



REPUBLIC OF KENYA`

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 105 OF 2003

IN THE MATTER OF THE ESTATE OF MANASSE OTIENO ESHITUBI (DECEASED)

JUDGMENT

1. I am called upon to determine two applications for confirmation of grant, one dated 25th May 2007 and the other dated 25th April 2018. The applications were consolidated on 10th December 2018.
2. The deceased herein died on 16th August 1991. The letter from the Chief of Marama West Location, dated 24th February 2003, lists individuals that it says are rightful heirs of the estate. It is not indicated how they were related to the deceased. They are Wilson Afubwa Otieno, Livingstone Otinga Otieno, Johnstone Namai Otieno, Johnstone Nandwa Otieno, Maurice Asumwa Otieno, Harrison Ramoya Otieno, Reuben Kalai Otieno, Alex Amukambwa Otieno, John Namai Otieno, Ismael Okune Otieno, Festo Akwera Otieno, Susy Mukhaye Chirande and Wycliffe Wanguba Otieno. Representation to the estate of the deceased was sought by Wycliffe W. Otieno, Festo A. Otieno, Ismael G. Otieno and Johnstone N. Otieno, in their purported capacities as sons and daughter of the deceased. The deceased was expressed to have had died possessed of the persons listed in the Chief's letter referred to above, and to have died possessed of Marama/Lunza/247. Letters of administration intestate were made to the deceased on 22nd March 2004, and grant was duly issued, dated 24th March 2004. I shall hereafter refer to the four as administrators.
3. All four administrators filed the application dated 25th May 2007 on even date. They identified all the persons listed in the Chief's letter as the survivors of the deceased, and proposed that the said survivors share the estate of the deceased equally.
4. The summons dated 25th April 2018, was initiated at the instance of Johnstone Namai Otieno. He identified the individuals named in the Chief's letter as the survivors of the deceased. He proposed a mode of distribution which was uneven. He proposed that the property be shared out as follows - Wilson Afubwa Otieno 0.18 hectare, Livingstone Otinga Otieno – 0.28 hectare, Johnstone Namai Otieno – 0.26 hectare, Johnstone Nandwa Otieno – 0.28 hectare, Maurice Asumwa Otieno 0.40 hectare, Harrison Ramoya Otieno – 0.31 hectare, Reuben Kalai Otieno – 0.24 hectare, Alexander Amukambwa Otieno – 0.12 hectare, John Mamai Otieno – 0.26 hectare, Ismael Okune Otieno – 0.31 hectare, Festo Akwera Otieno – 0.12 hectare, Susy Mukhaye Chirande – 0.30 and George Wycliffe Wanguba Otieno – 0.23 hectare. Attached to the application is a consent on distribution by all the survivors, except for four of them, being Johnstone Nandwa Otieno, Festo Akwera Otieno, Alexander Amukabwa Otieno and George Wycliffe Wanguba Otieno. The distribution proposed in the application dated 25th April 2018 is based on the acreages actually occupied by the respective survivors. The survey work, which led up to those said figures, was ordered by the court on divers dates, on the application of some of the parties.
5. The issue of a survey first came up in court on 14th February 2018, when Johnstone O. Otieno informed the court that they were yet to do survey on the subject property. They asked the court for more time, which was granted. On 7th May 2018, it was directed that the cost of the survey be borne by Johnstone Nandwa Otieno. An order was made on 20th June 2018, to facilitate a visit on the subject property by a surveyor, to confirm the actual acreage on the ground occupied by the survivors.
6. Directions were given on 26th September 2018 to the effect that the two applications be disposed of simultaneously, by oral evidence based on the affidavit on record.
7. The oral hearing commenced on 10th December 2018. The applicant in the application dated 25th April 2018, Johnstone Namai Otieno, was the first on the witness stand. He testified that the deceased had married five times, to Phoebe Nyapola, Grace Angulu, Jesita Masaba, Mwanaiki Nechesa and Refa Anyodo. All the wives were also deceased, save for Refa Anyodo. Each of the five wives had children. He stated that the children of the late Phoebe Nyapola were the late George W. Wanguba, Joseph Swaka, Morris Asumwa, Dorica Onindo, Rose Mukhwana and Margaret Namai. He testified that the children of Grace Angulu were Fredrick Charande Otieno, Wilson Afugwa, Livingstone Otinga, Johnstone Nandwa Otieno, Lorna Mukhwana, Emily Mukwambo and Rosalinda Lukale. Harrison Kamoya. Johnstone Namai Otieno, Reuben Kadhai Otieno, Jona Namai, Sylipha Amambwa, Dina Okoth and Fatuma Omududu were said to be the children of Jesita Masaba. Mwanaiki Nechesa was said to have had only one child, Ismael Okune; while Alexander Mukabwa, Festo Akwere, Christabel Biere, Frida Otieno, Nerea Otieno, Florence Mung'asia and Rosebella Ambetsa were the children of Refa Anyodo. The deceased was said to have been the proprietor of Marama/Lunza/247, whose acreage was put at 4.6 hectares. He proposed distribution based on occupation, as set out in the affidavit sworn in support of the application.

