



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 258B OF 2011**

**IN THE MATTER OF THE ESTATE OF MUTIALO SILWALI (DECEASED)**

**RULING**

1. According to the certificate of death on record, serial number 022698, dated 4<sup>th</sup> March 2011, the deceased herein, Mariko Mudialo Silwali, died on 14<sup>th</sup> February 1988. According to the letter from the Chief of Koyonzo Location, dated 21<sup>st</sup> April 2011, the deceased had married 3 times, and had sons from each of the 3 houses. Those in the 1<sup>st</sup> house are named as Edward Andera Mudialo, a son, Mathew Odhiambo Mudialo, a son, and Bonface Oloo Mudialo, grandson; from the 2<sup>nd</sup> house are Fredrick Muchere Mudialo, a son, and William Barasa Mudialo, Gladys Nabwire Wanzala, granddaughter; and from the 3<sup>rd</sup> house Patrick Onyango Mudialo, a son.

2. Representation to the intestate estate of the deceased was sought by Fredrick Muchere Mudialo, in his capacity as son of the deceased, vide a petition filed herein on 14<sup>th</sup> June 2011. The survivors named in the petition are the 7 individuals listed in the Chief's letter referred to above, plus a daughter-in-law of the deceased, Josophen Magero Oloo. The deceased is said to have died possessed of North Wanga/Lung'anyiro/3, 9 and 700, and Plot No. 3 Munami Market. Letters of administration intestate were duly made to the petitioner, on 22<sup>nd</sup> September 2011, and a grant was duly issued, dated 28<sup>th</sup> September 2011. I shall hereafter refer to Fredrick Muchere Mudialo as the administrator.

3. What is due for determination is a summons for confirmation of grant, dated 8<sup>th</sup> August 2012, filed herein on even date. It is brought at the instance of the administrator. It is founded on an affidavit that the administrator swore on 3<sup>rd</sup> August 2016. The persons listed in the application as the persons beneficially entitled to a share in the estate are grouped into the 3 houses of the deceased. From the 1<sup>st</sup> house is Edward Wandera Mudialo, Mathew Odhiambo Mudialo and the late Atanas Oloo Mudialo. From the 2<sup>nd</sup> house is Fredrick Muchere Mudialo, William Barasa Mudialo and the late Jason Wanzala Mudialo. The 3<sup>rd</sup> house has Patrick Onyango Mudialo. It is disclosed that the 2<sup>nd</sup> wife of the deceased, described as Sisilia Kadima Mudialo was alive. The 2 dead sons of the deceased, are survived by spouses or children, or both. The late Atanas Oloo Mudialo is said to be survived by a widow, Joseph Magero Oloo, and a son, Bornfas Oloo; while the late Jason Wanzala Mudialo is said to be survived by a daughter, Gladys Nabwire Anzala. The deceased is said to have had owned 3 pieces of land; North Wanga/Lung'anyiro/3, measuring 12.3 hectares/30.64 acres; then there is North Wanga/Lung'anyiro/700, measuring 10 acres, which is in the possession of all the children of the 1<sup>st</sup> and 2<sup>nd</sup> houses. North Wanga/Lung'anyiro/9, measuring 6.5 acres, where the home of the 3<sup>rd</sup> spouse is established, and is in possession of Patrick Onyango Mudialo. There is a plot at Munami Market, No.3. The total acreage of the 3 pieces of land is said to be 47.74 acres. It is proposed that the same be distributed in a more or less equitable manner, so that Edward Wandera Mudialo would get 6.73 acres, Mathew Odhiambo Mudialo would get 6.73 acres, the late Atanas Oloo Mudialo would get 6.73 acres, Fredrick Muchere Mudialo 6.99 acres, William Barasa Mudialo would get 6.73 acres, and the surviving spouse, Sisilia Kadima Mudialo and the late Jason Wanzala Mudialo to get 6.7 acres, and Patrick Onyango Mudialo to get 6.5 acres. Each house to get a share of 1 door in Plot No. 3 Munami Market.

