REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 1246 OF 2012

IN THE MATTER OF THE ESTATE OF TSIMANGO AKAFWALE (DECEASED)

JUDGMENT

1. What is for determination is the summons for confirmation of grant, dated 10th November 2016, filed at the instance of Debora Mwanika Omodo. She is the administratrix of the estate, by virtue of letters of administration intestate made to her on 26th February 2013 and a grant issued to her on 24th September 2013. I shall refer to her, henceforth, as such. She proposes distribution of the estate between herself and other individuals, being Alice Shiroya, Esther Kura Omoto, Philip Atolwa Omoto, Daniel Anyangu Omoto and James Sheila Omoto, at diverse proportions. It is not disclosed, in the application, how these other individuals are related to the deceased.

2. There is a reply to the application, by Gabriel Mulabi Nganyi, vide an affidavit sworn on 28th November 2016. The summons for confirmation of grant is premised on section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, and any opposition or objection to it ought to be in the nature of a protest, in terms of Rule 40(6) of the Probate and Administration Rules. Gabriel Mulabi Nganyi has christened his reply a replying affidavit, rather that the affidavit of protest envisaged in Rule 40(6), and I shall presume that the replying affidavit is intended to be his protest affidavit under Rule 40(6), and I shall, accordingly, refer to him, henceforth, as the protestor. He essentially asserts entitlement to the estate property, being Kisa/Mundeku/575, having entered into a sale agreement over it in 1983, with some person, who I am unable to figure out, as the copy of the agreement, attached to evidence the sale is in a dialect of the Luhya language, and no English translation has been provided, and I, therefore, being not familiar nor proficient in the Luhya language, am totally unable to decipher what the document is all about.

3. The protestor herein commenced proceedings, by way of citation, in Butere SRMCSC No. 42 of 2010, dated 19th May 2010, in the matter of the estate of Jackson Omoto Tsimango, deceased, addressed to Dibora Omoto, who I suppose is the administratrix herein, described as a widow of the deceased. The protestor described himself as a liability of the estate and one of the persons beneficially entitled to a share in the estate. In the affidavit that he swore in support, on 19th May 2010, he explained that the husband of the administratrix was the son of the deceased herein, Tsimango Akafwale, the registered proprietor of Kisa/Mundeku/575. He stated that he had bought 3 acres out of Kisa/Mundeku/575, without disclosing whether he bought the same from the deceased herein or from his son, the late Jackson Omoto Tsimango. The late Jackson Omoto Tsimango was said to have had died in 1989, before the registration of Kisa/Mundeku/575 had been changed from the name of the deceased herein. The Protestor complained that the administratrix herein had not yet taken out representation to the estate of her late husband, Jackson Omoto Tsimango, and it was on that basis that he was seeking a citation to issue to her to take or refuse to take out letters of administration to the intestate estate of her late husband.

4. It would appear that it was the filing of the citation cause, in Butere SRMCSC No. 42 of 2010, that prompted the administratrix herein to initiate the cause, in Butere SRMCSC No. 56 of 2010, in the estate of the deceased herein, Tsimango Akafwale, who had died on 19th September 1967. The administratrix described herself as the widow of the deceased person in that cause, and listed herself as the sole survivor of the deceased, who had died possessed of a property known as Kisa/Mundeku/575. That cause was published in the *Kenya Gazette* of 20th August 2010, under Gazette Notice No. 9948. On 20th September 2010, the protestor lodged herein an objection to the making of a grant, in Form 76, dated 18th September 2010, wherein he alleged to have had bought the property from the deceased, to have had been in continuous occupation of the property since 1967, to have had developed the property, and that the administratrix had remarried after the demise of the deceased, and moved out of the property. He essentially asserted the right of a purchaser, and claimed to be the *bona fide* administrator. The protestor did not, thereafter, comply with section 68(1) of the Law of Succession Act, by filing an answer to the application and a cross-application, and, therefore, there was no proper objection to the making of the grant, and the objection ought to have been ignored, with the court proceeding under section 69(1) of the Law of Succession Act, by making a grant in accordance with the original application. The court continued to entertain the flawed objection. Butere SRMCSC No. 56 of 2010 was subsequently transferred to the High Court at Kakamega, vide orders of the Butere court made on 5th April 2012 and 12th July 2012, where it became Kakamega HCSC No. 1246 of 2012, the instant cause. On 26th February 2013, the High Court stated that the administratrix, as widow of the deceased, was the proper person for appointment as personal representative of the deceased, and a grant of letters of administration intestate was made to her, dated 24th September 2013. In the order of 26th February 2013, the administratrix was directed to file for confirmation of her grant, which she did, as narrated in paragraph 1 of this judgment, and the protestor replied to the application as narrated in paragraph 2 hereabove.

