



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 840 OF 2011

IN THE MATTER OF THE ESTATE OF MICHAEL MAPESA INJILI (DECEASED)

JUDGMENT

1. The deceased to whose estate this cause relates, was known as Michael Mapesa Injili, who died on 7th September 1967. There is a letter on record from the office of the Chief of Lubinu Location, dated 1st December 2006. It indicates that the deceased had been survived by a widow, Esther Chitayi Mapesa, and two sons, being Moses Masai Mapesa and Morrice Wesonga Mapesa. The deceased is said to have had died possessed of the property described East Wanga/Lubinu/549. It is stated that the family had agreed on Morrice Wesonga Mapesa as administrator of the estate.

2. Representation to the intestate estate of the deceased was initially sought in Butere SRMCSC No. 10 of 2008, Morrice Wesonga Mapesa, as son of the deceased. He was expressed to have had been survived by two sons, being Moses Masai Mapesa and Morrice Wesonga Mapesa. He said to have died possessed of a property known as East Wanga/Lubinu/549. Dickson Juma Eshitubi is listed as a buyer. Letters of administration intestate was made to Mourice Wesonga Mapesa on 9th May 2008, and a grant was duly issued on 9th May 2008.

3. There were proceedings in Butere SRMCSC No. 10 of 2008, which culminated in an order made on 19th May 2011, by consent, for Shaban Eshianda Juma, to be included in the cause as a beneficiary of the estate, and to be given 5 acres out of East Wanga/Lubinu/549, as ordered in Kakamega CMC Award No. 39 of 2006 on 22nd May 2009. It was directed that the matter be fixed for confirmation of grant.

4. In compliance with the said directive, to file a summons for confirmation of grant, the administrator lodged a summons in Butere SRMCSC No. 10 of 2008 on 19th August 2011, dated 16th August 2011. It listed the survivors of the deceased to be all the two sons listed in the petition. It proposed distribution of East Wanga/Lubinu/549 be shared out between the two sons, Sheban Eshianda Juma and another individual, in the following proportions:

- a. Morrice Wesonga Mapesa – 3 acres
- b. Moses Masayi Mapesa – 3 acres
- c. Sheban Eshianda Juma – 5 acres
- d. Zakayo Muchelule Mukoya – 1 acre.

5. When the summons for confirmation of grant was placed before the court, in Butere SRMCSC No. 10 of 2008, on 17th October 2011, Hon. ES Olwande, Senior Resident Magistrate, formed the opinion that the value of the 12 acres sought to be shared out exceeded the jurisdiction of the resident magistrate's court, given the provisions of the Law of Succession Act then. It was directed that the matter be placed before the High Court.

6. Following the orders made on 17th October 2011 in Butere SRMCSC No. 10 of 2008, the matter was placed before SJ Chitembwe J on 8th December 2011, where it was directed that the same be allocated number Kakamega HCSC No. 840 of 2011. Further directions were made on 26th January 2012, that the administrator files a fresh application for confirmation of grant, and that the other parties file their replies if they were so minded.

7. In compliance with the directions of Chitembwe J, the administrator filed a summons for confirmation of grant herein, on 6th February 2012, dated 30th January 2012. The persons listed in the affidavit in support as survivors were Moses Masayi Mapesa and Maurice Wesonga Mapesa, in their capacities as sons of the deceased. The deceased was expressed to have died possessed of a property known as East Wanga/Lubinu/549, and it was proposed that the same be shared equally between the two sons equally.

8. An affidavit of protest was lodged in the cause against the summons for confirmation of grant, on 14th February 2012, dated 2nd February 2012 by Dickson Juma Eshitubi. He averred that he had bought a portion of East Wanga/Lubinu/549 from the administrator, Maurice Wesonga Mapesa for Kshs. 280, 000.00, vide a sale agreement that was executed on 7th October 2008, and was allowed to move into the land, but was later denied access to the land. He complained that the administrator has not included him in the proposed distribution, yet he sought to include another individual, known as Shaaban Eshianda Juma, an alleged purchaser of a portion of the same property. He urged that the grant ought not be confirmed before his plight was addressed. He had attached to his affidavit, a copy of the sale agreement between him and the administrator, dated 7th October 2008. I shall refer to Dickson Juma Eshitubi as the first protestor.