4. To that proposal, Patrick Malvin Onyango Mudialo swore an affidavit of objection, on 14<sup>th</sup> December 2012. He avers that the 3<sup>rd</sup> house was not consulted over the proposals. He further avers that there were 4 children, namely Godliver Pamela, Patrick Mudialo, Violet Awino Mudialo and Ruth Akinyi Mudialo who had not be disclosed. He states that North Wanga/Lung'anyiro/3, which he says is 12.5 hectares, was the ancestral land, which was shared out amongst the 5 sons in the 1<sup>st</sup> and 2<sup>nd</sup> houses, in 1990, by family and clan elders, and the 3<sup>rd</sup> house was excluded. North Wanga/Lung'anyiro/9, which he says measures 6.5 acres, where the 3<sup>rd</sup> house resided, had been bought from one Malele Mangwana, who died in 1978, and the estate did not have title to it, as succession proceedings with respect to it had not been done. He avers that 1¼ acres of it had been donated to Namayiakalo Primary School, by the deceased, in 1987, and that the acreage available for distribution was 5.4 acres. He avers that North Wanga/Lung'anyiro/1188, which the administrator was referring to as North Wanga/Lung'anyiro/700, which he says measures 9.7 acres, is what is meant for the 3<sup>rd</sup> house, in case the title deed for North Wanga/Lung'anyiro/9 is not forthcoming, given that North Wanga/Lung'anyiro/1188 is in the name of the deceased. He avers that North Wanga/Lung'anyiro/9 should be shared equally amongst the 3 houses. He alludes to an oral will by the deceased, made before family members and village elder, sometime in February 1988. He states that Gladys Nabwire Wanzala is not entitled to 6.7 acres, as her share is in North Wanga/Lung'anyiro/3, which was distributed in 1990.

5. Edward Mudialo has also sworn an affidavit, on 16<sup>th</sup> June 2013, protesting at the proposals. He says that he is unaware of the succession proceedings, as the same were initiated without consulting him, and Patrick Onyango Mudialo and Mathew Edward Mudialo. He avers that the land was shared out in 1990, and that Jason Wanzala Mudialo had died earlier, and had no daughter. They planted boundaries, and developed their portion, and nobody then talked of Gladys Nabwire Anzala then. He states that the said Gladys Nabwire Anzala does not stay on the land, is married in Lugulu, and is being dragged into the matter with ulterior motives, to benefit the administrator. He asks that the court directs a surveyor to visit the land to confirm the boundaries. He states that North Wanga/Lung'anyiro/700, belonging to the 1<sup>st</sup> and 2<sup>nd</sup> houses, was left unallocated, just in case Patrick Onyango Mudialo was evicted from the land where the 3<sup>rd</sup> house occupied, since it did not have a title deed. He further states that the commercial plot was sold by the Butere-Mumias local authority due to accumulated rent arrears.

6. The administrator responded to the protest by Patrick Onyango Mudialo, through his reply, sworn on 9<sup>th</sup> May 2013. He avers that North Wanga/Lung'anyiro/9 was bought specifically for the 3<sup>rd</sup> house, for that was where the deceased established a home for the 3<sup>rd</sup> wife, who lived there for 20 years, and when she died was buried there, and that should be the land to be given to the 4 members of the 3<sup>rd</sup> house. He further avers that the other lands were shared out by the clan to the exclusion of the 3<sup>rd</sup> house, as the deceased had made provision for the 3<sup>rd</sup> house during his lifetime. He states that it was up to the protestor to cause the property to be registered in his name. He avers that if any portion of North Wanga/Lung'anyiro/9 was donated or sold, then that had nothing to do with the other houses. On Gladys Nabwire Wanzala, he avers that she had no direct personal interest, and that she was merely taking the share that was due to her father, the late Jason Wanzala Mudialo.

7. There is another summons on record, dated 13<sup>th</sup> January 2021, by William Baraza Mudialo, seeking revocation of the grant. He avers that the administrator had sold a portion of North Wanga/Lung'anyiro/3, which sale he would like declared illegal. He accuses the administrator of failing to administer the estate, as he was based in Uganda. He is also accused of failing to cause North Wanga/Lung'anyiro/9 to be registered in the name of the deceased yet he was proposing that the same be distributed. He is also accused of omitting 3 children of the deceased from the proceedings.

