REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 485 OF 2012

IN THE MATTER OF THE ESTATE OF ELIJAH OKITAH MIKAH TSIMBWELE (DECEASED)

RULING

1. According to the certificate of death on record, serial number 276263, dated 23rd March 2012, the deceased herein, Elijah Okitah Mikah Tsimbwele, died on 20th December 2004. According the letter from the Chief of East Butsotso Location, dated 7th February 2012, the deceased was said to have had been survived by a widow, Josephine Queen Kitaha, and children, said to be Simon Speed Kitaha, Leonard Shiloli Kitaha, Humphrey Osuga Kitaha, Benson Makokha Kitaha, Elius Mutali Kitahi and Ausilyne Munyanya Kitaha. Luke Amambia Musindole, Wycliffe Akula Tunduka and Danson Obuchere Olunga. The property he died possessed of is described as Butsotso/Shikoti/4168.

2. Representation to the estate of the deceased was sought in a petition that was lodged herein in 20th June 2012, by Humphrey Osuga Kitaha, in his capacity as son of the deceased. He listed the survivors of the deceased to his widow, Josephine Queen Kitaha, and four sons, being Simon Speed Kitaha, Humphrey Osuga Kitaha, Benson Makokha Kitaha and Elius Mutali Kitaha, and one daughter, being Ausilyne Munyanya Kitaha. The asset of the estate was listed as Butsotso/Shikoti/4168. Liabilities were listed as Luke Amambia Musindole, Wycliffe Akula Tunduku and Danson Obuchere Olunga. Consents in Form 38 were allegedly executed by Simon Speed Kitaha, Leonard Shiloli Kitaha, Humphrey Osuga Kitaha, Benson Makokha Kitaha, Elius Mutali Kitahi, Ausilyne Munyanya Kitaha, Luka Amambia Musindole, Wycliffe Akula Tunduka and Danson Obuchere Olunga. Representation was granted to Humphrey Osuga Kitaha, on 1st July 2014, and a grant was issued, dated 2nd July 2014. I shall hereafter refer to Humphrey Osuga Kitaha as administrator.

3. What has been placed before me for determination is a chamber summons, dated 2nd April 2019, filed herein on 6th March 2019. It is brought at the instance of Benson Makokha Kitaha, who I shall refer to herein as the applicant. It is founded on an affidavit that he swore on 2nd April 2019. The application seeks three principal prayers: substitution of Humphrey Osuga Kitaha as administrator, confirmation of the grant, and cancellation of the registration of Humphrey Osuga Kitaha as proprietor of Butsotso/Shikoti/4168 to facilitate distribution.

4. In the supporting affidavit, the applicant avers that the administrator had died before he had had his grant confirmed, but the estate asset had been transferred to his name as administrator. The applicant seeks to be appointed to take his place as administrator. He wants the grant made to the late administrator amended to reflect him as administrator, and to have the same confirmed. He states that he would have the estate transferred to the beneficiaries.

5. The applicant swore an affidavit on 25th February 2020, where he has repeated the averments made in his earlier affidavit, save that he has introduced a proposed distribution. He proposes that Butsotso/Shikoti/4168 be distributed as follows:

(a)0.20 hectare, to Lydia Joab,

(b) 0.14 hectare, to Boniface Osundwa Munyakho,

(c) 0.08 hectare, to Dixion Bahatri Okello,

(d) 0.04 hectare, to Banard Omwera Ezolio,

(e)0.04 hectare, to Hellen Nanjala Wafula and Peter Maende Ndiri,

(f) 0.04 hectare, to Mary Sitheswa Owiti,

(g) 0.17 hectare, to Willingston Maina Nangabo,

(h) 0.07 hectare, to Beatrice Luka,

(i) 0.06 hectare, to Wycliffe Akula Tunduka,

(j) 0.15 hectare, to Danson Omuchere Olunga,

(k) 0.07 hectare, to Benson Makokha,

(l) 0.28 hectare, to Herbert Olocho Namuleli,

(m) 0.09 hectare, to Bonface Osundwa Munyakho, and

(n) 0.10 hectare, to Leonard Shiloli Kitaha.

