REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 2 OF 2018

IN THE MATTER OF THE ESTATE OF SMM alias SMM alias XM alias SMM alias SMM. alias SMM (DECEASED)

JUDGMENT

1. This matter relates to the intestate estate of SMM, who died on 23rd April 2015, according to the certificate of death on record, serial number [...], dated 29th July 2015. According to a letter, dated 11th October 2016, from the Chief of Koyonzo Location, he died a polygamist, and was survived by 3 widows, 8 sons and 11 daughters. The widows are named as IAM, RMW and VAM. The children are listed as SK, BM, JM, CO, KK, AM, SO, JS, GA, PA, VA, BK, CA, SM, MM, EM, TM, GA and FM. He was said to have died possessed of North Wanga/Koyonzo/[...], North Wanga/Namamali/[...], North Wanga/Namamali/[...], North Wanga/Mayoni/[...], Nairobi Block [...], LR No. [...] Nairobi East, East Bukusu/South Kanduyi/[...], Kakamega/Block [...], Kakamega KS Plots [...] and [...], and Bungoma Plots Nos. [...], [...] and [...]. He also had money in the bank, and a motor vehicle, registration mark and number KBQ [...].

2. Representation was sought in this cause, vide a petition lodged herein on 14th February 2018, by KKM, in his capacity as a son of the deceased. He expressed the deceased to have been survived by the individuals listed in the Chief's letter, and to have died possessed of the assets set out in the same letter. Letters of administration intestate were made to him on 22nd October 2018, and a grant was duly issued, dated 14th November 2018.

3. The making of the said grant sparked the filing of an application for its revocation. One of them was filed on 11th January 2019, by JMM, dated 31st December 2018. His case was that the grant had been obtained falsely, not all the assets of the estate were disclosed, a stranger was listed as a survivor of the deceased, and consents of all entitled to administration had not been sought. The second revocation application was filed on 2nd May 2019, by VAM. She averred that she had a superior right to administration, as a widow, over the administrator, that some beneficiaries and assets had been omitted. The application for revocation of grant were resolved by consent on 2nd May 2019, when the parties agreed on appointment of administrators, representing the various houses of the deceased. Those appointed were KKM, JMM, VAM and RMW. A grant was duly issued to the four, dated 2nd May 2019.

4. By the time the four were being appointed, the previous administrator had already filed a summons for confirmation of his grant. The said summons for confirmation of grant is dated 30th April 2019. I shall refer to the maker of that application, KKM, as the applicant. I directed, on 2nd May 2021, that any of the new administrators, who did not agree with the proposals made in the said application, was at liberty to file and serve an affidavit of protest.

5. In the said summons for confirmation of grant, the applicant identified the children and widows of the deceased to be the individuals listed in the Chief's letter, and the assets of the estate to be the assets set out in the same letter. It was proposed that the same be distributed or shared out as follows:

(a) North Wanga/Koyonzo/[...] – to BMM, COM and KKM;

(b) North Wanga/Namamali/[...] – to VAM, RMW, SKM and KKM;

(c) North Wanga/Namamali/[..] – to SKM, JMM, JCM, SOM and AM;

(d) East Bukusu/South Kanduyi/[...] – to GAM, COM and KKM;

(e) Nairobi Block [...] – to EM, SKM, JMM, JCM and CAM;

(f) Imara Daima Property (title not yet ascertained) – VAM, SM and TM;

(g) Bungoma Town Plot No. [...]– to BKM, BMM and RWM, in equal shares;

(h) Bungoma Town Plot No. [...] – to AM, FM and TM, in equal shares;

(i) Bungoma Town Plot No. [...]– to VAM, PAM and BMM, in equal shares;

(j) Kakamega Town Block [...] – TO wholly to SOM;

(k) Kakamega Town KS Site and Service Scheme Plots Nos. [...] and [...] – to Peter Rakama Ndombi, a buyer from the deceased;

(l) Koyonzo Market Plot No. [...] – to SKM, JMM and JCM, in equal shares;

(m) Nairobi East No. [...] (Nyayo Estate) – to AM, GAM and MM, in equal shares;

(n) Town plots in Busia Town (titles to be ascertained) – to VAM, SM, TM, GAM, MM, FM and AM, in equal shares;

(o) Mayoni plot (title to be ascertained) – to IAM, RMW and COM, in equal shares;

(p) Motor vehicle registration number and mark KBQ [...] Suzuki – to IAM; and

(q) The money in Barclays Bank of Kenya Bungoma Branch A/C No. xxxx - to be shared equally amongst all the survivors, save Kshs. 505,000.00 to be retained by the applicant, to meet administration expenses.

6. The summons for confirmation of grant was filed simultaneously with a consent to confirmation of grant, in Form 37, filed under Rule 40 of the Probate and Administration Rules, dated 30th April 2019, and filed on even date. Although the same lists 22 individuals, it was signed by only 9 of them, being SKM, BMM, COM, KKM, GAM, PAM, VAM, BKM and RMW.

7. The application elicited several affidavits of protest. The first in time was filed by IAM, on 11th July 2019, and was sworn on even date. She avers to be a widow of the deceased, having married him in church in 1959. She avers to have had 9 children with the deceased, being the late GM, the late MM, OM, KKM, GM, COM, PM, BMM and VAM. The late GM died without issue, but the late MM was survived by CT, a child with special needs, under the guardianship of the applicant, KKM. She avers that she would like to be allocated the Mayoni plot and the motor vehicle, as she had acquired the same jointly with the deceased. She avers that she had consented to the applicant being administrator as he had contributed to the settlement of the deceased's final medical bills and had spent his own money to initiate the succession cause. She accuses JMM and VAM of being intermeddlers with the estate. She further avers that as the 1st wife of the deceased, she had caused a meeting to be held by the family, in June 2015, to safeguard the wellbeing of SOM, who is mentally challenged, and a last born child from the 2nd house, and who had been neglected by JMM, and was being cared for by the administrator. She proposes that Kakamega/Block [...] be allocated to SOM, to cater for his education and medication. She states that after the funeral of the deceased, the family met and agreed on the distribution of the estate, and property was allocated to each of the houses, as per the proposals made by the applicant in his application, dated 30th April 2019. She would like the court to distribute the estate as proposed in the confirmation application. She has attached to her affidavit copies of the medical bills incurred with respect to the deceased's hospitalization, and receipts issued by the advocates for the applicant towards administration expenses.