8. The administrator has responded to the revocation application. He avers that upon appointment he did file the summons for confirmation of grant on record. He says that he does not live in Uganda, as he was there for business purposes only, and that even when he initiated these proceedings he was still based there. He said that when the first son of the deceased, Edward Adeya Mudialo, refused to seek representation, he was forced to move the court himself. He says members of the 1<sup>st</sup> house had refused to sign the consents, saying that there was no need for the proceedings, as the land had been shared out. He asserts that North Wanga/Lung'anyiro/9 had been given to the 3<sup>rd</sup> house, and the owner of the land was not opposed to its distribution. He states that the daughters of the deceased, Victorina Nekesa, Marselina Athieno, Godliver Pamela, Violet Awino and Ruth Akinyi were not interested in the estate, but they had refused to sign consents to that effect. He concedes to selling a portion of the share that is due to him.

9. There was a hearing on 22<sup>nd</sup> march 2021, when William Baraza Mudialo, the applicant in the summons from revocation, testified, and so did the administrator. The other beneficiaries were not in court.

10. 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.”

14. The deceased died a polygamist, having married 3 wives, and had children with each one of them. Representation was sought by a member of the family from only 1 of the houses, and, therefore, the other houses are not represented in the administration. Democracy was not practiced, and the voices of the other 2 houses are silent in the administration of the estate herein. The record indicates that only 2

individuals signed consents for the administrator to apply for representation, out of the 9 who were not applying for representation, yet the administrator had equal entitlement to apply compared with the 9. He did not file an affidavit to explain that he had approached the rest and they had refused to sign. See section 66 of the Law of Succession Act, and rules 7(7) and 26 of the Probate and Administration Rules. There could be credence in the argument by the protestors that they were not involved in the process of obtaining representation.

15. The other concern is that the administrator did not list the daughters of the deceased in his papers, when he sought representation. I am talking about Victorina Nekesa, Marselina Athieno, Godliver Pamela, Violet Awino and Ruth Akinyi. The existence of the daughters was raised by the protestors after the administrator filed his application for confirmation of grant. He has only acknowledged them in his reply to the revocation application. He concealed information from court. He claims that the daughters were not interested in a share in the estate, yet they have not filed any documents to support that claim. The process of obtaining representation was, therefore, defective, and was founded on fraud and misrepresentation. See sections 51(2)(g), 71(2)(a)(b) and 76(a) of the Law of Succession Act.

16. The third concern is that the administrator was appointed as such on 22<sup>nd</sup> September 2011. He filed a summons for confirmation of grant on 6<sup>th</sup> August 2012. That application has been pending since then, and ten years after his appointment, the estate is yet to be distributed. He has not given any plausible explanation for that state of affairs, in his response to the revocation application.

17. The fourth concern is that although the grant has not been confirmed, the administrator has purported to sell a portion of the estate. The buyer of the portion is not disclosed, but the applicant, in the revocation application, says that a sum of Kshs. 425, 000.00 exchanged hands. The administrator has conceded, in his response to the application for revocation, that he did in fact sell a portion of the land. Such a sale would run counter to section 82(b)(ii) of the Law of Succession Act. Although the estate of the deceased vests in the administrator, under section 79, and he has power to sell any of the assets that vest in him, by virtue of section 82(b), that power is limited by section 82(b)(ii), where the asset in question is immovable. According to that provision, immovable property ought not be sold before the grant is confirmed. That outlaws sale of immovable estate assets by both administrators and others. The grant herein is yet to be confirmed, so any sale of immovable assets must run counter to section 82(b)(ii). Of course, section 82(b)(ii) can be overridden by a court order, where a court permits sale of such property before confirmation of grant. The administrator has not alleged that he obtained such leave from court, and I have not seen, from the record before me, any evidence that the court ever granted any such permission to anyone. Clearly, the administrator, who is supposed to safeguard estate assets, is the one disposing of the same in ways that are not allowed in law.

