. See Tabitha Ntibuka Mboroki vs. Julius Gitonga M'Marete [2016] eKLR (Gikonyo, J) and In re Estate of Mbiyu Koinange (Deceased) [2020] eKLR (Muchelule, J). Sometimes need may

arise to sell immovable assets, before confirmation, to deal with urgent needs. Where need arises for that, and cannot wait until the grant is confirmed, the administrators would only act within the law, where they obtain prior leave of the court, before selling such assets. Where a sale happens between the date of death and the date of appointment of an administrator, the sale would still be invalid, as the principle of relation back does not apply in cases of intestacy, by virtue of section 80(2) of the *Law of Succession Act*. A grant of letters of administration intestate, obtained after the entering into such illegal sale, would not authenticate or sanitize it. See Roy Parcels Services Limited vs. Esther W. Ngure [2010] eKLR (Okwengu, J) and Simon Mwangi Ngotho & another vs. Susannah Wanjiku Muchina [2022] eKLR (Kasango, J).

30. The relevant portions of sections 79, 80 and 82 provide as follows:

> "79. Property of deceased to vest in personal representative
>
> The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."
>
> "80. When grant takes effect
>
> (1) ...
>
> (2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."
>
> "82. Powers of personal representatives
>
> Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-
>
> (a) ...
>
> (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
>
> Provided that-
>
> (i) ...
>
> (ii) no immovable property shall be sold before confirmation of the grant;
>
> (c) ..."

31. So, what happened here? The deceased died in 1989. The sale happened in 1997. Grant of letters of administration intestate was initially made herein 2005. So, when the sale agreement was entered into, the deceased had died, and, therefore, the 1st protestor did not deal with the deceased. The persons who sold the land to the 1st protestor were not administrators of the estate, for there were no administrators in 1997, as administrators were not appointed until 2005. The estate did not vest in anyone in 1997, and so no one had power or authority then to sell it to anyone else. As there was no grant in 1997, the issue of a confirmed grant did not even arise, and the persons who purported to sell the property had no iota of authority to do what they purported to do. The property did not vest in them. They were yet to inherit it. They had nothing to sell, and the 1st protestor bought nothing from them. He is entitled

to nothing from the estate herein. He can only look up to the individuals who purported to sell land that they did not have, to either refund his money or give him a portion of the land that will come into their hands after the grant herein is confirmed.

32. Perhaps something should be said about intermeddling. It is addressed in section 45 of the *Law of Succession Act*, which says that the property of a dead person can only be legitimately handled by a person who has been granted representation to the estate of the dead person. See Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J), Joseph Ondu Nyangiri vs. Monicah Auma Odeny & another [2021] eKLR (Odeny, J) and In re Estate of Erman Bundotich Arap Cheptoo (Deceased) [2022] eKLR (W. Korir, J). It goes on to criminalize the handling of such estate by a person who holds no grant to administer it. See Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J) and Gladys Nkirote M'Itunga vs. Julius Majau M'Itunga & 3 others [2016] eKLR (Gikonyo, J). Whatever those who alleged to sell estate property did amounted to intermeddling, so long as they held no grant. What they did amounted to criminal activity, and any act, done in furtherance of a criminal enterprise, cannot found basis for conveyance of any rights. Such an act would be unlawful, and transactions around it would be null and void. See In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J).

33. The relevant portions of section 45 say as follows:

> "45. No intermeddling with property of deceased person
>
> (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under 0this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
>
> (2) Any person who contravenes the provisions of this section shall-
>
> (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
>
> (b) ..."

34. I believe I have addressed all the issues that have arisen, with respect to the confirmation application, dated 3rd November 2017, and I am now in a position to determine it. I shall dispose of it in the following terms:

a. That the administrators appointed on 14th November 2016, and to whom a grant was duly issued, dated 1st February 2017, are hereby confirmed to go on with administration for the purpose of completing it;

b. That the persons beneficially entitled to a share in the estate of the deceased herein are Florence Auma, Juliana Nabwire, Clementina Kafwa, Victorine Kafwa, the late Mary Naliaka, Elizabeth Kafwa, Nicholas Odanga Kafwa, Peter Kafwa, the late Joseph Ndubi Kafwa, Fredrick Odanga Kafwa, John Odanga Kafwa, Thomas Kafwa, the late Emmanuel Kafwa and Margaret Kafwa;

c. That Bukhayo/Kisoko/1285 shall be shared equally between Florence Auma, Juliana Nabwire, Clementina Kafwa, Victorine Kafwa, the late Mary Naliaka, Elizabeth Kafwa, Nicholas Odanga Kafwa, Peter Kafwa, the late Joseph Ndubi Kafwa, Fredrick Odanga Kafwa, John Odanga Kafwa, Thomas Kafwa, the late Emmanuel Kafwa and Margaret Kafwa;

d. That for the children of the deceased who are dead, their shares or entitlement shall devolve upon their respective estates, to be distributed in succession causes to be initiated by their survivors or beneficiaries of their estates, and distribution of those shares shall be in those causes;

e. That the 1st protestor has no claim against the estate, and his protest is hereby disallowed;

f. That the estate shall be disposed of in those terms, and a certificate of confirmation of grant shall issue accordingly;

g. That the administrators shall cause the estate to be transmitted, in accordance with section 61(2) of the *Land Registration Act*, No. 3 of 2012, within the next 6 months after of the date herein, and the matter shall be mentioned thereafter, to confirm completion of the administration, and for closure of this court file;

h. That each party shall bear their own costs; and

i. that any party aggrieved by these orders is granted leave of 30 days, to move the Court of Appeal, appropriately.

35. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 26TH DAY OF MAY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Otanga, instructed by Bogonko Otanga & Company, Advocates for the applicant.

Mr. Balongo, instructed by Balongo & Company, Advocates for the 1st protestor.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the 2nd protestor.