6. A consent on distribution, in Form 37, dated 25th February 2020, was filed, on 6th March 2020, under Rule 40(8) of the Probate and Administration Rules, duly signed by the fifteen (15) persons mentioned in the further affidavit.

7. The application, dated 2nd April 2019, came up for hearing on 27th October 2020, when the applicant attended court alone, and I directed that the said application ought to be heard in the presence of all the beneficiaries. On 25th January 2021, the applicant brought fourteen (14) individuals to court, being Josephine Queen Kitaha, Simon Speed Kitaha, Leonard Shiloli Kitaha, Beatrice Imbwana Ngalo, Pamela Naliaka, Danson Obuchere, Bonface Osundwa, Dixion Bahatri Okello, Daniel Khaemba, Hellen Nanjala, Mika Owiti Wanga, Willington Nangabo and Herbert Olocho.

8. The court interviewed the parties in attendance. Of the immediate survivors of the deceased, those who attended court were his widow, and three sons, being the applicant, Simon Speed Kitaha and Leonard Shiloli Kitaha. The applicant explained that the late administrator had been survived by a person he named as Evelyn Muronji Kitaha. He also stated that his brother and sister, Elias Mutali and Ausilyne Munyanya, were alive. He said that he was involved in the process of applying for representation to the estate, and stated that the widow of the deceased was not involved in the process, and he was unaware that she had priority, and that her consent was needed. The widow, Josephine Queen Kitaha, stated that she was chased away from home by her in-laws after the deceased died, and they then sold the land, to the persons who were in court claiming to be creditors of the estate. She said that she had no land, and she had nowhere to farm. She said that she wanted the land to revert to her so that she could distribute it to the children. She added that she was not involved in the process of obtaining representation, and that she did not sign any papers. Simon Speed Kitaha described himself as the eldest child of the deceased. He confirmed that he and his siblings had sold estate lands, and asserted that the sales were valid. Leonard Shiloli Kitaha said that the family sat and everyone got their share. He said the land was given out by their father. He said that the widow was not present.

9. Beatrice Imbwana said that she was the wife of Luke Amambia Musindole, and that they bought land from Simon Peter Speed. She explained that that happened in 2007, after the deceased had died. Pamela Naliaka said she was the wife of Wycliffe Akula Tunduka, and that they had bought land from Simon Speed. Danson Obuchere said he bought land from Benson Makokha, in 2000, after the deceased had died. Bonface Osundwa and Dixion Bahatri Okello also bought land from Simon Speed, in 2013. Daniel Khaemba, representing Banard Ezolio, bought land from Willington Maina. Hellen Nanjala also bought land from Willington Maina, on 29th November 2017. She also represented Peter Maende, who had also bought a portion of the land from Willington Maina, on the same date. Mika Owiti Wanga represented Mary Sitheswa Owiti, who had bought land from Willington Maina in 2017. Willington Maina Nangabo said that he had bought the land from Simon Speed in 2013. Herbert Olocho said that he acquired his piece from the late administrator, Humphrey Kitaha in 2014.

10. I will deal with the three prayers in turns, starting with the prayer for substitution. The design under the Law of Succession Act, cap 160, Laws of Kenya is that once a sole administrator dies, he or she is not to be substituted, instead his grant is rendered useless and inoperative by his death, and the same ought to be revoked under section 76(e) of the Law of Succession Act. The death of the sole administrator means that the assets of the estate remain vested in a dead person, and that same dead person would still have the powers set out in section 82 of the Act, and remains under the burden of the duties set out in section 83 of the Act. Since the administrator would be dead, he would be unable to exercise the powers in section 82, nor carry out the duties in section 83. That would render the grant a mere piece of paper, which would be useless and inoperative. A grant is personal to the person appointed, and it cannot be transferred to another, through substitution, and subsequent amendment of the grant. Section 76(e)of the Law of Succession Act says:

> *"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –*
>
> *(a)* …
>
> *(b)* …
>
> *(c)* …
>
> *(d)* …
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

11. The death of one of more administrators does not affect the grant, in terms of rendering it invalid or inoperative or useless. Under section 81 of the Act, the powers and duties of personal representatives vest in the surviving personal representative on the death of one of

them. Section 76(e) of the Act only applies where there is a sole administrator, who then dies. For avoidance of doubt, section 81 says as follows:

> "*81. Powers and duties of personal representatives to vest in survivor on death of one of them*
>
> *Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:*
>
> *Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him."*

12. In the instant case, Humphrey Osuga Kitaha was the sole administrator of the estate. Once he died, section 81 could not apply to have the assets vest in the surviving administrator, for there was none. That then meant that section 76(e) of the Act applied, rendering the grant, made on 1st July 2014, useless and inoperative. It could not be transferred, and, therefore, the question of the applicant, being appointed administrator through a mere amendment of the grant does not arise. The grant of 1st July 2014 has to be revoked first, to pave way for appointment of fresh administrators. I hereby, therefore, on my own motion, or *suo moto*, in exercise of the discretion given to me by section 76 of the Act, revoke the grant made on 1st July 2014, and issued on 2nd July 2014, to Humphrey Osuga Kitaha, on grounds that the same has become useless and inoperative, following his death on 11th January 2017.

13. The next task should be to appoint an administrator or administrators to take his place. In the application before me, the applicant has applied for appointment. He avers to have the support of the family. I have closely looked through his application, and I have not seen any evidence that the immediate survivors of the deceased, that is to say his widow and sons and daughter, had agreed on the appointment of the applicant to take the place of the dead administrator. There is no consent in Form 38, nor any minutes of a family meeting, nor affidavits sworn by the other survivors of the deceased. All I have is a consent on distribution of the estate in Form 37, dated 25th February 2020, which says nothing about appointment of administrators. In any case, the said consent, even if it were to be the basis for making the appointment, is not signed by all the immediate survivors, members of the immediate family of the deceased, his widow and children. It is only signed by the sons, but not by the widow and the surviving daughter.

14. Appointment of administrators midstream, that is upon the death or resignation of an administrator, follows the same principles as those governing appointment at the initiation of the cause. The persons who qualify to administer estates of intestates, that is persons who die without leaving a will, like the deceased herein, are set out in order of priority in section 66 of the Law of Succession Act. The list in section 66 is aligned to the persons entitled to shares in the estate in intestacy under Part V of the Law of Succession Act. 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 surviving parents, followed by 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*. Section 66 states as follows:

> "*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 …"*

15. The provision in Part V of the Law of Succession Act, which is relevant to this ruling, is section 35, since the deceased was survived by a spouse and children. Section 35 says:

> "*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."

16. There is overwhelming case law, that, by virtue of sections 35 and 66 of the Act, surviving widows have prior right to administration over their children and anyone else. See *Re Kibiego* [1972] EA 179 (Madan J), *Loise Selenkia vs. Grace Naneu Andrew & another* [2017] eKLR (Muigai J), *Jason Werimo Onyango vs. Patrick Onyango Sakwa* [2018] eKLR (Musyoka J), and *In re Estate of Aggrey Makanga Wamira(deceased)* (200) eKLR (Waki J), among others. The widow of the deceased has priority, and since, in this case, the deceased was survived by a spouse, she should be considered first. A surviving widow does not require the consent of anyone, under Rule 26 of the Probate and Administration Rules, to be appointed as such. She does not also have to comply with Rule 7(7), by having citations issued, or renunciations obtained. See *In Re Estate of Peter Ambani Mataywa (Deceased)* [2019] eKLR (Musyoka J), *In Re Estate of Mwaura Gitukui* [2016] eKLR (Musyoka J), *In re Estate of Luka Modole (Deceased)* [2019] eKLR (Musyoka J), *In re Estate of Festo Akwera Kusebe (Deceased)* [2019] eKLR (Musyoka J) and *In re Estate of Eliza Isigi Asamba (Deceased)* [2020] eKLR (Musyoka J). No one has argued that she is not entitled, or is disqualified for some reason. For some unknown reason, the widow was not involved in the process of appointment of administrators, and she was overlooked in favour of the son. I shall, therefore, consider her first.