18. The fifth concern is that the administrator has not done due diligence to collect and gather the estate of the deceased. He has proposed distribution of assets that are not in the name of the deceased. The record before me indicates that North Wanga/Lung'anyiro/9 was registered in 1971, in the name of Malele Mangwana. The parties have stated that this property is still in the name of Malele Mangwana, a position that the administrator has agreed with. If the property is not in the name of the deceased, then it is not part of estate. It is not available for distribution, as it is not an asset of the estate. The administrator believes that it should be up to the person who is to be allocated the property to get it transferred to his name. That is a fallacy. Firstly, such a property ought not be presented for distribution, at all, for it is not an estate asset, so long as it is still registered in the name of a person other than the deceased. Secondly, it is not the business of any beneficiary to cause it to be transferred. That is the duty of the administrator. He has a duty, before he thinks of applying for confirmation of his grant, to have the assets perfected, so that those assets that the deceased bought during his lifetime, and which had not yet been transferred to his name, as at the date of his death transferred to the name of the deceased, so that they are then available for distribution. It is the responsibility of the administrator to do so. The administrator cannot push that responsibility to someone else. It is his duty. The fact that he does not understand it to be his duty is proof of his incompetence, and failure, as administrator. The other property that he proposes for distribution is North Wanga/Lung'anyiro/700. The register for this property was closed on 11<sup>th</sup> September 1985, after it was subdivided into North Wanga/Lung'anyiro/1187, 1188 and 1189. As it is, North Wanga/Lung'anyiro/700 does not exist since 1985, yet it is the property that the administrator is asking the court to distribute. Secondly, the administrator does not talk about its subdivision in 1985 into North Wanga/Lung'anyiro/1187, 1188 and 1189. One of the protestors alluded to that subdivision, but the administrator did not advert to it. So, the administrator is asking the court to distribute an asset that has ceased to exist. Thirdly, the record reflects that the owner of the property is a person known as Elizabeth Osiako Okinda, and not the deceased. So, the administrator is inviting the court to distribute an asset that does not even belong to the deceased or the estate. If the deceased had bought this property from someone, then the administrator had a duty, upon being appointed, to cause the portion bought by the deceased transferred to the estate, to make it available for distribution. As it is, this property is not yet in the estate, and is not available, as at now, for distribution. The only asset that is currently in the name of the deceased is North Wanga/Lung'anyiro/3, and it is the only one available for distribution.

19. The sum of what I have stated above is that the administrator has not administered this estate in accordance with the law. He would have been deemed to have had done so, had he caused North Wanga/Lung'anyiro/9, and the portion of North Wanga/Lung'anyiro/700 that the deceased had bought, to be transferred the name of the deceased in readiness for distribution. He is, therefore, engaging the court in an exercise in futility, by asking it to distribute assets that are not in the name of the deceased. He either does not understand his duties as administrator, or he is too busy in Uganda to find time to do duty as administrator. Rather than doing the right things, the administrator is busy selling off estate assets, contrary to what the law requires.

20. The principal purpose of confirmation of grant is distribution of the assets. The proviso to section 71(2) of the Law of Succession Act 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.”

21. I would like to emphasize that the provisions above cast a duty on both the administrator and the court, with respect to ascertainment of the persons beneficially entitled and their shares. The administrator who moves the court under section 71, is under an obligation to ascertain all the persons beneficially entitled to a share in the estate of the deceased, and to identify those shares in the application. The proviso is about cases of intestacy. The administrator ought to go back to Part V of the Law of Succession Act, and look at the provisions in that Part,

that apply to intestate distribution, and satisfy himself that he has ascertained the persons entitled in intestacy in accordance with those provisions. Part V runs from sections 32 to 42 of the Law of Succession Act. These provisions are very clear on who the persons beneficially entitled are, where the intestate was survived by a spouse and children, a spouse but no children, children but no spouse, and no spouse and no children. They also address situations where the intestate died a polygamist, how to deal with shares due to minors and how to treat previous gifts, settled to some of the persons beneficially entitled, either *inter vivos* or by will. The provisions are gender neutral, for the law does not entertain discrimination based along those lines.

22. The obligation on the court faced with a summons for confirmation of grant, according to the proviso, is that the court ought not treat the application casually, by just going by what the administrator has disclosed, in terms of the persons beneficially entitled. The court ought not treat the list of survivors furnished by the administrator as the gospel truth. There is need to probe, to ask questions, to go through the entire record, to peruse the petition that initiated the cause, read the letter by the local Chief or his assistant, among other measures. Go beyond the confirmation application. This is critical because a succession cause in intestacy is about distribution of the assets amongst those entitled. In probate, the exercise is easier, for distribution is in accordance with the will of the deceased, and the persons beneficially entitled would usually be those that the testator had named in his will. In intestacy, the court relies entirely on the honesty of the administrator. The court can be misled, and so it has to be vigilant. It must, therefore, go the extra mile. It must avoid a casual approach to the application.