8. The next affidavit of protest was filed on 12th July 2019, by Boniface Anjeche Oremo, the chairperson of Kakamega County Network of Persons Living with Disabilities, on behalf of SOM. He avers that the other protestors had not highlighted the interests of SOM, who is mentally challenged. He avers that although SOM comes from the 2nd house, the first son in that house, JMM, had neglected him, despite collecting the income generated from the houses allocated to the 2nd house. He avers that SOM was under the care of the applicant, despite he coming from the 1st house, and he supports the proposals on distribution made by the applicant. he mentions that there is a court in Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, where SOM was allocated Kakamega/Block [...] to cater for his needs. He avers that this is property from which JMM collects rent, but he does not spend the money on SOM. He has attached copy of the order made in Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, dated 23rd October 2017 and issued on even date.

9. There is an affidavit by PRN, sworn on 8th July 2019, and filed herein on 10th July 2019. He describes himself as a liability of the estate, having bought the property known as Kakamega Town KS Site and Service Plots Nos. [...] and [...] from the deceased. He says that after the purchase, the deceased gave notices to the tenants on the change of ownership, and that he took possession of the property, and entered into tenancy agreements with the tenants. He avers that he is the owner of the two plots and that he collects rents from them. He avers that he did inform the National Housing Corporation of the change in ownership, and that he has been paying land rates for the property since then. He further avers that the deceased had paid transfer fees to have the property transferred to his name. He asserts that although the two plots are registered in the name of the deceased, they were his by purchase. He states that as a liability or creditor of the estate he ranked in priority with respect to distribution, and that he should be settled first before the net intestate estate is shared out amongst the survivors of the deceased. He says that he has no claim to any other property of the deceased. He avers that the delay in effecting the transfer was due to indolence on the part of the officials of the Kakamega County government. He has attached to his affidavit a bundle of documents to support his case. These are the sale agreements between him and the deceased, the notices jointly issued by him and the deceased to the tenants, the tenancy agreements executed between him and the tenants, correspondence with the National Housing Corporation, and receipts to evidence payment of property rents and rates to the Kakamega County government.

10. RMW filed an affidavit on 14th November 2019, sworn on even date, to respond to the affidavit of protest sworn by IAM. She contests several averments made in that protest affidavit. One, the property that the 1st wife claims was acquired with her joint efforts with the deceased, as no particulars had been supplied. Two, that the only motor vehicle of the deceased was KBQ [...], which was registered in his

name jointly his 4th wife, VAM, and who had possession of the said motor vehicle. Three, she avers that the Mayoni plot ought to be allocated to her, since she was the one who had been using it. Four, she contests the allegation that the applicant was the only person who settled the hospital bill for the deceased, saying that the bill was settled collectively by the family through rental income from the assets of the deceased, but sent to the applicant, being the first son, to pay the same on their behalf. Five, the moneys allegedly spent by the applicant on the administration, saying that the same ought to be drawn from the estate, and ought to be shared by all the survivors. She urges that the same be taxed. Six, she avers that Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017 had been filed by a stranger and was struck out for being incompetent. Seven, she avers that SOM was under the custody of VAM, after his mother died, and so were other members of the 2nd house. She states that SOM was removed from the custody of VAM by stealth by the applicant. She avers that Kakamega/Block [...] was a property due to the 2nd house, and the same ought to be shared out equally amongst all the members of that house. Finally, she agrees with the distribution proposed in the affidavit of VAM. She has attached a copy of the ruling in Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, delivered on 19th October 2018, which, allegedly, dismissed that suit.

11. JMM filed an affidavit on 11th November 2019, sworn on even date, to respond to the affidavit of protest sworn and filed by Boniface Anjeche Oremo, on behalf of SOM. He describes the said Boniface Anjeche Oremo as a stranger to the estate, who could not represent SOM, as he was not his guardian *ad litem*, and the said SOM had close relatives who were alive. He avers that the suit in Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, where he had purported to represent SOM, was struck out for being incompetent. He denies that the interests of SOM were not being taken care of, arguing that Boniface Anjeche Oremo had not comprehended his affidavit. He has equally attached a copy of the ruling in Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, delivered on 19th October 2018, which, allegedly, dismissed that suit.

12. JMM also filed another affidavit, on 11th November 2019, sworn on even date, in response to the affidavit of protest by IAM. He contests several averments made in that protest affidavit. One, the property that the 1st wife claimed was acquired with her joint efforts with the deceased, as no particulars had been supplied. Two, that the only motor vehicle of the deceased was KBQ [...], which was registered in his name, and was, as at the date of his death, being used by his 4th wife, VAM, who had possession of the said motor vehicle. Three, he avers that the Mayoni plot ought to be allocated to RMW, the 3rd wife, as she had not been built a homestead by the deceased, and lived with the deceased at Bungoma, and the two were jointly drawing income from the Mayoni plot, before members of the 1st house chased her away after the demise of the deceased. Four, he contests the allegation that the applicant was the only person who settled the hospital bill for the deceased, saying that the bill was settled collectively by the family through rental income from the assets of the deceased, but sent to the applicant, being the first son, to pay the same on their behalf. Five, the moneys allegedly spent by the applicant on the administration, saying that the same ought to be drawn from the estate, and ought to be shared by all the survivors. he urges that the same be taxed. Six, she avers that Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, had been filed by a stranger, and was struck out for being incompetent. Seven, he avers that SOM was under the custody of VAM after his mother died, and so were other members of the 2nd house. He states that SOM was removed from the custody of VAM by stealth by the applicant. He avers that Kakamega/Block [...] was a property due to the 2nd house, and the same ought to be shared out equally amongst all the members of that house. Finally, he agrees with the distribution proposed in the affidavit of VAM. he has attached a copy of the ruling in Kakamega Chief Magistrate's Court Children's Case No. 36 of 2017, delivered on 19th October 2018, which, allegedly, dismissed that suit.