9. On 7th March 2012, Shaban Eshianda Juma lodged herein what he titled as a notice of objection, dated 6th March 2012. In it he averred that he had an interest in East Wanga/Lubinu/549, and that he had been using it since 1972. He stated that he had been awarded 5 acres out of East Wanga/Lubinu/549 in Kakamega CM Award No, 39 of 2006, which he asserted was still a valid judgement, and that the court had ordered that he be included in the succession proceedings, by an order made in Butere SRMCSC No. 10 of 2008 on 19th May 2011. He asserted that he had occupied the property for over thirty (30) years. He had attached a copy of a summons filed in Butere SRMCSC No. 10 of 2008 on 14th November 2008, of even date, and an order extracted from orders made therein on 19th May 2011, of even date. He had also attached a copy of the award made in Kakamega CM Award No, 39 of 2006 dated 25th May 2009.

10. The proper way to react to a summons for confirmation of grant, by a party who is opposed to the proposals made, is to file an affidavit of protest. That is what Rule 40(6) of the Probate and Administration Rules requires, when it provides:

“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”

11. Rule 40 of the Probate and Administration Rules, which governs the procedure for confirmation of grants, does not provide for the filing of notices of objection, of the kind that Shaban Eshianda Juma had filed. He should have filed an affidavit of protest. Evidence of the sort that he had filed with the purported notice could only be attached as annexures to an affidavit, which made it sworn evidence placed before the court on oath. Clearly, Shaban Eshianda Juma has not filed a proper protest to the summons for confirmation of grant, dated 30th January 2012. I shall, nevertheless, treat and fir to him as the second protestor,

12. The administrator filed a reply to the affidavit of protest by the first protestor. He averred that he never sold any land to the first protestor, and that the signature on the agreement purported to be his was forged. He averred that it was his brother, Moses Masai, who had allowed the first protestor on the land, to build a shop on an eighth of a ha, but he never bought 5 acres of the property, neither was entitled to the 5 acres. He said that he discovered that first protestor had initiated a succession cause in the estate of the deceased, and even filed a summons for confirmation of grant, purporting it to have been filed by him. He withdrew the said summons for confirmation of grant, and filed a fresh one. He further averred that even if the first protestor had purchased any portion of the suit land, the said agreement was unlawful, illegal and unenforceable for failure to comply with the law.

13. Directions were given on 7th March 2012, for the disposal of the matter as the parties were plaintiff and defendants in a suit commenced by way of plaint.

14. The matter proceeded orally. The oral hearings commenced on 3rd December 2012, with the administrator being the first to take the stand. He explained that the deceased was his father, who had married one wife, with whom he had 5 children. The children were named as the late Hadija Mapesa, the late Amanywa Mapesa, the late Maloba Mapesa, Moses Masai Mapesa and Morris Wesonga. He stated that the late Amanywa and the late Maloba were married. The deceased was said to have had died possessed of the property described as East Wanga/Lubinu/549, which measured 12 acres. He proposed that the same be shared out equally between him and Moses Masai Mapesa. He stated that he was aware of the award by the elders. He confirmed that the elders had given the second protestor five acres out of the estate property. He said that according to the matter in Butere SRMCSC No. 10 of 2008, the second protestor was set to get five acres, and the administrator 3 acres. He conceded that the second protestor lived on the land. He said he did not object to the second protestor getting the five acres., but from the share due to Moses Masai.

15. The second protestor testified next. He averred that he lived on the estate property, East Wanga/Lubinu/549, since 1971, having bought the property from the deceased, the wife of the deceased, the administrator and Moses Masai. He then said the land was sold to him by the wife of the deceased and her sons, Moses and Maurice. He stated that the three gave him the land. They subsequently took him to village elders, but he won the case. He also referred to the proceedings in Butere SRMCSC No. 10 of 2008, which he said awarded him 5 acres. He said that he was claiming 5 acres and nothing more. He said that his house got burnt and his documents got destroyed there.