5. Directions on the disposal of the application were given on 2nd May 2013, for oral evidence.

6. The oral hearing commenced on 5th October 2015. The protestor, George Malubi Nganyi, national identity card number xxxxxxx, was the first to take to the witness stand. He stated that he had bought the land, Kisa/Mundeku/575, from Jackson Omoto Tsimango on 11th June 1983, in the presence of witnesses, for a consideration of Kshs. 10, 000.00. The money was paid in instalments to the late Jackson Omoto Tsimango and the administratrix. The seller was said to be a son of Tsimango Akafwale, the deceased herein. The protestor allegedly took possession of the property in 2012. He testified that the administratrix, on a date that he did not disclose, entered the land cut trees and started fencing the land, with an intent of giving it to strangers. He reported to the authorities and the intruders were driven out. He asserted that since 2012 he had not been disturbed by anybody. He produced a copy of the sale agreement dated 11th June 1983.

7. During cross-examination, the protestor conceded that at the time of the sale, the property was registered in the name of the father of the seller, that is to say the deceased herein, Tsimangu Akafwale, and that the seller did not have a title to the land, since it was still in his father's name. The seller, Jackson Tsimango died in 1989. He stated that there was a case at the Chief's office, in 1986, when a Omuomo claimed that the land was his. He stated that prior to 1983, he used to lease the land from the administratrix. He stated that he was the one who drafted the sale agreement, which he signed and was witnessed by a Pastor Machio. In 1993, the administratrix, who had left sometime after 1989, to take the position of her late husband at his former place of work, returned to claim that the protestor was squatting on her land. She then reported the matter at the office of the local Assistant Chief in 1994. She did a similar thing in 2004. He stated that it was the late son of the deceased, the seller of the land, who gave him the original title deed to the land. He denied that the administratrix had given him the original title deed for safe keeping. He said he did not know when the deceased herein died.

8. At re-examination, he stated that the deceased herein was dead by 1983, when he, the protestor, was buying the land, and that the administratrix gave him the title deed for the land, when her late husband, the alleged seller of the land was still alive. He added that she gave him the title deed to keep during the succession proceedings.

9. The second witness for the protestor was Patrick Omukuba Eshikunyi, national identity card number xxxxxxx. He testified that he was privy to the sale transaction. The administratrix, who he described as his sister-in-law, had allegedly sent him to procure a buyer for the subject land sometime in 1983. He obtained one, and the parties settled on a sale price of Kshs. 10, 000.00. They entered into a sale agreement in his presence. He said that he knew two sons of Omoto, but he did not know the person referred to as Jackson. He said he did not know how to write, and that he signed documents by thumb printing, although he also said he could write his name. He later said he knew Jackson Omoto, who he said was present at the execution of the sale agreement.

10. The case for the administratrix, Debora Mwanika Omodo, national identity card number xxxxxxx, opened on 18th November 2019, when she took to the witness stand. She testified that the deceased was her father-in-law, and that her husband was the late Jackson Omoto Tsimango. She stated that the deceased herein had other children, who were all dead, as at the date of her testimony. The said children were said to have had died unmarried, except for George Malubi, the protestor. She stated that the protestor had raised an objection, claiming that he had bought the land from Jackson Omoto. She said that that was a lie, as she was the one who used to lease out the land to the protestor, and he would pay her for the same. After her husband died in 1989, her employer invited her to take his position at his former place of work, and so she relocated to Nairobi. She said the lease agreement between her and the protestor was not in writing, but was a loose oral understanding between them. She stated that he was still using the land, as at the time of her testimony, and she accused him of cutting down her trees and burning charcoal. She stated that she asked him to leave, but he refused, and that at one time she used the land, but was arrested and charged at the Butere court. She stated that the persons she had listed in her summons for confirmation of grant were her own children. She stated that as at the time of her marrying her late husband, the deceased had died, and she never got to meet him. She asserted that the deceased never sold the land to the protestor, the title deed was never in her late husband's name, and that her late husband had no property that he could sell to the protestor. She asserted that the cause herein was with respect to succession to the estate of the deceased, and she wished to distribute the assets to the relatives of the deceased. She stated that the protestor was not related to the deceased, as he was neither a son nor brother of the deceased.

11. During cross-examination, she stated that she was the person who had the cause transferred to Kakamega from Butere, and that she had documents that showed that she was the administratrix of the estate of her late husband. She stated that she had not signed any document in 1984 nor 1985 to sell the land, and that she had not witnessed her late husband receive any money to sell any land.

12. Willy Ogonji Chimuti, national identity card number 6309269, the Chief of Kisa Central Location, testified as the second witness for the administratrix. He stated that the deceased herein died a long time ago, and that he had had two sons and a daughter, who were all dead. He described the administratrix as the sole survivor of the deceased. He stated that the protestor was the one using the land. The administratrix had objected to the protestor using the land, and he had asked the protestor for evidence to show that he had bought it, but he produced none. He asserted that no one produced evidence that the deceased had sold his land to anyone. He stated that the deceased died in 1967, and that at that time there was no issuance of burial permits nor death certificates. He said that the only son of the deceased died in 1989, and the administratrix was the only person entitled to apply for representation to his estate. He stated that it was the family of the deceased that was entitled to inherit his land. He said that he was not aware of the alleged sale of Kisa/Mundeku/595, between the protestor and the late husband of the administratrix, or even the deceased.