13. The applicant filed a further affidavit on 18th November 2013, sworn on even date. He avers in it that the family had sat on 21st June 2015, and agreed on the sharing of the rental property, according to the houses, which, he says, obtains to date, but with some slight variations. He also set out the rents collected from 12 of the immovable assets of the deceased. He proposes that the rental income should guide the court in distribution. He states that the proposals by JMM and VAM were self-serving and meant to appropriate the most lucrative assets of the estate to their houses to the disadvantage of the rest. He states that VAM had refused to relinquish North Wanga/Namamali/[...], which she had fraudulently transferred to her name without due process, and has refused to surrender it to the estate for distribution. He further says that Kakamega Town KS Site and Service Scheme Plots Nos. [...] and [...] had been sold by the deceased, and no longer formed part of the estate. He further says that SOM ought to be given Kakamega/Block [...], to cater for his special needs, as he was vulnerable, and had been mistreated by JMM, and that the court ought to appoint trustees to supervise his wellbeing. To that affidavit, the applicant has attached a document, which purports to be a meeting of the family held on 21st June 2015, where the assets were allegedly shared out amongst the 4 houses of the deceased.

14. BMM filed his affidavit of protest on 21st February 2020, sworn on 31st January 2020. He avers that the deceased died a polygamist having married four times. Members of the 4 houses are listed the 1st house is said to comprise of the widow, IAM, and her children, the late GM (survived by a child, the late MM (survived by a child), the late OM, KKM, GM, COM, PM, BMM and VAM. The 2nd house is said to comprise of JMM, SKM, JCM, SOM, CAM and BM. The 3rd house is said to comprise of RMW (widow) and BKM. The 4th house is made up of VAM (widow), SAM, MNM, FAM, TTA, AM and GAM. On the assets, he identifies the same assets as identified by the other parties, save that he adds Bukhayo/Mundika/[...] and South Teso/Angoromo/[...], which he strangely does not propose for distribution. He urges the court to allocate Bungoma Town Plot No. [...] and Bungoma Town Plot No. [...] to him, on the basis of renovations that he made on the property at a cost of Kshs. 403,735.00. He proposes a distribution which more or less aligns with that of the applicant, save for a few adjustments.

15. RMW filed a further affidavit on 10th March 2020, sworn on 21st February 2020. She avers that although the family had agreed to share the property of the deceased, the applicant decided to evict some survivors, like herself, and that she had since moved away from the distribution that they had agreed on. She proposes sharing according to the houses. She avers that the sharing of monthly rental income was exaggerated, as it was lower on the ground than what was being averred in the affidavits. She asserts that there should be equal distribution according to the houses.

16. JMM filed another affidavit on 27th July 2020, sworn on 16th March 2020, in response to the further affidavit of the applicant. He avers that the meeting where the family purportedly agreed on the sharing of the estate did not happen in the manner the applicant was alleging. He states that no one signed the minutes of the meeting, and the 4th house was not represented at that meeting, which, in any event, was illegal to the extent that the persons holding the meeting had not yet been appointed administrators of the estate, and the meeting had not been

sanctioned by the court. He further avers that no documents were attached to support the rents allegedly collected with respect to the immovable assets of the estate, and he goes on to try to discount the same. He avers that the proposals by the applicant favoured the 1st house, which was getting a lion's share of the estate. He concedes that Kakamega Town KS Site and Service Scheme Plot No. [...] had been sold to Peter Rakama Ndombi. He contends that there is no proof that the other plot at the scheme, No. [...], had similarly been sold to him. He has also averred that the applicant had not demonstrated how Kakamega Block [...] was going to cater for the special needs of SOM, who, in any case, was taken care of in the proposals that the deponent had made.

17. Directions were taken on 27th June 2019, to the effect that the application be disposed of by way of *viva voce* evidence.

18. The oral hearing began on 30th November 2020. It was the applicant who took to the witness stand first. He averred that he had listed all the survivors of the deceased and persons beneficially entitled to a share in the estate, as well as all the assets of the estate. He explained that the deceased had 4 wives, of which 1 was dead, that was to say the late AM, the 2nd wife. He said that there were children in all the 4 houses. He said that the family sat in 2015, to allocate the commercial properties, to facilitate collection of income for the families. The plots were allocated according to the houses, and the allocation was guided by the number of people in each houses, since the house had uneven numbers of members. Each house was given a rental house to draw income from, including the 4th house. He said that the Mayoni property was allocated to RMW at the meeting. He said that after that the 1st wife asked to be included in the property, so he included her in his proposed distribution. COM renovated the property, so he included him. He said that the distribution should be guided by the rental income collected. On North Wanga/Namamali/[...], he said that the 4th wife had the property transferred to her name without following the right procedure. That happened after the deceased died, and without the concurrence of the rest of the family. He said that there was a criminal case concerning that piece of land. He said that the rest of the family considered North Wanga/Namamali/[...] to be estate property. He explained that Peter Rakama Ndombi had bought some of the assets from the deceased. he had shown him the sale agreements. On SOM, he explained that he was the last born in the 2nd house, and had special needs. He explained that he was taking care of him, since he was not getting his rightful share from those who should have taken care of him from his house. He proposed that trustees be appointed to take care of the share to be allocated to him, and the trustees should exclude JMM, his blood brother, who he described as heartless. He proposed that the motor vehicle ought to be given to the 1st wife, for she was elderly and needed something for mobility. On the money in the bank, he proposed that the outstanding legal fees be settled from the deceased's bank account, and the balance to be shared equally amongst the beneficiaries. He said that he did not know of the property known as Kakamega Jua Kali Plot No. [...]. He said that he was counting the child of the late MM as a child in the 1st house.