16. The first protestor testified next. He said that he bought land on 12th December 2006, from Moses and Morris. He said that he had also bought 5 acres. He produced a sale agreement. He stated that he and his family lived on the land. He stated that there was one agreement for 1 acre, and then he bought the other acre. He said that the sale agreement for 5 acres was entered into on 7th October 2008. He said he moved into the land in 2006, when the instant case was pending. The first protestor called his wife, Zaituni Juma, who stated that the first protestor had bought the land from Morris and Moses. He said the portion that he bought was 2 acres. She produced two letters from the Chief to support her case.

17. Several documents were produced at the oral hearing. There was the order made on 25th May 2009, in Kakamega CMC Award No. 39 of 2006, where the court adopted an award of elders as an order of the court. The said order revoked all subdivisions that had emanated from East Wanga/Lubinu/549, and restored the land to its original status. It also directed the administrator, and his brother, Moses M. Mapesa, to file letters for administration for East Wanga/Lubinu/549, out of which the second protestor was to be given 5 acres. The second document is the proceedings in Mumias Land Tribunal Case No. 36 of 2005, between the administrator as plaintiff, and Moses Masayi Mapesa and Sheban Eshianda Juma, which culminated in the orders the subject of Kakamega CMC Award No. 39 of 2006. In those proceedings, the administrator testified that the administrator had had the property subdivided after the deceased died, and had allocated to himself a portion

of it before succession had been conducted. The subdivision he alleged left him without land, since the remainder of the land was registered in the name of his brother, Moses Masayi. Moses Masayi Mapesa testified that their mother who sold the land, and gave some of the money, with which he bought a cow and paid dowry. The second protestor testified that he bought the land from the widow of the deceased and her two sons in 1971. He moved in and took possession. The portion he bought was transferred to his name by Moses, on the instructions of the widow. He said that the sale agreement was signed by Moses and his mother. Julius Olwichi Keya testified as a witness for the administrator. He stated that he and the administrator conducted a search on East Wanga/Lubinu/549, and found that it had been subdivided, yet no succession had been conducted. The subdivision was done in 1971, the numbers came out in 1972. In its ruling, the tribunal directed the administrator to move the High Court of Kenya to obtain orders revoking the titles created from the subdivision of East Wanga/Lubinu/549, directed the two sons of the deceased to seek representation to the estate of the deceased, directed the second protestor to place his claim to 5 acres in the succession cause to be filed and the remaining 7 acres to be shared equally between the two sons of the deceased. The third document is the order made in Butere SRMCSC No. 10 of 2008, on 19th May 2011, adopting the award made in Kakamega CMC Award No. 39 of 2006, on 22nd May 2009, dated 25th May 2009. The fourth document is the affidavit that the administrator swore on 16th August 2011, in support of the summons for confirmation of grant, filed in Butere SRMCSC No. 10 of 2008, where the administrator had proposed that the second administrator be given 5 acres out of the land.

18. The fifth document is an acknowledgement of receipt of money, in Kiswahili, dated 21st December 2006, with respect to sale of land to the first protestor, signed by several individuals, but curiously not by the first protestor, the administrator and Moses Masai. The sixth document is a letter from the Assailant Chief for Lusheya Sub-Location, dated 8th October 2012, confirming that the first protestor had placed a dispute with his office with regard to East Wanga/Lubinu/549, which he was referring to the Chief of Lusheya Location. He remarks that it looked like that piece of land had very many interested parties. The seventh document is dated 7th October 2008, which is a sale agreement signed by Moses Mapesa and the first protestor, over sale of 5 acres of East Wanga/Lubinu/549, for Kshs. 280, 000.00. The eighth document is a caution registered against the title in East Wanga/Lubinu/549, by the first protestor, claiming a purchaser's interest, dated 14th January 2013. The ninth document is a letter dated 15th November 2012, signed by the administrator and his brother, Moses Masai Mapesa, addressed to the Chief of Lusheya Location, proposing to refund the purchase price to the first protestor. The tenth document is an acknowledgement of sale money, signed between the administrator, the first protestor and Moses Masai Mapesa on 14th December 2006. The eleventh document is a land sale agreement made on 27th November 2006, between the administrator, the first protestor and Moses Masai Mapesa. It was for sale of two acres of land, for a consideration of Kshs. 140, 000.00. The parties were to thereafter initiate succession proceedings to facilitate the sale, but in case of breach there was provision for refund of the purchase price. The twelfth document is a land sale agreement which is also dated 27th November 2006, for sale of 2 acres of land to the first protestor, this time for Kshs. 80, 000.00. It was signed between the 1st protestor, the administrator and Moses Masai Mapesa. The thirteen document is a letter from the Assistant Chief of Lusheya Sub-Location, dated 19th January 1998, to the effect that the house for Livingstone Omusotsi Juma had burnt down, and property inside, including official documents relating to land that he had been purchasing had been destroyed. The land in question is identified as East Wanga/Lubinu/1214. The fourteenth document is a letter from the Chief of Lusheya Location, dated 9th November 2011, in which it is stated that the deceased was survived by two sons, who were staying on the estate land with five individuals who had bought land from the deceased. The purchasers are identified as the second protestor who bought in 1971, Abdala Kabeyi Kweyu who bought land in 1972, Zeituni Jondo Amani who bought in 1976, Orata Juma Atenya who bought in 1972 and the first protestor who bought land in 2007. The fifteenth and final document is a certificate of death in respect of Livingstone Omusotsi Juma, who died on 29th May 2006.