13. At cross-examination, he said that the husband of the deceased had no property, and the property the administratrix wanted to inherit was in the estate of her father-in-law. He testified that the administratrix did not show her any documents signed between her late husband and the protestor, but confirmed that the protestor was using the land. He said that when he took over as Chief, he was briefed by his predecessor about the dispute. He sat the parties down and guided them on what to do, and that was why the administratrix was willing to sit out and await the determination of the succession proceedings. He said that the other son of the deceased was known as Aluvuli Omoto, and he had died as a youth, before he had married and gotten children. The other child was a daughter, Jennifer, who also died young, although she had married by then.

14. Julius Mbandu Otinga, national identity card number xxxxxxxx, testified next. He was a cousin of the late husband of the administratrix, the late Jackson Omodo Tsimango. He stated that the protestor was the one using the land. He had allegedly leased it out from the family, but he refused to move out. He said that he had seen the deceased during his lifetime, and that both the deceased and his son had not sold the land before they died. He said that it was the administratrix and her children who were surviving from the family of the deceased.

15. At the close of the oral hearing, the parties were given time to file written submissions. Only the administratrix filed written submissions, on 10th March 2020, of even date.

16. She submits that Kisa/Mundeku/575 was still an asset in the estate of the deceased, as it had not been validly sold to the protestor, for it was allegedly sold by a son of the deceased long after the demise of the deceased herein. She has cited section 45 of the Law of Succession Act, to submit that it is an offence for someone to handle the property of a dead person without authority; and section 79, to make the point that the assets of an estate vest in an administrator upon their appointment as such; and section 82, to submit that the powers of an administrator are only exercisable by a person who has been appointed as such. It is submitted that the son of the deceased, who is the late husband of the administratrix herein, had no legal authority to dispose of the property of the deceased herein, at the time it is alleged he did, for want of a grant of representation. It is submitted further that a proviso in section 82 of the Law of Succession Act limited the powers of an administrator, to sell immovable property, before grant was confirmed. It is submitted that the agreement between the late husband of the administratrix and the protestor was of no effect, as no grant had been made to the alleged seller. It is further argued that the deceased died intestate, and that the principle of relation back did not apply, by virtue of section 80, to validate or authenticate the unlawful acts of the said late son of the deceased.

17. It is common ground, from the facts that emerge from the affidavits and the oral testimonies, that the protestor was not a child nor sibling of the deceased. He was, therefore, not entitled to a share in the estate of the deceased on account of being a survivor of the deceased, whether under customary law or under the Law of Succession Act. He, himself, is not claiming the estate asset on the basis of survivorship, but rather as a person who had allegedly acquired a right to it upon buying the same from a son of the deceased proprietor of the property.

18. It is also common ground that the deceased proprietor died in 1967. The alleged sale happened in 1983, while representation to the estate herein was not obtained until 26th February 2013. Consequently, as at the time the alleged sale of the subject land, representation to the estate of the deceased had not been granted to anyone. The property had not vested in anyone, by virtue of section 79 of the Law of Succession Act, and, therefore, no one could validly deal with it by way of sale in 1983. In the circumstances, the seller had no valid title that he could pass to the buyer. Secondly, the sale violated the proviso to section 82(b)(ii) of the Law of Succession Act, which requires that no immovable property should be sold before the grant is confirmed. No grant had been made before 1983, so the question of confirmation did not arise, for it is now that confirmation is being sought. The alleged sale, therefore, amounted to intermeddling, as defined in section 45 of the Law of Succession Act, which is a criminal offence. The two parties involved in the alleged sale, therefore, engaged in criminality by entering into that transaction, and a transaction tainted by criminality cannot possibly be authentic or valid.

19. The provisions that I have mentioned above state 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;"*

20. It is trite that a person can only deal with the estate of a deceased person pursuant to a grant of representation. It was said, in *In re Estate*

of John Gakunga Njoroge (Deceased) [2015] eKLR (Muriithi J), that:

> *"A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act."*

21. It was submitted, by the administratrix, that the principle of relation back does not apply to this case, so as to authenticate or validate the acts of protestor and the late husband of the administratrix done before representation was obtained in the matter. A grant of letters of administration takes effect from the date of its making, and it only authenticates the acts of the administrator, appointed under it, committed after its making. It does not, therefore, relate back to any acts that were committed prior. That would mean that it does not sanitize acts done by administrators, prior to their appointment, which amounted to intermeddling. The principle of relation back is of relevance only where the deceased had died testate, to authenticate the prior acts of his executor. The deceased herein died intestate, and, therefore, there is no relevance for the principle in the matter. See *Ingall vs. Moran* [1944] KB 160 (Scott LJ), *Kothari vs. Qureshi and Another* [1967] EA 564 (Rudd and Mosdell JJ), *Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd* HCCC No. 543 of 2005 (Kasango J), *Otieno vs. Ougo and another (number 4)* [1987] KLR 407 (Nyarangi, Platt and Gichuhi JJA), *Troustik Union International and another vs. Mrs. Jane Mbeyu and another* [1993] eKLR (**Apaloo CJ, Kwach, Cockar, Omolo and Tunoi JJA**), *Martin Odera Okumu vs. Edwin Otieno Ombajo* HCSC N9479 of 1996 (Khamoni J), *Coast Bus Services Limited vs. Samuel Mbuvi Lai* [1997] eKLR (**Gicheru Tunoi and Shah, JJA),** *Ganijee Glass Mart Ltd & 2 others vs. First American Bank Ltd* [2007] eKLR (Waweru J), among others

22. The provision as to when a grant of letters of administration takes effect is section 80(2) of the Law of Succession Act, which stipulates:

> *"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."*

23. The sale of the suit property herein is said to have had occurred on 11th June 1983, as per the sale agreement placed on record. Representation was made by this court on 26th February 2013, and a grant was issued, dated 24th September 2012. The said grant is yet to be confirmed, and the sale of immovable property prior was not permissible, thereby making the transaction void as far as matters succession is concerned. It was said *In re Estate of Francis Kimani Muchiri (Deceased)* [2018] eKLR (Musyoka J):

> *"The property of a dead person vests in the persons that the court appoints as personal representatives, be they executors of a will or administrators. It is in such persons that the rights of proprietorship of estate assets inure. It is them that can sue or be sued over the property. It is them who can enter into contracts of various shades over the property, of sale or disposal or lease, among others. In the case of intestacy, by virtue of section 80 of the Act, the grant of representation becomes effective only from the date the same is made. Meaning that the assets only vest in the administrator from the date of the grant. The administrator is therefore only able to bind a third party in his dealing with the assets only from the date of the grant. The principle of relation back is of relevance here. The grant of letters of administration in intestacy does not cover acts of the administrator prior to the making of the grant or prior to his appointment as administrator."*

24. One other issue is about jurisdiction of the court. As submitted by the administratrix, this is a succession cause, in the matter of the estate of the deceased. The mandate of a probate and succession court is limited in the manner described by the court in *In re Estate of Solomon Mwangi Waweru (Deceased)* [2018] eKLR (Ndungú J), where it was said:

> *"The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate."*

25. Similar sentiments were expressed in *In re Estate of Mbai Wainaina (Deceased)* [2015] eKLR (Musyoka J), where it was held;

> **"…***The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.*
>
> *Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.*
>
> *In this case, therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court."*

26. The objection by the protestor is that he had acquired a right to the property in question by way of sale, which he believes has elevated him to the position of a survivor of the deceased, and he can access the said property by way of inheritance or succession. That is very far from the truth. The alleged sale did not elevate the protestor to a position which places him at par with the survivors of the deceased, say the children and grandchildren of the deceased. He cannot assert a right to the estate equal to that of the survivors of the deceased. He can only claim as a creditor of the estate. Yet, the protestor herein is not a creditor of the estate. He did not acquire any interest in the estate from the deceased himself. He did not even know him during his lifetime. The alleged transaction, from which alleges to have acquired interest, was

carried out after the deceased had died, and with a person who had no capacity to transact with him over the property. I have discussed that at length above. There was no valid transaction. The son of the deceased had no property to sell, he had not capacity to sell his late father's property, as he had not been appointed his personal representative, and, therefore, the property was yet to vest in him. He has no claim whatsoever to it. He has no decree of a court conferring any entitlement to him in the property. The probate court cannot pronounce itself on the legality of that transaction, nor declare that he had acquired a right through that transaction, for the High Court has no jurisdiction, by dint of Articles 162(2) and 165(5) of the Constitution. If he is so minded, the protestor may move the court or courts with such jurisdiction, as against the estate of the late son of the deceased, to establish his claim to the land, for that is the only remedy available to him.

27. I am alive to Rule 41(3) of the Probate and Administration Rules, which applies in circumstances where, during confirmation, a question arises, over the identity or share, or estate of a person beneficially entitled to a share in the estate, which cannot be conveniently determined within the confirmation hearing. The court may appropriate the asset in question, to await determination in separate proceedings, and thereafter proceed with the distribution of the estate with respect to the other assets. It is about removing the asset in question from the distribution process, to allow the parties move the court, in separate proceedings, for determination of the status of the said property, or its ownership or the rights of the claimants, among others. See *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo J), *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR (Musyoka J), *In re Estate of Mwangi Gikonyo (Deceased)* [2017] eKLR (Waweru J), *In Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR (Musyoka J), *In re Estate of M'guatu M'itania (Deceased)* [2020 eKLR (Gikonyo J) and *In re Estate of Kariuki Ngunyu (Deceased)* [2019] eKLR (Ngaah J).