19. During cross-examination, he stated that the meeting of 2015 was held before representation had been granted, and it had not been sanctioned by the court. He said it was an illegal meeting before the court, but not the family. He said that it was not attended by all family members, but it was binding as minutes were taken, although they were not signed by any of those present. He said VAM did not attend the meeting. The family agreed on allocation of the rental houses, and they began to collect rent based on the deliberations of that meeting. He said that he was in agreement that the property be distributed according to the houses. He said that he did not agree that the administration expenses be met from the estate account. He said that only the expenses of administration should be met from the account, but not the legal costs incurred by the parties. He said that he was not aware that there were other administrators that were appointed by the court, and he did not recognize them as co-administrators, saying that if they were indeed co-administrators they would share responsibility with him. He said that he paid Kshs. 120, 000.00 as legal fees to his advocates. He said the other administrators should pay their own advocates. He said that he lived with SOM and provided for him, yet he should have been supported from the estate. He conceded that he had no documentary proof to support the assertion that he was the one providing for SOM. He explained that RMW was the 3rd wife, and he had given her property in Bungoma. He said the Mayoni property had been given to RMW and others. He said that VAM did not take up responsibility for SOM, saying that he took over after they neglected him. He said when the deceased died, SOM was staying with VAM, and that it was after that the he took over. He said that in his proposals only 2 assets were going the 1st house, East Bukusu/South Kanduyi/[...] and Bungoma Town Plot No. [...]. On North Wanga/Namamali/[...], he said that the same was registered in the name of the VAM, but it was estate property available for distribution, although not in the name of the deceased. He said there was a criminal case in which he was a complainant. He said he had not provided any proof that the transfer was unlawful. He said he had evidence that the transfer happened after the deceased died. On Kakamega/Karubi somali plots Nos. [...] and [...], he said that he became aware of the sales after Peter Rakama Ndombi approached him after the deceased died. He also said that the deceased had told him that he had sold the plots to Peter Rakama Ndombi. He said that he was not, as administrator, collecting rent from the two plots. He said that no one was using the vehicle KBQ [...], and that it was parked at the residence of VAM. He asserted that it was a personal car of the deceased. He said that he was aware of Bukhayo/Mundika/[...] and South Teso/Angoromo/[...]. He said that he had not left them out, but had shared them out, although the numbers were to be ascertained. He had referred to them as Busia plots. He said that VAM had refused with the titles, documents and that was why he had no details of them. He said that TM referred to TTA. He said that he did not know that she was a minor, because he was a resident of Kakamega, while she resided abroad. He said that VAM declined to give him details of the children. He said that there were very few minors in the estate. He said he was unaware that GAM and FAM were minors, although he knew that they were school going. Regarding BMM, he said that he was aware that he carried out repairs on estate property. He said that he should not be reimbursed for that expense, because he was one of the beneficiaries of the subject building. He said that for the monies he spent on the medical bills of the deceased he was not asking for reimbursement, but he wanted the estate to pay the balance of the legal fees to his advocates.

20. VAM followed. She stated that she collected rent from the houses on Bungoma plot, South Teso, and in Nairobi at Nyayo Estate and Imara Daima. She said that she did not attend the family meeting, but she was told to hold on to the houses and continue to collect rent from them. She said that she had six children and she had listed all of them in her papers. She said North Wanga/Namamali/[...] was her property. She said that it had no house on it. She denied transferring it after the deceased died, saying that it was the deceased who gave it to her, and transferred it to her. She said that it was the deceased who processed the title, and he did not even tell her about it. She said that the lands office called her after the deceased died and asked her to sign some papers, in order to get the title. She conceded that there was a criminal case over the matter. She said she did not understand why the other houses were claiming that property. She said that she had one plot at Bungoma. She said that she did not know Peter Rakama Ndombi, not that he had bought the KS plots from the deceased. She, however, said that Peter Rakama Ndombi could take Plot No. [...], but not Plot No. [...]. She said SOM was 25 years old when the deceased died in 2015, and that she took charge of him after his mother died in 1989. She said that his only problem is that he is mute. She said his needs should be taken care of from the 2nd house. She stated that he left her custody in 2017. He was taken by the administrator, claiming that he taking him so that he could help him get an identity card., but he never brought him back to her. She said she did not want to be one of his trustees, saying that such trustees should come from the 2nd house. She asserted that it would a lie to say that the 1st wife raised SOM. She explained

that she was settled by the deceased in the *boma* of the 2nd wife, as she was dead, so that she could take care of the children of the said wife. She said she farmed on North Wanga/Namamali/[...]. She said the 1st wife had been settled on a farm from where she still operated. The 2nd wife was settled on North Wanga/Namamali/[...]. She said it had been given to her during her lifetime, and that she had her home on P/No. North Wanga/Namamali/[...]. She said that each of the wives had a farm, which they cultivated.

21. JMM followed. He categorized the estate into four – farmland, commercial plots, motor vehicle and money in the bank. He said that during his lifetime the deceased had settled each of his 4 families on agricultural land. The 1st house was settled on North Wanga/Koyonzo/[...], which measured 3 acres, and comprised of 6 children. The 2nd house was settled on North Wanga/Namamali/[...], measuring 10 acres, and there are 6 children. Bungoma/[...] was where the 3rd house was settled, and it measured less than an acre. The 4th house was also settled on North Wanga/Namamali/[...], and she had 6 children. He explained that SOM was 2 weeks old when the 2nd wife died in 1989, and the 4th wife, a cousin of the 2nd wife, was brought in to take care of the children, and she was later married by the deceased. He asserted that SOM was never raised by the 1st house. He said that the applicant had omitted to include the 1st wife in the sharing of North Wanga/Koyonzo/[...]. He stated that they did not agree on the commercial plots, because they were not able to meet as administrators as the applicant was not cooperating. He stated that the 1st house had taken the lion's share of the commercial plots. He proposed that the same be shared according to the houses. He said that the motor vehicle should be sold and the proceeds shared equally among the houses. He said that the family meeting of 2015 was not attended by all the members of the family, and there were no administrators then. He said that the same was not binding, and it ended without agreement. He said that although he was supposed to be the secretary of the meeting, it was the applicant who generated the minutes that were filed in court. He said that he was not assigned responsibility to take care of anyone, and that he had allocated SOM a share in the property equally with the other sons in the 2nd house. He said that SOM was also getting Kakamega Town/Block [...], which was to be shared by the 2nd house. He said that he was not aware that taxes were to be paid on the commercial plots. He said that the taxes ought to have been paid by the estate and not the individual beneficiaries. He said that administration cost ought to be met by the estate, such as legal fees, transfer fees, etc. On East Bukusu/South Kanduyi/[...], he said that the same should not go to the 1st house, and it should be given to the 2nd house instead, to be shared equally. He said that SOM should be taken care of by members of the 2nd house. He said that he was aware of the children's case, but said that SOM was not a child. He said that the case was dismissed. He said that he was not aware that North Wanga/Namamali/[...] was transferred to VAM after the deceased died, saying that it should go to her, as she was the one who was utilizing it, even during the deceased's lifetime. Regarding BMM, he said that he did not do any renovations on Bungoma Town Plot No. [...] and Bungoma Town Plot No. [...]. On the KS plots, he wondered why the buyer did not get the two transferred between 2001/2002, when he allegedly bought them, and 2015 when the deceased died. He asserted that the alleged buyer should not get the two plots. He denied that he had neglected SOM before responsibility over him was taken up by the applicant. He said that no house had been allocated to any individual, and that SOM, was one among those who were to benefit from Kakamega town.Block/[...]. He said the 2nd house would take care of him.