17. Should I consider any of the children to act with her? I note that the sons proceeded to process this cause and sidelined her, even when she had prior right to administration. I note too that they went ahead to dispose of the estate before confirmation, and proposed a distribution where she has been excluded. I do not trust that they merit appointment as administrators, whether solely or in concert with her. Although they qualify for appointment, by dint of being children of the deceased, they have not impressed me as competent to administer an estate, nor suitable, given the exclusion or sidelining of their mother from the earlier processes.

18. The second issue is about confirmation, or distribution of the estate. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, 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."

19. Under normal circumstances, where a new administrator is appointed, it is the practice to allow them time to file for confirmation of their grant. However, in this case, I have an application for confirmation before me, I shall have to consider it. I take into account that the deceased herein died 2004, and representation was granted ten (10) years later, in 2014, and to date the grant has not been confirmed, and the estate distributed. It is only right that I get into distributing the estate.

20. The issue relating to how the initial administrator was appointed does not arise, since he has since died. Appointment of a fresh administrator to complete administration has been dealt with above, and I have concluded that the person qualified is the widow of the deceased. I have also concluded that the sons are unsuitable and incompetent.

21. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic, that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged, in the proviso, has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules, at Rule 40(4) ,as follows:

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

22. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? On the first limb of the proviso, as to whether all the beneficiaries of the estate have been ascertained, I am persuaded that they have. It is common ground that the deceased was survived by a spouse and children, being five sons and a daughter. The sons are the applicant herein, Simon Speed Kitaha, Leonard Shiloli Kitaha, the late Humphrey Osuga Kitaha, and Elius Mutali Kitahi. The daughter is Ausilyne Munyanya Kitaha. These are the persons who are entitled to a share in the intestate estate of the deceased.

23. Then there is a host of individuals listed as liabilities or persons who had bought estate property. In his letter to court, the Chief identified three of such individuals. The three were also listed in the petition. However, in the application dated 2nd April 2019, that list has ballooned from three to thirteen. Are they real creditors of the estate? In the application for confirmation of grant, the applicant did not disclose how these individuals were related to the deceased person, and it was only at the hearing, that, upon interviewing them, it turned out that they were not blood relatives of the deceased, but individuals who had allegedly purchased estate property. They did not deal with the deceased, for the said sales took place long after the deceased had died, and, therefore, they dealt with persons other than the deceased. Indeed, the sellers, according to them, were the sons of the deceased. Since they did not deal with the deceased during his lifetime, and they bought assets after his demise, they do not qualify to be creditors or liabilities of the estate, for the estate does not owe them anything. The estate herein is of the late Elijah Okita Mikah Tsimbwele. Anyone who dealt with the deceased would qualify to be a creditor, who would have a claim against the estate. Anyone who entered into transactions, regarding estate assets, after the deceased died, is not a creditor of the estate, since he did not deal with the deceased, and whatever claim he has does not predate the demise of the deceased. He would have no claim against the estate, and he should look up to the person who sold the property to them. Furthermore, none of the alleged purchasers have lodged any documents as proof that they did buy such property, and a court should not be expected to give away estate property to individuals who have not provided any iota of evidence that they did buy such property.