19. At the close of the oral hearing on 3rd December 2012, an oral application was made for a surveyor to visit the subject land, and an order was made that the Kakamega Land Registrar and Surveyor to visit East Wanga/Lubinu/549, to demarcate it on the ground, and file a report.

20. The record reflects that the surveyor visited the land on 13th November 2013, and a report was prepared, dated 28th November 2013. It reflects that the persons in actual possession in East Wanga/Lubinu/549 and the acreage occupied by them. They are named as Dickson Juma, Moses Masai Mapesa, Zakayo Muchelule Mukoya, Zeituni Jondo Amani, Morrice Wesonga Mapesa, Orato Juma Atenya, Kabeyi Kweyu Abdala and Shabani Eshianda Juma. The surveyor drew a chart of the layout of the property and the manner it was occupied by the individuals identified to be in possession. The said report was filed in court, vide a letter from the District Survey Office, dated 25th February 2014, on 27th February 2014.

21. The surveyor's report was accepted by most of the parties, save for the first protestor who indicated that the portion allocated to him, as per that report, was too small, and did not amount to the 5 acres he had bought. It was directed that issue be tried orally, with the first protestor being treated as a plaintiff. The matter came up several times, but a trial was never conducted in that behalf. I took over the matter on 19th November 2019, when I was informed that the matter had been concluded, and I was invited to give directions, which I did, that the proceedings be typed, and that the parties file written submissions.

22. When the matter was mentioned on 14th July 2020, to confirm filing of written submissions, the advocate for the administrator informed me that the matter had not been concluded as there was an issue in respect of which witnesses were to testify. I was referred to the proceedings of 30th June 2014, to an order that required that the first protestor be heard. After going through the typed record, I directed that there were orders made on 30th June 2014 and 21st July 2015, which envisaged further proceedings founded on the surveyor's report. I then reviewed my directions of 19th November 2019, and directed that a hearing on that aspect be conducted on 30th September 2020.

23. On 30th September 2020, I directed that since it was only the first protestor not agreeing with the surveyor's report, he was the only person I was to hear. He took the witness stand, and testified. He stated that the surveyor took measurements of the land that he had not bought. He said that he had bought 5 acres from the two sons of the deceased, but when the surveyor came they said his land was 0.12 hectare. He said he wanted his 5 acres, and was not agreeable to a refund of the purchase price. During cross-examination, he said that when the surveyor came he only took measurements of his homestead and the portion that he was cultivating. He confirmed that he did not buy the land from the deceased, for he entered into the sale transactions after he died.

24. The administrator also indicated that he did not agree with the report, and I elected to hear him too. He was sworn and testified. He said that his brother entered into sale agreements with many people, selling portions of the land to them, and bringing them into the land before

succession was initiated. He identified the said individuals as the persons listed in the surveyor's report. He said that all the said persons purported to buy the land from his brother, Moses Masai Mapesa, and not from the deceased.

25. What I am entrusted with determining is a confirmation application, dated 30th January 2012, in respect of which two protests have been filed. In a confirmation application, the court is called upon to confirm two issues – the appointment of the administrators and the distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(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 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; 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 such grant shall specify all such persons and their respective shares.”

26. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law. I suppose that with regard to the third limb, the court will be guided chiefly by the material before it that points to whether the grant had been obtained properly and whether the administrators had administered the estate properly and in accordance with the law up to the point of the filing of the confirmation application.

27. The issue as to appointment of the administrator, and whether he ought to be confirmed, has not been contested, and therefore I shall not exercise my mind too strenuously about it. I shall presume that the administrator was properly appointed. I have no material before me which would suggest that he has not administered the estate in accordance with the law, and should not be confirmed to complete administration, especially distribution of the estate.

28. The only concern I have is that the grant that I am called upon to confirm was made in Butere SRMCSC No. 10 of 2008, and the cause was transferred to the High Court, on the basis that the magistrate's court seized of it lacked pecuniary jurisdiction. When the High Court got seized of the matter it did not revoke the grant made by the magistrate's court and make a fresh one to issue out of the cause before the High Court. So technically, I am asked to confirm the grant the magistrate's court made on 9th May 2008 in Butere SRMCSC No. 10 of 2008. That cause no longer exists. The way out of the matter should be to revoke the grant made on 9th May 2009 in Butere SRMCSC No. 10 of 2008, and thereafter make a fresh one, and proceed to confirm the same on the spot, if at all.

29. Distribution of assets raises two issues. The first, and the more critical is about the assets that make up the estate. Succession is all about property, and without property there is no estate to be distributed, and the question of succession would not even arise. Secondly, is the matter of the persons who are entitled to a share of the property. The two critical aspects of confirmation are brought in the proviso to section 71(2). That proviso requires that the court be satisfied, before distribution, that the administrator has ascertained all the persons who are beneficially entitled to the estate and has determined the shares of each one of them to the assets. That presupposes that all the assets available for distribution should have also been ascertained before distribution can be proposed, for distribution should be of the assets that are available for that purpose. In the instant case, there is no dispute, that the deceased died possessed of only one property, East Wanga/Lubinu/549. Therefore, the matter of the assets of the estate being ascertained should not be an issue.

30. The other requirement is assessment of the persons who are beneficially entitled to the assets. The deceased died intestate, and therefore the court should only be concerned about who his survivors are for it is such persons who would be entitled in intestacy to a share in the estate. From what is on record, the deceased married only once, and had two sons and three daughters. He died in 1967, long before the Law of Succession Act came into force on 1st July 1981. By dint of section 2(2) of the Law of Succession Act, his estate fell for distribution in accordance with the law in force prior to 1st July 1981, but administration should be subject to Part VII of the Law of Succession Act, under which section 71 falls.

31. In these proceedings, the only members of the family of the deceased who were listed as survivors are the two sons. None of the three daughters were listed. It emerged that all three are dead. Two were said to have had been married, but it was not indicated whether they had children. If the daughters had been survived by children, then their children ought to have been brought to the fore. That is what section 51(2) of the Law of Succession Act, which is in Part VII of the Law of Succession Act, and which provides for applications for grants of representation requires. It does not matter that the persons envisaged in section 51(2) are not entitled to a share, it is required that they be disclosed. The law does not require that the petitioner only lists those entitled to a share in the estate. Section 51(2) applies regardless of whether the deceased died before or after 1st July 1981.

32. Section 51(2) states as follows:

“(1...

(2) Every application shall include information as to—

- (a) the full names of the deceased;
- (b) the date and place of his death;
- (c) his last known place of residence;
- (d) the relationship (if any) of the applicant to the deceased;
- (e) whether or not the deceased left a valid will;
- (f) the present addresses of any executors appointed by any such valid will;
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- (h) a full inventory of all the assets and liabilities of the deceased; and
- (i) such other matters as may be prescribed.”

33. The deceased herein allegedly died intestate. The provision in section 51(2), which is of relevance is paragraph 2(g). All the persons mentioned in paragraph (g) ought to be listed, whether or not they will take a share in the estate. So, based on that the administrator did not properly ascertain the survivors of the deceased. I am, however, inclined to overlook that shortcoming, given that the law on distribution to apply would be customary law, under which married daughters did not have a right to inherit. I shall, therefore, take it that the two sons are the persons entitled to a share in the estate. However, the matrix could change should any of the survivors of the daughters come forward to claim a share, given the provisions of the Constitution, 2010, and more so its Article 27, on freedom against discrimination.