22. RMW testified next. She explained that she attended the 2015 meeting, where JMM was the secretary, she said that they were told that they were to collect rent from the houses while awaiting the succession proceedings, for their upkeep. The property was shared out according to the houses. She was given Bungoma Town Plot No. [...] and the Mayoni plot. She said she would have no problem if the two were allocated to her by the court. She said she collected rent from Bungoma Town Plot No. [...] from 2015 up to 2018, when she stopped. She said that she heard that it was BMM who took over. She said she was unaware that BMM did renovations on the houses on the plot. She added that the house was not in bad state when she was collecting rent. She said she agreed with the proposals by the 4th wife.

23. Boniface Anjeche Oremo followed. He worked an the organization known as Kakamega Network of Persons with Disabilities, which he said championed the rights of persons with disabilities. He was the chairperson of the organization. He said that he was not related to the deceased, and that he was only championing the rights of SOM, as a person with disability. He conceded that he was not his guardian. He said he knew nothing about guardian *ad litem*. He said that he had filed the children's case, and described SOM as a child, on account of his status. He said that SOM should inherit Kakamega Town/Block/[...]. He accused the 2nd house of not cooperating, and of abandoning him. He said his siblings were not responsible, so he stepped in. He said that he had a court order which had decided that JMM did not to have responsibility over Sylvester Ojwang Makokha, and not to collect rent from Kakamega Town/Block [...]. He said that he was not aware whether the orders were vacated. He insisted that they existed, for he had not been notified that they had been set aside.

24. Peter Rakama Ndombi was the last on the stand. He said that he bought the two KS plots from the deceased. He explained that thereafter the deceased gave notice to the tenants on the change of ownership, and thereafter he got into tenancy agreements with the tenants. The deceased also informed the National Housing Corporation that he had sold the plots to him. He began to pay the land rates and rents over the property. He also paid the transfer and clearance fees. He was issued with a certificate from the local authority. He said that after the sale the deceased stopped collecting rent for the two houses, and that he never saw anyone else collecting the rent, and no one from the family came to question him about the rents. He said that he bought them in 2001 and 2002, but they were not transferred to him by the time the deceased died. he said that he had done all the documentation, and that it was up to the local authority to transfer the same to him. He said that he worked abroad and that by the time he came back he found that the deceased had died. He contacted the agent who had arranged the sale, who referred him to an advocate for one of the sons of the deceased, who in turn linked him up with the applicant. He said the applicant told him to wait for the succession process, which he was undertaking, where he listed him as a liability of the estate. He asserted that he was entitled to the two plots. He said that he had developed them further.

25. At the close of the oral hearings, on 2nd December 2020, the parties were directed to file written submissions. There has been compliance. Some of the parties have placed on record written submissions, some supported by authorities. I have read through them, and noted the arguments made.

26. What is before me is a summons for confirmation of grant. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which provides as follows:

> ""*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 principal purpose of confirmation of a grant is distribution of the assets. The proviso to section 71(2) 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), which governs applications for confirmation of grant, as follows:

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

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? It would appear that the applicant has all through properly ascertained the survivors of the deceased. The deceased died a polygamist, having married four times, and having sired children with all 4 wives. These are well captured in the affidavit of BMM, sworn on 31st January 2020. I am satisfied that the persons beneficially entitled to a share in the estate have been properly ascertained, and, therefore, the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with.

16. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. Shares are about the property being distributed. Before I look at the shares ascertained, it would be critical to consider whether the property forming part of the estate was properly ascertained, before shares were allotted to the survivors and heirs.

17. The parties appear to be largely in agreement with regard to the assets that make up the estate, and which are available for distribution. The contestation appears to be limited two sets of assets: the two KS plots and North Wanga/Namamali/[...]. One set is said to have been sold by the deceased before his demise, while the other is said to have been transferred by the deceased to his 4th wife before his demise. I will consider the issues relating to the two separately.

18. Let me start with the KS plots. I give the two priority because the claimant asserts rights as a creditor of the estate. Under the law of succession, debts and liabilities take precedence over distribution of the estate. They should be settled first before the estate is offered for distribution to the survivors. What should be available at distribution should be the net intestate estate, that is after paying off debts and liabilities, or taking away what is due to the creditors, liabilities and purchasers. That is the spirit of section 83(d), (e) and (f) of the Law of Succession Act. All the debts of the estate are to be ascertained and paid out; after which the administrators ought to produce a full and accurate inventory of the assets and liabilities of the estate, and a full and accurate account of all their dealings with the estate up to the date of the account; and after that distribute all the assets that remain after payment of expenses and debts amongst the persons beneficially entitled. But let the provisions speak for themselves:

"*83. Duties of personal representatives*

Personal representatives shall have the following duties—

(a) …

(b) …

(c) …

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) …

(h) …"

19. The provisions cited above are clear on the sequence of events. First of all, the administrators are to ascertain and settle debts and liabilities, after that they should render an account, which should cover an inventory of the assets and liabilities that they would have ascertained, and an account of the dealings with estate up to the point of rendering accounts. "Dealings" would cover such activities as settlement of any debts and liabilities of the estate, for it is after that that we move to the next activity, which is distribution of the estate, after confirmation, after the debts have been settled. The account should, therefore, relate to what the administrators have done with the estate, after ascertaining the assets and liabilities. One of the things that the administrators have to do before distribution is settle debts and liabilities, and the account before distribution should cover the same. The administrators have to explain to the court what they have done about the debts, before they propose distribution of the net estate to the beneficiaries.