24. Of course, an administrator can bind the estate where he deals with third parties after the grant was made to him. That would be so as section 82 gives him a power to sell estate property. However, that power is limited, for he cannot sell immovable estate property before the grant has been confirmed. Where, the exigencies of the estate demand that estate assets be sold, to meet administration expenses or to settle debts and liabilities prior to confirmation, the administrator has to obtain the leave of court before selling such property. The relevant portion of section 82 says as follows:

> *"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…"*

25. One of the alleged purchasers of the estate assets claimed to have had bought the assets from the late administrator. Of course, he has provided no proof. He says it happened in 2014. Without any documentary support of the alleged transaction, I cannot tell that that sale happened after the administrator had been appointed on 1st July 2014 or before then. These dates are critical. The estate of a dead person vests in an administrator upon his appointment as such. Vesting is about the administrator acquiring a legal right over such property, and it is on that basis that administrators are able to transfer estate assets to their names, before the grant is confirmed. Vesting is under section 79 of the Law of Succession Act. Before appointment, the property does not vest in anyone, and no one can deal with it as his own. No one can exercise the powers over the property that are set out in section 82 of the Act, and cannot enter into any transactions over it. Similarly, before appointment, he cannot be under the duties imposed on administrators by section 83 of the Act. I have already set out section 82 above, and section 83 is not so critical here, but section 79 states as follows:

> *"79. Property of deceased to vest in personal representative*
>
> *The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."*

26. The property of the deceased herein vested in the administrator on 1st July 2014. It was only from that date onwards that he could exercise the powers over it that are set out in section 82, which include the power to sell it. He could only sell it after 1st July 2014, but, again, that sale, if it was of immovable property, could only happen after confirmation of grant. If he sold it before 1st July 2014, then it would mean that he had no power to sell it, and he could not bind anyone with respect to it, meaning that such transaction would be null and void. If it happened after 1st July 2014, it would mean that the administrator would have had power under section 82 of the Act to sell, but he died before his grant was confirmed, so any sale he entered into, with respect to the land of the estate, happened before confirmation, and, therefore, it was unlawful, and not binding on the estate, unless the sale had been sanctioned by the court. I have scoured through the record before me, and I have not come across any order of this court allowing the late administrator to sell the land of the estate before confirmation of his grant.

27. There is a principle known as relation back, which applies to authenticate unauthorized acts of a personal representative, of which an administrator is one. However, that principle applies where the deceased had made a will, but not where he died before making one. The argument is that the personal representative of the deceased, in such case, would be the executor appointed under the will. An executor is appointed by the maker of the will, and his appointment becomes effective upon the death of the maker of the will. Where there is no will, there would be no executor to take charge of the estate immediately upon the death of the deceased. That would mean that the family has to wait for the court to appoint an administrator to take charge. An administrator is only appointed by the court after the death of the deceased, and he only takes office after his appointment, and he can only begin to validly handle the estate from the date of his appointment. The principle of relation back will not apply to validate whatever unauthorized things that he might have done with estate assets before his appointment. 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.

28. The provision as to when a grant of representation takes effect is section 80 of the Law of Succession Act, which states:

> "*80. When grant takes effect*
>
> *(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.*
>
> *(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."*

29. The point is that if the administrator had sold the property before his appointment as administrator, his subsequent appointment did not apply backwards to authenticate or validate is otherwise unlawful or unauthorized acts. The transactions, if they happened prior to appointment, therefore, remained invalid and of no legal effect.