28. Rule 41(3) of the Probate and Administration Rules provides as follows:

> "*Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.*"

29. Should I exercise discretion under Rule 41(3) of the Probate and Administration Rules, now that a question has arisen as to the share or estate of a person claiming to be beneficially interested in the estate of the deceased? I do not think so. Firstly, I have already found, by dint of the provisions of the Law of Succession Act, that the protestor was not a creditor of the estate of the deceased, for he had no dealings with the deceased himself prior to his death, and there was no administrator for the estate in 1983. Secondly, the principle of relation back did not apply to the matter so as to validate or authenticate any unauthorized transactions that might have been carried out by the persons subsequently appointed as administrator prior to their appointment. Thirdly, the alleged sale happened in 1983, and as it related to agricultural land, consents under the Land Control Act, Cap 302, Laws of Kenya, ought to have been obtained within six months. Since they were not, the said transaction, without prejudice to whatever action the protestor may take after delivery of this judgment, was as dead as a dodo. Fourthly, the protestor had all the time, since 1983, to approach a civil court for a decree in his favour to validate the sale, if at all. Overall, therefore, it would not profit to invoke Rule 41(3) of the Probate and Administration Rules, to set aside the property, so as to facilitate further action by the protestor, pending confirmation of the grant, or final orders on distribution.

30. Turning to the summons for confirmation of grant, the law on it is stated in section 71 of the Law of Succession Act, which stipulates:

> "*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 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 such grant shall specify all such persons and their respective shares.*"

31. There are two principal factors in confirmation of grants, one is confirmation of the administrators, and, two, confirmation of the proposed mode of distribution.

32. On confirmation of administrators, the court considers whether the administrator was properly appointed; and if he was, whether he had

gone about the administration of the estate in accordance with the law; and if he had, whether he would, upon being confirmed, continue to administer the estate in accordance with the law. The protestor had been the objector, where he was objecting to the appointment of the administratrix, who was the petitioner, as administratrix. As pointed out earlier, in paragraph 4 of this judgment, the so-called objection was dead in water, to the extent that the protestor had not complied with the mandatory provisions of section 68(2) of the Law of Succession Act, by filing an answer to the petition and a cross application. Secondly, the appointment of the administratrix, as such, on 26th February 2013, was by the court on its own motion, as part of case management, to avoid the matter dragging on needlessly, after the court concluded that the administratrix, as a relative of the deceased, had a stronger entitlement to administration compared with the protestor. The protestor has not raised issue with the appointment. There is no claim that the administratrix has not administered the estate well or in accordance with the law, nor that she would not be able to administer it in accordance with the law upon being confirmed.

33. I, however, have serious misgivings about the appointment of the administratrix as such. In the petition which initiated this cause on 22nd June 2010, and in all the subsequent filings by the administratrix and generated by the court up to the date of the making of the grant, the administratrix projected herself as a widow of the deceased. She swore affidavits on 19th December 2012 and 31st January 2013, in which she described herself as the widow of the deceased. The protestor swore an affidavit on 25th April 2013, in which he pointed out that administratrix was misleading the court that she was a widow of the deceased, as she was instead a daughter-in-law of the deceased, on account of being the widow of the late son of the deceased. The administratrix did not file any papers to straighten out the point. When the court appointed the administratrix, as such, on 26th February 2013, it was under the illusion that she was a widow of the deceased. In the said order the court said:

> *"... the petitioner, DEBORAH MWANIKA OMODO, who is the deceased's widow, I do order that a grant be issued to the petitioner."*

34. From the oral testimonies of the witnesses for both sides, including the administratrix herself, it became clear beyond per adventure, that the administratrix was not the widow of the deceased, but his daughter-in-law, being the wife of the late son of the deceased, Jackson Omoto Tsimango. The court was misled, therefore, by the administratrix to make representation to her on the guise that she was a widow of the deceased, while she was not.

35. The persons who qualify to be appointed as administrators of intestates' estates are set out, in order of priority, in section 66 of the Law of Succession Act. That list of the persons entitled to the grant does not feature the children-in-law of a dead person. The list in section 66 is aligned to the persons entitled to shares in the estate in intestacy. The persons entitled in intestacy are identified in Part V of the Law of Succession Act, sections 32 to 42. The persons listed, in order of priority, are the surviving spouse, followed by the surviving children, followed by the surviving parents, followed by the surviving siblings of the deceased, followed by the surviving half-siblings of the deceased, followed by other blood relatives of the deceased up to and including the sixth degree, and if no such relatives exist the property passes to the State in *bona vacantia*. The list in Part V of the Law of Succession Act does not mention the children-in-law of a deceased intestate as persons entitled in intestacy to the estate of their parent-in-law. The relevant provisions in Part V (sections 35, 36, 38, 39 and 40) and section 66 state as follows:

> *"35. Where intestate has left one surviving spouse and child or children*
>
> *(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) a life interest in the whole residue of the net intestate estate:*
>
> *Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*
>
> *36. Where intestate has left one surviving spouse but no child or children*
>
> *(1) Where the intestate has left* one *surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and*

(c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.