20. Section 83(d), (e) and (f) of the Law of Succession Act does not make any reference to distribution of the net intestate estate, although the language in section 83(f) of the Law of Succession Act is wide enough to cover that. The term "net intestate estate" is specifically used in Part V of the Law of Succession Act, and particularly at sections 35, 36, 38, 39, 40 and 41. The provisions provide that what is for distribution, in the event of intestacy, would be the net intestate estate. The terms "net estate" and "net intestate estate" are defined in section 3(1) of the Law of Succession Act, as follows:

"… "net estate" means the estate of a deceased person after payment of reasonable funeral expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any;

"net intestate estate" means the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of "net estate", so far as the expenses, debts, liabilities and estate duty are chargeable against that estate…"

21. It would be useful, and would reduce lengthy litigation at confirmation of grant, if administrators were to settle the debts of the estate prior to applying for confirmation of grant, so that the proposals placed before the court at confirmation would relate only to the net estate, and limited to the survivors and beneficiaries. Debts are often contested, by the administrators themselves, or the survivors and beneficiaries, and it would help if those contests are carried out outside of the confirmation process. The person who claims the two KS plots, Peter Rakama Ndombi, approached the applicant, and presented his case, complete with documents. If the applicant was satisfied that there was a genuine transaction between the deceased and the claimant, he should have set in motion the process of settling that debt, by seeking the authority of the court to transfer the two plots to the claimant, of course, with service of the application to all the survivors of the deceased. If that was resisted by the other survivors, perhaps challenging the validity of the sale, then, the applicant should have taken advantage of Order 36 of the Civil Procedure Rules, by placing the matter before the relevant court, in separate proceedings for determination of the question. Alternatively, the claimant could have done the same, or even initiated an ordinary suit for determination of his rights. That is the spirit of Rule 41(3) of the Probate and Administration Rules. The issue, though, can be addressed in the context of the confirmation proceedings, subject to the jurisdiction of the High Court over determination of land questions, in view of Articles 162(2) and 165(5) of the Constitution. See *In re Estate of Julius Javan (Deceased)* [2018] eKLR (Gikonyo J) and *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR (Musyoka J).

22. There is no dispute that the two KS plots were in the names of the deceased as at the date of his death. The majority of members of the family do not appear to have a challenge with the claim, save for JMM. The claimant produced documents that demonstrated that he entered into sale transactions with the deceased over the two plots. There is correspondence to show that the deceased surrendered possession and control of the plots to him, and that he began to collect rent from the two plots. That is not contested by anyone. The only issue raised appears to be that the sales happened in 2001/2002, yet the claimant did nothing to have the transfers effected before the deceased died in 2015. The claimant explained that delay. He was working abroad, and, in any event, he presented all his documentation to facilitate the transfer but the relevant authorities did not appear to have had moved with speed to effect the transfers. I am satisfied that the deceased had done everything that needed doing for the property to be transferred to the claimant, and that the delay could not be blamed on either of the deceased or the claimant. Consequently, Peter Rakama Ndombi has demonstrated that the two KS plots belonged to him, and did not form part of the estate. They ought to be given to him. See In *Re Estate of Gedion Mauthi Nzioka (deceased) [2015]eKLR (Nyamweya J) and in Re Estate of Nyachieo Osindi (deceased) [2019] eKLR (Ougo J.)*

23. That leaves me with North Wanga/Namamali/[...]. The property previously belonged to the deceased, but shortly after his death it was transferred to the 4th wife. The transfer is contested by the applicant. The other members of the family appear noncommittal on the matter of the said property. The applicant contends that since the transfer happened after the deceased died, it was illegal and fraudulent, and the property ought to be reverted to the estate; while the 4th wife argues that it was the deceased who transferred the property to her, and, therefore, the same was no longer estate property. The same is subject to criminal proceedings, initiated by the applicant. No documents were placed before me, in terms of either a certificate of official search or a green card, which would have helped me understand who had

initiated the process of the transfer. So, I cannot say, one way or the other, whether or not the same was transferred to the 4th wife by a proper or fraudulent process. If the property were to be found to have been transferred illegally, then it would remain estate property. If not, then it would not an asset in the estate, available for distribution. Of course, it would still be of interest to the court, in terms of section 42 of the Law of Succession Act, so that the court can distribute the estate in a balanced way. The matter is still pending before the criminal court, and I should leave it at that. The only thing I should add, is that I wonder why the applicant chose to use the criminal process, when he could have just sued the 4th wife in the Environment and Land Court, for a determination of the validity of the said transfer. The matter should have been escalated to the criminal court only after the Environment and Land Court had found the transaction to have been effected through an unlawful or illegal process, for it would only be then that the criminal sanctions would become necessary. Determination of validity of land transactions is the province of the civil courts, not the criminal courts. The applicant is likely to find himself with egg on his face, should the criminal court find that there was no criminality involved. One cannot help but sense malice and ill will in the initiation of the criminal proceedings, whatever the final outcome will be. Since the matter is still before another court, and the property is in the name of another, I believe the best way forward would be to leave it out of the distribution schedule, to await the outcome of the criminal proceedings, so that this court does not make a decision that will undermine the criminal proceedings, and embarrass the court seized of the criminal matter.

24. The other aspect of the proviso to section 71(2) and Rule 40(4) is with regard to distribution, the court must be satisfied as to the distribution proposed, in terms of being satisfied that the shares of all the persons beneficially entitled had been ascertained. The applicant has made an effort to distribute the estate to all the persons who had survived the deceased. There are arguments that the distribution that he has proposed favours the house that he comes from, the 1st house, and, therefore, the other houses have come up with their own proposals.

25. The deceased died a polygamist, and, therefore, distribution ought to follow section 40 of the Law of Succession Act. That is easier said than done. Such an approach would be easy where there is only one asset to be shared amongst members of several houses. The deceased had several assets. It would be difficult to apply the principle in section 40 to distribute the estate in the circumstances. Particularly, noting that the deceased appears that he to have had settled some of the assets to certain houses, principally with respect to agricultural land. There would be no need to disrupt those arrangements. The main contest appears to be with respect to the commercial plots. He does not appear to have had done the same. It appears that the family did sit, after his demise, and allocated, between themselves, the commercial plots, to facilitate collection of rent for their maintenance pending succession. That meeting was not attended by all the family members, and the minutes of the meeting were not signed by those present, or even those who acted as the officials at the meeting. However, it would appear that there was some level of acceptance of what was discussed at that meeting, for the commercial plots were indeed shared out, and rents were collected by the houses allocated to them, and that arrangement appears to hold to date, subject to a few cases, such as where the 3rd wife appears to have been driven out of the asset allocated to her, and she even had to seek court intervention to secure her position. The distribution proposed by the various parties appear to mirror that tentative distribution in 2015, save that there have been some alterations. Much as the distribution proposed in the meeting of 2015 did not involve all the parties, it would be representative of what would be a fair distribution, and it shall guide me largely in working out the final distribution.