30. Related to the above, is the issue of intermeddling. Handling of estate property without authority amounts to intermeddling with it. It is outlawed by section 45 of the Law of Succession Act, and it is, in fact, an offence which exposes an intermeddler to payment of a fine or imprisonment or both, when found guilty by a criminal court. Any transaction carried out by a person who has no authority to sell or handle estate property amounts to criminal conduct, and a sale of land tainted by criminality cannot possibly be valid. Authority to deal with estate assets stems from a grant, and anyone who handles estate property without a grant, engages in unauthorized activity, and is an intermeddler. See *Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another* [2016] eKLR (Gikonyo J), *Gitau and two others vs. Wandai and five others* [1989], KLR 231 (Tanui J), *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti (*2001)eKLR (Mwera J), *In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)* [2017] eKLR (Mabeya J), *Gladys Nkirote M'itunga v Julius Majau M'itunga & 3 others* [2016] eKLR (Gikonyo J), *Re Katumo and another* [2003] 2 EA 508 (Nambuye J), *In re Estate of Francis Kimani Muchiri (Deceased)* [2018] eKLR (Musyoka J), *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J), *In Re Estate of James Aggrey Osundwa Mulama (Deceased)* [2008] eKLR (Gacheche J), *In Re the Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu J), Among others.

31. Section 45 provides 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.*"

32. The conclusion to draw from the above, is that all the persons who were presented to me on 25th January 2021, and said to be persons who had bought estate assets, were, in fact intermeddlers. They handled estate assets without authority, by purporting to buy the same from individuals who, themselves, had had no authority to sell it. They acquired no right as against the estate, and the only remedy, they would have, would be against the persons who purported to sell the property to them. They are, therefore, not persons who are beneficially entitled

to a share in the estate, and I shall not take them into account at distribution. See *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J). I shall only reckon the surviving widow of the deceased and her children.

33. As to whether the shares that the persons beneficially entitled had been ascertained, there is a huge problem. Out of the seven survivors of the deceased, the applicant has provided for only one, Leonard Shiloli Kitaha. The surviving widow, the surviving daughter and the rest of the surviving sons have not been provided for, and there is no explanation, why the said individuals have been left out. Looking at the Form 37, the consent on distribution, I note that the said persons did not consent to being disinherited, neither is there any proof that they have renounced or waived their right to shares in the estate of the deceased. A surviving child or spouse of the deceased must get their share in the estate, unless they renounce that right. Their exclusion from the schedule of distribution must be explained, and supported by documentary evidence, that they have exercised their right to renounce their share.

34. Since there is no concurrence amongst the survivors on distribution, I shall apply the law. It was said, in *Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), that an intestate estate could not legally be distributed in any other way other than by the parties agreeing amongst themselves and filing a consent, or by the court following the provisions of the Law of Succession Act on intestate distribution. Where the parties were in total agreement, and recorded a consent on the mode of distribution, the court would have no choice but to adopt the consent, and make it an order of the court, but in the absence of a written consent on the mode of distribution, the court would have no discretion but to distribute the estate of the deceased as per the provisions of the Law of Succession Act. Similar sentiments were expressed in *In re Estate of Juma Shiro - Deceased* [2016] eKLR (Mwita J) and *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J).

35. The deceased died Intestate in 2004, long after the Law of Succession Act in 1981, and, therefore, Part V of the Law of Succession Act applies. He was survived by a widow and children, and the relevant provision of Part V is section 35, whose provisions I have recited above. The surviving spouse would be entitled to a life interest in the net intestate, estate during her lifetime, and thereafter all six children of the deceased shall share the property equally. That is what the law requires.

36. However, the courts have variously departed from that position, on grounds that the same is unfair to surviving spouses, given that such surviving spouses would, often, have contributed to the acquisition of the property in question. There is a principle, that the court may ignore the life interest principle, and distribute the estate absolutely as between the surviving spouse and the children. It was stated in *Stephen Gitonga M'murithi vs. Faith Ngira Murithi* [2015] eKLR (Waki, Nanbuye and Kiage JJA), where the court declared 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, apart 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).

37. I believe that the approach, discussed in paragraph 31 here above, commends itself to this case, where the widow was sidelined throughout these proceedings, and where other children, including the daughter have been completed excluded. To protect and cement their rights, the estate ought to be distributed equally amongst all of them.

38. The sons have argued that the deceased had shared out his estate before he died. That was not averred by the applicant in his affidavit, and there is no material whatsoever, pointing to a distribution prior to the demise of the deceased. Without any form of evidence, I shall take it that there was no distribution during the lifetime of the deceased, and the property is available to all the survivors of the deceased.