37. …

38. Where intestate has left a surviving child or children but no spouse 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.

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

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."

"*66. Preference to be given to certain persons to administer where deceased died intestate*

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors …""

36. Section 51(2)(g) of the Law of Succession Act is also relevant, in terms of disclosure of the names of the persons who ought to be disclosed in a petition in intestacy. The persons identified in that provision rhyme with those set out in Part V and section 66 of the Law of Succession Act, and that is to say, surviving spouses, children, parents, brothers and sisters, and children of any child of the deceased then dead. In that list children-in-law do not feature. Section 51(2)(g) of the Law of Succession Act provides as follows:

"*Application for Grant*

51. (1) …

(2) Every application shall include information as to—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(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)..."

37. The effect of these provisions is that a child-in-law of a deceased parent-in-law is not entitled to both appointment as administrator and to a share in the estate of a dead parent-in-law. As between a child-in-law and their children, who would be the grandchildren of the deceased, the grandchildren would have a direct access to the estate of the deceased, in terms of both entitlements to administration and a share in the estate at distribution. Children-in-law can only access the estates of their dead parents-in-law indirectly, as administrators of the estate of their late spouses, who would be children of the deceased. They would claim, not directly, as survivors of the deceased, but on behalf of the dead children of the deceased, and for them to have that access they would need to have a grant of letters of administration to the estate of their dead spouses. They cannot assert a right to take the share of their dead spouses merely on grounds that they were married to the dead children, they can only assert such rights as personal representatives of their dead spouses. The point is that whereas surviving spouses have direct access to the share of their dead spouses, surviving children-in-law do not enjoy a similar privilege, with respect to accessing the estates of their dead parents. The legal positon is that the only non-blood relative of a deceased person, entitled to a direct access to the estate of such deceased person, is a surviving spouse, except for adopted children.

38. In the instant case, the administratrix was not a surviving spouse of the deceased herein, and, therefore, she could not access the estate of her father-in-law directly, in the way a surviving spouse of the deceased would have. She could only claim, not as a daughter-in-law, since such a status gives her no access at all to her parents-in-law's estate, but as the personal representative of her late husband, which meant that she could only do so upon obtaining representation to the estate of her late husband. She had not obtained representation to the estate of her late husband, and, therefore, she could not assert a right to administer the estate of her late father-in-law nor a share in that estate on behalf of her husband.

39. Since a daughter-in-law has no direct access to the estate of her father-in-law, but her children have, it means that her children would have a superior right to administration of the estate of the late grandfather over her. That should take us back to the process of obtaining representation to the estate of the deceased herein. It would mean that it was her children who had a superior right to administration over her, and, therefore, she should have complied with Rules 7(7) and 26 of the Probate and Administration Rules, by having citations issued upon the children, or to have them renounce or waive their right to administration, or to consent to the administratrix applying. Apparently the administratrix, who had an inferior right to administration, did not have citations issued, nor consents obtained, nor renunciations obtained from the children.

40. Rules 7(7) and 26 of the Probate and Administration Rules provide as follows:

"7(7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

"26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

41. These provisions were not complied with, and to that extent the process under which the administratrix was appointed was flawed.

42. Looking at the petition that was lodged herein on 22nd July 2010, the administratrix only disclosed herself as the sole survivor of the deceased. She was not a blood relative of the deceased, as discussed above, yet the deceased had been survived by blood relatives, who had a

prior right to administration and shares in the estate over her, that is to say the grandchildren of the deceased. Curiously, she did not disclose them. She did not obtain their consent to apply for administration of the estate of their grandfather. The process was, therefore, flawed.

43. On the second aspect, distribution, the guiding principle is in the proviso to section 71(2) of the Law of Succession Act, that the court be satisfied that the administratrix had properly ascertained the persons beneficially entitled to the estate and their shares in the estate.

44. So, have the survivors or persons beneficially entitled to a share in the estate been ascertained? From the affidavits and oral testimonies, it has emerged that the deceased herein had only three children, two sons and a daughter. The sons were the late husband of the administratrix and another who died young, before he got himself a wife and children. The daughter also died young, even then she had by then gotten married. There is silence as to whether she had had any children. Ideally, the administratrix should have made an effort to disclose whether the late daughter of the deceased had any child or children, and if so identify the said child or children, and involve them in the process. However, the estate herein is of a person who died in 1967, before the Law of Succession Act came into force on 1st July 1981. According to section 2(1) of the Law of Succession Act, the Act, on matters of distribution, only applies to estates of persons who died after the Act had come into force. Under section 2(2), the estate of person dying before 1st July 1981, is to be governed, on distribution, by the law then in force, in this case the law applying in 1967. The deceased died intestate, and the law in application then to the estate of a dead Luhya was Luhya customary law. It is notorious that the said law did not allow married daughters to partake in the estate of their biological parents, for their entitlement was on the side of their husband's family. See *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1992) 2 KAR 292 (Masime and Kwach JJA, with Hancox CJ dissenting. The daughter herein was married, and, therefore, her entitlement was not on the side of her parents' family, but that of her husband. If she had a child or children, then they would have no claim under customary law to the estate herein. However, under the Constitution, 2010, such exclusion is frowned upon, and would be illegal, by dint of Article 27 of the Constitution. It would be open to such children to decide whether or not to take a share in accordance with their constitutional rights or to forgo the same in keeping with section 2(2) of the Law of Succession Act. It has not been disclosed whether such children exist, and the starting point should be with the administratrix making a disclosure as to whether such children did exist; and if they do, bring them on board, and get them to state their position on the matter either way.