23. The importance of the confirmation process cannot be gainsaid. A succession or probate cause is initiated for the sole purpose of distribution of the estate. The process under section 71 is about that distribution. That should make the process of confirmation of grant the most critical in the entire succession process. It is the one process that ought to bring closure to the succession or probate cause. The parties and the court must get it right. Failure to get it right will mean that there would be no closure, and the parties will have to re-visit it for one reason or other. This would explain why, after confirmation, most causes do not close, for parties keep coming back for review, or redistribution of the estate, or for rectification of the certificate of confirmation, or for revocation. Much of it has something to do with the bungling of the confirmation process. To avoid that what the court ought to do is to insist on scrupulous compliance with what is required under section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules, for the converse is that succession litigation then never ends.

24. The importance of the court doing duty, in terms of section 71 of the Law of Succession Act, was underlined in *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)* Kakamega HCSC No. 249 of 1992 (unreported) (Waweru J), where the court said:

“What is immediately obvious is that the court (Hon. Tanui J.) did not enquire into or satisfy himself as to the persons beneficially entitled and their respective shares to the estate of the Deceased as required by the proviso to subsection (2A) of section 71 of the Law of Succession Act, Cap 160 before making the order for confirmation of the grant. The proviso is in mandatory terms, and from its wording, failure of the court to so satisfy itself, in my judgment, renders the order of confirmation (and the resulting confirmed grant) illegal. Contrary to what might be thought, confirmation of grant in intestate succession is a not a mere formality. It is probably the most important aspect of intestate succession, as it is at that stage that the court determines who are beneficially entitled to the estate of the deceased and their respective shares therein. In this station and in my previous station (Kisii) I have come across hundreds of disputes which would have been avoided if the court concerned had performed its statutory duty. The present dispute is one such.”

25. I have a duty, therefore, to be satisfied, before I can proceed to confirm the grant herein, as to whether the administrator herein has ascertained the persons beneficially entitled to a share in the estate, and of their shares in the estate. 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 the administrator has properly identified all the beneficiaries of the estate, I am not persuaded that he has. I have already dealt with this in the preceding paragraphs. The deceased had 5 daughters. They were not disclosed in the Chief’s letter, not in the petition and not in the confirmation application. They were concealed from the court. An impression was created that they did not exist. They were not allocated their shares, as envisaged in the proviso.

26. The deceased herein died in 1988, long after the Law of Succession Act had come into force on 1<sup>st</sup> July 1981. His estate is, therefore, by dint of section 2(1)(2) of the Law of Succession Act, for distribution in accordance with the provisions of the Act. He died intestate, and, therefore, distribution should be in accordance with Part V of the Law of Succession Act. The parties have mentioned that one of the wives survived the deceased, yet the administrator did not make any provision for her, in accordance with section 35(1)(b) of the Law of Succession Act, by allocating to her a life interest in the net intestate estate. It is not clear whether she is still alive. It would appear the majority of the survivors are the children of the deceased. Where the deceased is survived by children only, without a surviving spouse, that is, sections 35(5) and 38 of the Law of Succession Act apply, the property is shared equally amongst the children. Of course, in case of polygamy, the estate is first dealt with in terms of section 40(1) of the Law of Succession Act, where the assets are devolved to the houses, and thereafter each house is required, under section 40(2), to distribute the assets devolved to the house, in terms of sections 35 to 38 of the Act, whichever is applicable.

27. These two provisions say, for avoidance of any doubt:

“35 Where intestate has left one surviving spouse and child or children

(1) ...

(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...

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.”

28. The record is very clear, that the administrator has disclosed only the sons of the deceased. As to whether the deceased had female children, the administrator has not disclosed that. Such children did in fact exist. Their names were disclosed by two other members of the family, and the administrator has admitted the deceased had daughters. He was obliged to disclose them when he sought representation to the estate, by dint of section 51(2)(g) of the Law of Succession Act, and he was obliged to when he filed for confirmation of his grant. Indeed, he was required to file their consents in both cases. One, to consent to his applying for representation, and, two, to consent to the distribution proposed in his summons for confirmation.