34. The administrator proposes equal distribution of the property as between the two sons. No effort has been made to demonstrate whether equal distribution is what customary law prescribed, but then Kenya is under a new constitutional dispensation, which envisages equal treatment, equity and fairness, and it would appear that equal distribution of the property between the two sons is the way to go.

35. The protestors are individuals who allege to have had bought the estate property. It came out clearly that the alleged sales were not between them and the deceased, for they in fact happened after the deceased died, and before representation had been granted to anyone.

36. Section 79 of the Law of Succession Act vests the estate of the deceased in the personal representatives of the deceased, be they executors or admissions. In this case, the deceased died intestate and the estate, therefore, vests in the administrator. By virtue of section 80(2) of the Law of Succession Act, a grant of letters of administration intestate takes effect from the date of the grant. The grant in Butere SRMCSC No. 10 of 2008 was made on 9th May 2008. That is the effective date when East Wanga/Lubinu/549 vested in the administrator. It was from that date onwards that the administrator could exercise the powers over the property that are set out in section 82 of the Law of Succession Act, and incurs the duties imposed on administrators by section 83. See generally *Ingall vs. Moran* [1944] KB 160, *Kothari vs. Qureshi and Another* [1967] EA 564, *Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd* HCCC No. 543 of 2005, *Otieno vs. Ougo and another* (number 4) [1987] KLR 407, *Troustik Union International and another vs. Mrs. Jane Mbeyu and another* [1993] eKLR, *Martin Odera Okumu vs. Edwin Otieno Ombajo* HCSC N9479 of 1996, *Coast Bus Services Limited vs. Samuel Mbuvi Lai* CACA No. 8 of 1996, *Ganinjee Glass Mart Ltd & 2 others vs. First American Bank Ltd* [2007] eKLR, among others.

37. The property of a dead person can only be disposed of by way of sale by a person in whom it has been vested by law, by virtue of section 79 of the Law of Succession Act. It is only he that can exercise the powers in section 82, which include the power to sell such property. Any sale of property by a person to whom it has not been vested amounts to intermeddling, which has been outlawed by section 45 of the Law of Succession Act. Any sale of such property contrary to the provisions of sections 45, 79 and 82 of the Law of Succession Act render such sales unlawful and void. See *Gitau and Two Others vs. Wandai and Five Others* [1989] KLR 231 and *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti* [2001] eKLR. It is clear beyond peradventure that the sale transactions that happened between the protestors and whoever sold portions of East Wanga/Lubinu/549 were contrary to sections 45, 79 and 82 of the Law of Succession Act, and the said transactions were therefore unlawful, void and of no effect. For at the time of the alleged sales, the property sold had not been vested in the persons who purported to sell them to them. I should add that the fact that representation in intestacy was eventually obtained did not help matters. For a grant of letters of administration intestate does not relate back to the date of death. It is only effective from the date it was

made. It does not, therefore, authenticate the acts of the administrator undertaken before their appointment as such.

38. For avoidance of doubt, Sections 45, 79 and 82 of the Law of Succession provide as follows:

“45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this 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) 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.”

“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.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(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;”