45. The other aspect to this is as to the shares to which each of the persons entitled get out of the estate. Firstly, it may be premature to make a pronouncement on this, so long as there is no clarity as to whether the late daughter of the deceased was survived by a child or children, for if such children exist, and are keen on asserting their constitutional rights under Article 27 of the Constitution, then their shares should be identified and allocated. Secondly, the administratrix has disclosed the children of her late husband, and has allocated to all of them shares in the estate. However, the distribution proposed is not in keeping with either customary law or the Law of Succession Act, for under both, the administratrix is entitled only to a life interest in the net intestate estate. She has allocated herself a larger share compared with the children. The probate court is bound to distribute an intestate estate strictly in accordance with the dispositive provisions in Part V of the Law of Succession Act, or customary law, whichever is applicable, unless the parties have, by consent, agreed on a mode of distribution departing from that prescribed by the applicable law. In the instant case, I have not seen any consent on distribution in Form 37, and, therefore, the estate ought to be distributed strictly in accordance with either customary law or Part V of the Law of Succession Act, and in particular section 35. See *Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), *Mercy Kagige Kamunde vs. Eliphas Mugambi Kamunde & 3 others* [2016] eKLR (Mabeya J), *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J) and *In re Estate of Juma Shiro-Deceased* [2016] eKLR (Mwita J).

46. I could not help but notice that the persons that the administratrix proposes to distribute the property to are not described, in terms of drawing the relationship between them and the deceased. It is the first time that the administratrix is mentioning their names. They were not listed in the petition. She has not mentioned how they are related to the deceased to warrant their being allocated shares in his estate. Of course, at the oral hearing she disclosed that these individuals are her children, but that information ought to have been disclosed in the confirmation application itself, instead of waiting to disclose it orally at the trial. As was stated in *In re Estate of Wepukhulu Wanambisi Maundende (Deceased)* [2020] eKLR (Musyoka J), the applicant in a confirmation application ought not just mention the names of the persons to benefit from the distribution, in the confirmation application, without disclosing the relationship with the deceased. It does not help the court in any way as distribution is pegged on how the survivor was related to the deceased. Under section 35, a surviving spouse takes a life interest in the net intestate estate, where there are surviving children, and the children do not take anything until, by virtue of section 35(5), the life interest terminates. Under section 36, the surviving widow, where there are no surviving children, does not take the entire estate, for he or she is entitled to a certain proportion, with the rest of the estate going to the survivors listed in section 39. Under section 38, where there is no surviving spouse, the children share the estate equally amongst themselves. Where there is no surviving spouse nor children, then, under section 39, the other surviving relatives of the deceased take the estate in the manner prescribed. Where the deceased died a polygamist, section 40 applies. So it is critical that the persons listed in the confirmation application as taking a share in the estate must be linked to the deceased, by the applicant disclosing their relationship with the deceased, so that the court can ascertain their entitlement under Part V of the Law of Succession Act. Throwing in the names in the confirmation application, without disclosing how those persons were related to the deceased, is of no use at all, as that cannot assist the court in assessing whether the distribution was in accord with the law or not. The court, in *In re Estate of Wepukhulu Wanambisi Maundende (Deceased)* [2020] eKLR (Musyoka J), said:

> "*An application that merely lists names without disclosing the relationship is no doubt deficient, and it cannot be said that it provides a proper basis for distribution of the estate in intestacy. The question that remains unanswered is who exactly are the persons beneficially entitled to a share in the estate of the deceased, going by the relationship between him* (sic) *and the deceased?"*

47. Finally, I note that the administratrix, in the proposed distribution, has allocated to herself, a bigger share in the estate compared with what she has allocated to the children. I trust that this has something to do with the entitlement of a widow to life interest. But the administratrix herein was not a widow of the deceased, and she has no entitlement to life interest or any interest at all in the estate as a widow. In any event, the law gives a surviving spouse a life interest in the net intestate estate, and not to an absolute right to the estate, which devolves ultimately to the children or grandchildren. The estate devolves to the surviving spouse during lifetime, limited to life interest, and thereafter, upon determination of the life interest, to the children or grandchildren in equal shares. Either way, a surviving spouse would not be entitled to a larger proportion of the estate compared with the children.