26. The applicant raised issues about moneys he had expended on the medication of the deceased. This issue was highly contested, with the other family members saying that they had not left the burden of caring for the deceased medically solely to him, and saying that they had contributed as well to meet the expense. I do not think that I should belabour it given that he has stated that he does not seek reimbursement of that money.

27. BMM seeks reimbursement of moneys he allegedly expended on renovations or repairs carried out on same estate property. It is not clear the circumstances under which he incurred those expenses. Firstly, because the property that he allegedly incurred expenses on had, in the meeting of 2015, been allocated to the 3rd wife. It is not clear how he came to displace her, and place himself in charge of the said property, to the extent of having to effect renovations on it. Secondly, the estate of a dead person vests in the personal representative. The personal representative, as at the time the repairs were being carried out, was the applicant. It only the administrator or personal representative who could authorize such repairs. Why? Because, under section 79 of the Law of Succession Act, the assets of the estate vest in him, and it is only him, who can handle the assets as if they belonged to him, for he represented the deceased and he could act as the deceased himself would have were he alive. Section 45 makes it a criminal offence to handle estate assets without lawful authority. That authority only vests in the administrator. Only he could lawfully effect those repairs. Alternatively, those repairs could only be carried out with his authority. BMM does not contend that he had the authority of the applicant before he carried out the repairs, and the applicant merely says he was aware that he carried out the repairs, which is not the same as authorizing him to carry them out. What he did amounted to intermeddling with the estate, for he was not an administrator when he did the repairs, and he did not have authority of the administrator to carry them out. Expenses incurred through a criminal process cannot possibly be recoverable. It is a liability that cannot be enforced against the estate, and it is a loss that must lie where it fell. The estate should not shoulder an expense incurred without authority, and in furtherance of a criminal enterprise.

28. I also understood BMM to be saying that he was entitled to the property he renovated on the basis that he acquired an interest in it as a consequence. What is clear is that the deceased did not allocate that property to BMM. Indeed, upon the demise of the deceased, and at that meeting in 2015, it was allocated to the 3rd wife, who took possession, but was later, in ways that neither BMM nor the 3rd wife made clear to the court, dispossessed and BMM took possession, and renovated the property. I have already hold and found that what BMM did amounted to intermeddling. It appears that he did the renovation with the sole aim of staking a claim to that property. That is unacceptable. There is nothing in the law of succession which states that a survivor of the deceased person, in intestacy, who improves or renovates or repairs property, in a manner that amounts to intermeddling, would be entitled to that property at distribution. Such an argument would be a monstrosity, as it would guarantee rights based on criminal conduct.

29. The applicant lays claim to East Bukusu/South Kanduyi/[...], on grounds that he was the one who paid land rents and rates for it. The same argument as that advanced by BMM, that he had renovated a property and, therefore, he was entitled to it. The applicant was the initial sole administrator of the estate. If he paid the land rents and land rents at the time when he was administrator, it would mean that he did as administrator. After all, it his duty as administrator to pay such land rents and land rates for all the immovable assets of the estate, for the same are vested in him, by virtue of section 79 of the Law of Succession Act. It is not an act of charity for him to pay such rates, it is a statutory duty. If he failed to pay such rents and rates, then he would have failed in his duties as administrator. Secondly, if he paid the land rates and land rents for the property before he was appointed administrator, then that amounted to intermeddling, for he would have handled estate property before representation was committed to him. Thirdly, the mere fact of paying land rents and land rates for estate assets does

not confer any rights to the payer over the property. The payer acquires no stake in the property on account of such payments.

30. The applicant proposes that the moneys held at the Barclays Bank account that the deceased was operating should be ploughed to settle legal fees and administration expenses. I have seen the bank statement that was recently generated from that account. I am surprised that the account is still active. It should have been closed soon after the deceased died, and the funds held in it held in suspense until confirmation. If the same was operated by the deceased to hold the income collected from the revenue generating assets, the administrator should have opened an estate account to receive such income, and from where he could draw funds for administration expenses, such as legal fees, payment of land rents and land rates, taxes, court fees, survey fees, *et cetera*. Be that as it may. The proposal to meet administration expenses and legal fees from that account is in order, for such expenses are an expense on the estate. They ought not be met from the pocket of the administrator.

31. The only other matter that I should address, with respect to that, is as to whether the legal fees incurred by the other three administrators ought to be settled from that account. The applicant has asserted that he does not recognize those other administrators. The short answer to that is that it is not up to the applicant to recognize them as such, so long as they were appointed by the court. Their status is not dependent on recognition by him, but rather by their appointment by the court. In any event, they were appointed by consent of the parties, and he was represented in those proceedings by his advocate, Mr. Nyikuli, and whatever Mr. Nyikuli did, with respect to that, was binding on him. The purported disowning of the other administrators by the applicant is, therefore, of no consequence, for he has no power to appoint or disappoint administrators. Should the legal fees accruing to the advocates appointed by the other administrators be an expense on the estate? I believe they should. The deceased died a polygamist. He had 4 houses. It was only democratic that all 4 be represented at administration. The applicant should have thought of that before he embarked on having himself appointed as the sole administrator. The events that followed, the flurry of filing of multiple revocation applications, is testimony to that fact, that in a polygamous situation, it would be foolhardy to assume that one administrator would be acceptable to all. In addition, the applicant embarked on exercises that were divisive, such as that of excluding the 3rd wife from the assets that she had been allocated at the 2015 meeting, and the initiation of the criminal proceedings against the 4th wife with respect to North Wanga/Namamali/[...]. All these were ill-advised actions, which exposed him as partial or partisan, and, therefore, an administrator who could not be relied upon to champion the interests of all the 4 houses of the deceased, hence the decision to introduce other administrators. These other administrators ought not shoulder the legal fees charged by their advocates, since these are estate or administration expenses, that were necessitated by the partisan approach that the applicant gave to the matter. Had the applicant acted fairly and with an even hand, no doubt the issue of appointing additional administrators would not have arisen. Therefore, the other administrators are entitled to have the legal fees of their legal counsel charged on the estate.