39. The second protestor has argued that he had court orders that granted him rights over the property. These emanated from an award of the Land Disputes Tribunal filed in 2005. They were subsequently adopted as orders of a court. I doubt whether that assists the second protestor at all. Firstly, the court has held that the mere filing of court proceedings over the property of a dead person where no representation has been granted amounts to intermeddling with the estate. Representation was granted herein in 2008, so any proceedings before a court of law or a tribunal established in law amounted to intermeddling with the estate, and any orders obtained would be a nullity. That is the case here. The proceedings in Mumias Land Tribunal Case No. 36 of 2005 and Kakamega CMC Award No. 39 of 2006 were nullities, and the orders made on their basis are nullities, which conferred no rights whatsoever to the second protestor. Secondly, the tribunal in Mumias Land Tribunal Case No. 36 of 2005 had limited jurisdiction under the Land Disputes Tribunal Act, Cap 303A, Laws of Kenya, now repealed, which was division of or determination of boundaries to land, a claim to occupy or work land, and trespass to land. There is overwhelming case law to effect that that jurisdiction related only to land held under customary tenure, and not over registered land, and in particular the tribunal could not determine disputes relating to ownership of land. See *Republic vs. Mwea Land Disputes Tribunal* [2009] eKLR, *Republic vs. Homa Bay Land Disputes Tribunal & 3 others* [2017] eKLR and *Republic vs. Ndivisi Division Land Disputes Tribunal comprising Harriet Sifuna & 2 others ex parte Wilson Sarai Wasai* [2009] eKLR. The award by that tribunal relied herein was in excess of its jurisdiction. It purported to cancel a title to land, and to determine ownership rights with respect to registered land and to share out property belonging to a deceased person amongst the sons of the dead person, The tribunal had no jurisdictions to grant the orders it made, and any orders made without jurisdiction were null and void. The purported adoption of the tribunal’s award by the court in Kakamega CMC Award No. 39 of 2006 could not salvage it. An order made without jurisdiction, is what is described as dead in water or on arrival, it cannot be salvaged, by even by a purported adoption by a court. It amounts to nothing, and there would be nothing to be adopted by a court. See *In re Estate of John Akwemba Akubania (Deceased)* [2020] eKLR.

40. Although only the two protestors came forward to stake a claim to the property, it emerged, when the surveyor went to the ground, upon a request by one of the parties, that there were three other persons in occupation of the said land. All claimed to have had acquired the property after the deceased died. I would like to say two things about this. A probate court distributes property in accordance with the applicable law, in this case the Law of Succession Act. That law, and customary law too, envisage distribution of property amongst family members. It is not about who is in occupation. Mere occupation grants no inheritance rights. Whatever rights it confers, if any, cannot be pronounced by a probate court, A party who advances a case that they have acquired certain rights over property on account of many years’ occupation or possession should advance that case elsewhere, that is before the courts with jurisdiction under the Environment and Land Court Act, No. 11 of 2012. Secondly, the probate court does not distribute estate property based on the acreage actually occupied by the parties. The principles that govern distribution are stated by the law, whether the Law of Succession Act or customary law, and the said

principles say nothing about entitlement based on actual occupation of the land on the ground. Dragging surveyors to succession disputes, is, often, an exercise in futility, as it adds little or no value to the proceedings.

41. The final word is that the persons who are entitled to the intestate estate of the deceased herein are his children, in this case, I shall take it to be his two sons, Morice Wesonga Mapesa and Moses Masayi Mapesa. The alleged purchasers have no claim against the estate, as they did not transact with the deceased, nor with persons in whom the estate had been vested as at the date the transactions took place. They can only look up to the persons who sold the property to them. I shall, therefore, distribute the estate to the two sons equally.

42. In the end, the final orders that I shall make in this matter are as follows:

- a. That I hereby revoke the grant that was made on 9th May 2008, in Butere SRMCC No. 10 of 2008,, to Mourice Wesonga Mapesa;**
- b. That I hereby appoint Mourice Wesonga Mapesa administrator of the estate of the deceased herein, and a grant of letters of administration intestate shall issue accordingly to him out of the instant cause, Kakamega HCSC No. 840 of 2011;**
- c. That the grant made in (b) above is hereby confirmed, so that Mourice Wesonga Mapesa is hereby confirmed as administrator of the estate, and East Wanga/Lubinu/549 is hereby devolved equally between Mourice Wesonga Mapesa and Moses Masayi Mapesa;**
- d. That a certificate of confirmation of grant shall issue to the administrator in the terms set out in (c) above;**
- e. That the protestors, and other persons who claim to have had acquired interest in East Wanga/Lubinu/549 by way of sale, shall pursue whoever, between Mourice Wesonga Mapesa and Moses Masayi Mapesa, had purported to sell the subject property to them;**
- f. That each party shall bear their own costs; and**
- g. That any party aggrieved by the orders that I have made herein has leave to move the Court of Appeal appropriately, within twenty-eight (28) days.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH, 2021

W. MUSYOKA

JUDGE