39. The daughter of the deceased was not provided for. No explanation was offered. She had not renounced her right. It could be that the applicant assumes that the daughter of the deceased is not entitled to a share in the estate. According to section 2(1) of the Law of Succession Act, the provisions of the Act applied effective from 1st July 1981that date to estates of persons dying after that date. That would mean that since the deceased herein died after the Act had come into force, his estate was subject to the provisions of the Act. Since he died intestate, his estate was available for distribution in accordance with the intestacy provisions of the Act, which are stated in Part V of the Act.

40. The term "children" as used in the Law of Succession Act, is defined or interpreted in section 3(2)(3), but not in terms of sons and daughters, or male and female, or gender, but in other respects. That would mean that the Act is gender-neutral in its reference to children, and children as used in the Act refers to children of both gender. Which would mean that the equal distribution in Sections 35(2) and 38, is as between both sons and daughters.

41. For avoidance of any doubt, section 3(2)(3) says:

> *"(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*
>
> *(3) A child born to a female person out of wedlock, and a child defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."*

42. The effect of the provisions of the Law of Succession Act is that all the children of the deceased, whether male or female, whether married or not, are to be treated equally when it comes to the intestate distribution of the estate of the deceased parent. The law does not discriminate as between children of different gender.

43. The non-discrimination principle, inherent in section 35(2) and 38 of the Law of Succession Act, has been given force by the

Constitution, 2010, which outlaws discrimination based on gender. Under Article 27, persons of either gender are to be treated equally in all respects, including succession. Previously, the retired Constitution allowed for application of African customary law, which permitted discrimination of daughters. There is no such provision in the current Constitution. The only provision which allows limited discrimination is Article 24(4) of the Constitution, with respect to persons who profess the Muslim faith. The deceased did not die a Muslim, and, therefore Article 24(4) is of no application to these proceedings.

44. The relevant provisions of Article 27 provide as follows:

> "*27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
>
> *(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
>
> *(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
>
> *(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
>
> *(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*
>
> *(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*
>
> *(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*"

45. The property of the dead parent is not available only to the sons. It does not accrue to them exclusively. The daughters are entitled to it in equal measure with the sons. The sons should not assume that by the mere fact of being sons or male gives them a superior right or entitlement to the property over the daughters of the deceased. There is nothing in the law that applies to the instant estate that says so. The property of a dead parent is not there for the sons to give out to the daughters of the deceased as they please or at their will. Daughters access to their dead parents' property is not available to them as a matter of charity from the sons.

46. The final orders that I am persuaded to make in the circumstances are as follows:

> **(a) That hereby revoke the grant of letters of administration intestate that was made to Humphrey Osuga Kitaha on 1st July 2014, on grounds that the same has become useless and inoperative following his death;**
>
> **(b) That I hereby appoint Josephine Queen Kitaha, administratrix of the said estate, and a grant of letters of administration intestate shall issue to her accordingly;**
>
> **(c) That the grant made in (b) above is hereby confirmed, and Butostso/Shikoti/4168 shall be shared equally between Josephine Queen Kitaha, Simon Speed Kitaha, Leonard Shiloli Kitaha, Humphrey Osuga Kitaha, Benson Makokha Kitaha, Elius Mutali Kitahi and Ausilyne Munyanya Kitaha;**
>
> **(d) That I hereby declare that the persons, who claim to have had bought portions of Butostso/Shikoti/4168, have no claim against the estate, for the reasons given in the body of the ruling, and they shall have to look up to the sons of the deceased, who sold the property to them;**
>
> **(e) That a certificate of confirmation of grant shall issue to the administratrix in those terms;**
>
> **(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, of twenty-eight (28) days, to move the Court of Appeal, appropriately.**

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

W MUSYOKA

JUDGE