29. The proviso to section 71(2) is gender-neutral. Indeed, the entire Law of Succession Act is gender-neutral, largely, and more specifically with regard to children. It does not classify children into male and female, or sons and daughters. The reference to children in Part V, whether in section 35(5), or 38 or 40, means children of both gender. The interpretation section in the Law of Succession Act, section 3, does not define children in gender terms. In fact, the definition in there on children has nothing to do with children being either male or female, and addresses other issues that are not relevant to gender. The provisions in section 3, on children, are in subsections (2)(3)(4), and they state as follows:

“3. Interpretation

1. ...

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, any child born to her out of wedlock, and, in relation to a male person, any 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 as 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.

4. Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated.”

30. As the deceased died after the Law of Succession Act had come into force, distribution of his estate must factor in his daughters. They are entitled to a share in the estate, according to the provisions of the Act. Daughters, therefore, should not be ignored, or be disregarded, as if they did not exist, or as if the deceased never had any such children. The Law of Succession Act has provided for them, they should be taken into account in succession proceedings, by being disclosed in the petition, and in the confirmation application, and being involved in all the processes in the succession cause. Of course, under the customary law of succession, daughters especially the married ones, had no entitlement to a share in their fathers’ estates, because they were entitled through the men who married them. If customary law were of application here, unfortunately it is not, then the nondisclosure of the daughters would, perhaps, be acceptable or tolerable.

31. Other than the Law of Succession Act, I am obliged to take into consideration the rights of the daughters of the deceased, by dint of the Constitution of Kenya, 2010, and international law. Article 27 of the Constitution of Kenya, 2010, decrees that men and women are to be treated equally, in all spheres of life, and succession is one of them. When a father dies and his estate is up for distribution, then, under Article 27 of the Constitution, all the children of the deceased, male and female, must be taken into account, and afforded equal treatment. Under Article 2(5) of the Constitution of Kenya, 2010, the general rules of international law form part of the law of Kenya, and under Article 2(6) of the Constitution, any treaty or convention ratified by Kenya forms part of the law of Kenya. Kenya has signed up to many treaties and conventions, which, by dint of that Article, have become part of the law of Kenya, even without any form domestication. I shall refer to only one of them, the Convention on the Elimination of All Forms of Discrimination Against Women, otherwise known by its acronym CEDAW. It vouches for equal treatment of men and women, and enjoins States to promote non-discrimination against women. CEDAW came before the Constitution, 2010, and the promulgation of the Constitution was, so to speak, part of the domestication of the said Convention. This court cannot, therefore, turn a blind eye to these legal instruments, and proceed as if there is nothing untoward in the manner that the administrator has done, concealed the existence of the daughters and granddaughters of the deceased, and proceed as if they do not exist and do not matter.

32. In view of everything that I have said above, I am moved to make the following orders:

**a. That I find the summons for confirmation of grant, dated 8<sup>th</sup> August 2012, premature, to the extent that it seeks distribution of 2 assets that are not yet in the name of the deceased, and I, therefore, strike out the said application;**

**b. That that I find the administrator, Fredrick Muchere Mudialo, unsuitable for the office of administrator for the reasons**

that I have set out in the body of the ruling, and I hereby, accordingly, revoke the grant made to him on 22<sup>nd</sup> September 2011;

c. That I shall refrain from appointing administrators to take his position, to allow the parties decide on administrators of their own choice;

d. That 4 fresh administrators shall be appointed, 3 to represent each one of the 3 houses of the deceased, and 1 to represent the daughters of the deceased, and shall exclude Fredrick Muchere Mudialo;

e. That the matter shall be mentioned, on a date to be allocated to the parties, in the presence of all 10 children of the deceased, for appointment of administrators in terms of (d) above;

f. That the new administrators shall, thereafter, file for confirmation of their grant, where they shall strive to comply fully with all the provisions of the law that I have discussed in the body of the ruling, and to address all the concerns raised in the ruling and the affidavits lodged in the confirmation and revocation applications the subject of this ruling;

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

h. That any party, aggrieved by the orders made herein, has leave, of 28 days, to move the Court of Appeal, appropriately.

33. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF AUGUST, 2021**

**W MUSYOKA**

**JUDGE**