32. The other issue revolved around SOM. He is a child of the deceased like any other. The fact that he suffers disability does not diminish his status as such. He is entitled to an equal share in the estate with everybody else. If anything, given his disability, he ought to be given special consideration. I believe it was on that basis that it was proposed that he should be allocated a property that would guarantee him constant income, now that he is not working, and may never get any gainful employment or other means of supporting himself. There was a bit of back and forth between the applicant, JMM and the 4th wife over this. I believe the proposal to allocate him an asset from which he would draw a constant income would be in order. On appointment of trustees to take care of his interests, I do not think that there is jurisdiction in the probate court to appoint such trustees. The family should, instead exploit the provisions of the Mental Health Act, Cap 248, Laws of Kenya, or any other law, depending on the nature of the disability.

33. So, how should the estate be distributed? Having taken into account the filings by the parties, the oral evidence recorded, the number of widows and children in each house, the arrangements made in 2015, and section 40 of the Law of Succession Act, I am constrained to distribute the immovable assets of the estate herein as follows:

(a) To the creditor/purchaser/liability, Peter Rakama Ndombi – Kakamega KS Site and Service Scheme Plots Nos. [...] and [...];

(b) To the 1st house –

(i) North Wanga/Koyonzo/[...],

(ii) Bungoma Town Plot No. [...], and

(iii) East Bukusu/South Kanduyi/[...];

(c) To the 2nd house –

(i) Nairobi Block [...],

(ii) Kakamega Town/Block [...],

(iii) ½ share of North Wanga/Namamali/[...], and

(iv) Koyonzo Market Plot No. [...];

(d) To the 3rd house –

(i) Bungoma Town Plot No. [...], and

(ii) Mayoni Plot;

(e) To the 4th house –

(i) Bukhayo/Mundika/[...],

(ii) South Teso/Angoromo/[...],

(iii) ½ share of North Wanga/Namamali/[...],

(iv) Imara Daima property,

(iv) Bungoma Town Plot No. [...], and

(v) Nairobi East No. [...] (Nyayo Estate).

34. I have not distributed North Wanga/Namamali/[...], for the reasons given above, that the same is subject to criminal proceedings, and its distribution should follow the outcome of those proceedings. If it turns out to be an asset belonging to the 4th wife, having been properly and procedurally transferred to her name, then it shall not be available for distribution. If, however, it is found to be estate property, that she had unlawfully caused to be transferred to her name, then it shall be available for distribution, and the administrators shall, after the verdict of the court in the criminal proceedings, or of the appellate court, should an appeal be proffered, apply to this court for its distribution.

35. There was mention of a property, variously referred to as Plot No. [...] Kakamega KS Site and Service Scheme and Plot No. [...] Jua Kali Kakamega. Only JMM talked about it, but he provided no evidence of its existence. I shall take it that the same does not exist, and I shall not purport to distribute it. Should the administrators ascertain its existence, they would be under a duty to place it before the court for distribution.

36. On the movable property, there is money in the bank and the motor vehicle. I have already addressed myself substantively on how the money should be dealt with. I reiterate that it should be plied to meeting administration expenses, that is to say to settle outstanding land rents and land rates, taxes on estate assets, legal fees, survey fees, fees concomitant upon transmission of the assets after confirmation of grant, reimbursement of any genuine expenses incurred by administrators towards administration, among others. The balance shall then be shared equally amongst all the survivors of the deceased.

37. The motor vehicle, KBQ [...], is said to be an asset in the estate, I have not seen any ownership or registration documents. The general consensus appears to be that the same belonged to the deceased. There were submissions that it was at the residence of the 4th wife, and the same should be given to her. If it was a vehicle belonging to the deceased, I believe it should be shared by all. It shall be sold, and the proceeds of sale paid into the estate account, to be plied to settle administration expenses, with the balance being disposed of as detailed above.

38. The deceased died a polygamist, and, therefore, section 40 of the Law of Succession Act should apply to the distribution. The provision says that after the assets are shared out between the houses of the deceased, they shall thereafter be distributed within each house, in accordance with sections 35 to 38 of the Act. For avoidance of doubt, the provision says as follows:

> *"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"*

39. In the scheme of things under section 40 of the Act, the assets that have been devolved to the houses, according to paragraph 33, shall be handled thereafter in the manner that I will set out in this paragraph. For the 1st house, where there is a surviving widow, the property shall be devolved upon her during her lifetime, and, upon determination of the life interest, to her children, both male and female, in equal shares, in terms of section 35 of the Law of Succession Act. Some of the children in the 1st house have died, and left their own offspring or children, who are the grandchildren of the deceased: such grandchildren shall be entitled to take the share that would have been taken by their late parents, had they been alive, in terms of section 41 of the Law of Succession Act. There is no surviving widow in the 2nd house, so the assets devolved to that house shall be shared equally amongst all the children in that house, both male and female, in terms of section 38 of the Law of Succession Act. The assets going to the 3rd house shall devolve upon the surviving widow in that house, during her lifetime, and upon determination of the life interest, to her only child absolutely, in terms of section 35 of the Law of Succession Act. The assets earmarked for the 4th house shall devolve upon the surviving widow in that house, during her lifetime, and, upon determination of the life interest, to her children, both male and female, equally, in terms of section 35 of the Law of Succession Act. For the 1st, 3rd and 4th houses, where there is life interest, the surviving widows shall have the power, under section 35(2) of the Act, to share out the property devolved to their respective houses, by way of appointment.

40. The other issue, of course, is about confirmation of the administrators, as required by section 71(2)(a) of the Law of Succession Act. The 4 were appointed by consent of the parties on 2nd May 2019. That summarily disposed of pending summonses for revocation of the grant that had been made earlier to the applicant. Since the appointment of the administrators was by consent, the process of their appointment is not challenged, and is not an issue. The applicant stated, at the oral hearing, that he did not recognize his co-administrators, but I have already

dealt with that, it is not for him to recognize them, for they are appointed by the court, and the court did appoint them as such. He can only have them removed through an application to revoke their appointment, which he is yet to file. There was not much administration to be done after their appointment as the application for confirmation, the subject of these proceedings, was pending as at the date of their appointment, and proceeded to full hearing shortly thereafter. It cannot, therefore, be said that the administrators had not diligently administered the estate.

41. The application for confirmation of grant, dated 30th April 2019, is hereby disposed of in those terms. The administrators are hereby confirmed as such, and the estate shall be distributed in terms of paragraphs 33, 36, 37 and 39 of this judgment Each party shall bear their own costs. Should any party be aggrieved by the decision herein, there is leave, of twenty-eight (28) days, to file appeal at the Court of Appeal. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST 2021

W. MUSYOKA

JUDGE