48. Succession is about generational transfer of property from one generation to the next, that is from the parents to the children, and not from one parent to the other, to the exclusion of the children. That explains why a surviving spouse only gets a life interest in the estate of a

departing spouse, with the children enjoying an absolute interest. In recent times, however, courts are inclined to uphold the matrimonial rights of surviving spouses in the property being distributed at confirmation. See *In re Estate of Johnson Njogu Gichohi (Deceased)* [2018] eKLR (Gitari J), *Elizabeth Wanjiru Njonjo Rubia vs. Brian Mwaituria* [2019] eKLR (Ouko, Nambuye and Warsame JJA), *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR (Nyakundi J), *In re Estate of M'Ikome M'Matiri (Deceased)* [2019] eKLR (Gikonyo J), *In re Estate of M'Barutua Kithia Kingili (Deceased)* [2019] eKLR (Gikonyo J) and *In re Estate of M'Ramare Nkunga (Deceased)* [2018] eKLR (Gikonyo J). I have misgivings about this approach, as at succession the matter is about inheritance rights and not matrimonial rights, for the ideal situation should be that matrimonial rights ought to be asserted during the lifetime of the other spouse, for the contest over the property ought to be between the two. It would be unfair to require children to contend with the surviving spouse over the matrimonial entitlement of the surviving spouse to estate property at distribution. The tension between the matrimonial rights of a surviving spouse and the inheritance rights of children in estate property should be avoided, and the property treated strictly as property available for distribution in succession, without considering matrimonial rights. For where such rights exist, ideally, they ought to have been asserted and the matter determined prior to the demise of the other spouse. It disadvantages or embarrasses or is prejudicial to the children where that issue has to be resolved in succession proceedings. The matter, in my view, is overtaken by events, once the other spouse passes on before the matrimonial rights are asserted, ascertained and determined, and the succession cause may not be the proper place to raise the issue.

49. I, however, have no issue with the surviving spouse being allocated distinct shares as opposed to a life interest, for the reasons given in *Stephen Gitonga M'murithi vs. Faith Ngira Murithi* [2015] eKLR (Waki, Nambuye and Kiage JJA), where the court stated that ordering a life interest occasioned injustice to all the survivors of the deceased, as that option bestowed on the surviving widow a hovering interest over the individual interests of all the other beneficiaries, making it impossible for all of them to enjoy freely the resulting benefits from the estate. The court found it more prudent to accord a direct unencumbered benefit to the widow as opposed to a life interest. Similar sentiments were expressed in *In re Estate of M'mugwika Baitobi (Deceased)* [2020] eKLR (Gikonyo J), where the court advocated that in intestacy surviving widows ought to get a distinct share of the property from their children so that each could enjoy their share without any encumbrance. See also *In re Estate of M'Ikome M'Matiri (Deceased)* [2019] eKLR (Gikonyo J). However, since section 35 of the Law of Succession Act does not envisage a distinct share for the surviving spouse, but a life interest, the children, who are the ultimate beneficiaries, ought to consent to the surviving spouse getting the distinct share, through executing the consents envisaged in Form 37, or by way of affidavit, or by stating their position on the matter orally in open court at the confirmation hearing. The court, in *Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), said that where the parties filed consents on distribution, the court would have no reason not to endorse the distribution proposed, so long as the same had the concurrence of all the persons beneficially entitled, even if the proposed distribution departed from what the law provided on distribution.

50. Before I can make final orders on the summons for confirmation of the grant herein, the administratrix will need to do more. Consequently, I will make the following orders, at this junction:

(a) That I have found no merit in the objection by the protestor to the confirmation of the grant herein, and I hereby dismiss the said protest;

(b) That I hereby postpone confirmation of the grant, under section 71(2)(d), to enable the administratrix provide more information on the items mentioned here below;

(c) That the administratrix shall file a further affidavit in which she shall disclose whether the late daughter of the deceased, who was identified as Jennifer, had any child or children, and if she did, name the said child or all the children;

(d) That the administratrix shall serve the application herein on all the children, if any, identified in (c) above, and shall cause them to attend court on the date that shall be identified for mention at the delivery of this judgment;

(e) That the administratrix, in the affidavit to be filed under (c) above, shall propose distribution of the estate amongst the children of her late husband and of the daughter of the deceased, if any, unless there is waiver or renunciation of interest by any of them, including herself, in complete compliance with Part V of the Law of Succession Act, Section 71 of the Act and Rule 40(8), unless all the survivors or persons beneficially entitled file a consent in Form 37;

(f) That the matter shall be mentioned on a date to be appointed at the delivery of this judgment, for compliance and further orders, and the grant shall only be confirmed on full compliance with the above;

(g) That each party shall bear their own costs; and

(h) That any party aggrieved by the orders made herein0 shall have twenty-eight (28) days leave to move the Court of Appeal, appropriately, on appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF MAY 2021.

W. MUSYOKA

JUDGE