8. During cross-examination, he stated that the deceased had distributed his property before he died. He said that the distribution was based on the wives and not the children. He said that happened in 1991. He said that the deceased told him so. He said that the sons had agreed on distribution as per the wives farms. He said the distribution by the sons happened in 2003. The farms were divided according to the sons. He described it as a form of succession. He denied being party to the application dated 25th May 2007, saying that the same had been brought by his co-administrators. He stated that he was not aware that that application had proposed equal distribution of the property. He said that surveyors went on the ground and did their work, and a report had been filed in court. He stated that, according to the surveyor, the largest acreage was held by George Wanguba with 1.23 hectares, the smallest acreages were held by Alexander Wamukambwa Otieno and Festo Akwara Otieno, at 0.12 hectares each. He stated that the two got the smallest shares because at the time of the distribution they were the smallest children of the deceased.

9. He was followed on the stand by Festus Akwera Otieno. He referred to the application dated 25th May 2007, and said that they had proposed equal distribution, and that was the agreement then. He said that the same was based on resolutions that they had reached at home. He said that all the thirteen (13) sons met and agreed on equal distribution.

10. Ismael Okune Otieno was the next witness. He stated that the estate ought to be distributed in accordance with the wishes of the deceased. He said that the deceased wanted his estate shared out according to the wives, and thereafter to the sons. He said that he was from the first house, he gave the first son his share, from the second house, he gave the first and second sons their shares, Fred Chirande and Wilson Afungwa. He recommended that the rest of the sons share out their mothers land as occupied on the ground. He stated that after the deceased passed on, the sons sat and agreed to go for succession. During cross-examination, he said that the deceased had shared out his land before he died. He said that the sons who had not been given their land were to take from their mothers. He said that he was not present when the distribution was done, but then he again said that the deceased told him about it thereafter. Boundaries were then allegedly marked on the ground, on the land allegedly given to the widows and three sons. When they filed for succession, it was agreed that each of the sons would share the land equally within their respective houses. He said that they did not agree on equal distribution globally. He said he was not party to the 2007 confirmation application, in fact, he said, he had not filed any application for confirmation of grant. He denied appearing before Mr. Nyikuli, advocate, to sign any papers. He denied agreeing to equal distribution.

11. Johnstone Nandwa Otieno testified next. He stated that the deceased had not distributed the estate before he died. After he died, the sons sat and agreed on who were to apply for representation, and also that the estate would be shared out equally, with each of them getting 0.3 of a hectare. He said he was party to the application filed in 2007, which he said was filed with the concurrence of all the administrators. He stated that he did not see why the property could not be distributed equally, adding that he did not mind if his share shrunk should the property be shared equally. He accused Johnstone Namai Otieno of causing him to be removed as an administrator.

12. The last witness was Repher Anyolo Otieno. She was the surviving spouse of the deceased. She testified that the deceased had not distributed his property before he died. She rooted for equal distribution. She said that they had never sat as a family to agree on distribution. She complained that the sons removed her from the process in 2003, saying that the matter was for the thirteen (13) sons.

13. At the close of the oral hearing, the parties proposed to file written submissions. Both sides have complied. I have read through the written submissions placed on record and I have noted the arguments made therein.

14. In confirmation applications, there are two principle matters for consideration by the court, appointment of the 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.”

15. The principal purpose of confirming the grant is to pave the way for distribution of the assets. The proviso to subsection (2) of section 71

states 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 share due to them. The proviso is emphatic that the grant shall not be confirmed before the court is so satisfied. Therefore, there is no need for me 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.”

16. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? The letter on the record from the Chief of Kongoni Location, dated 24th February 2003, indicates that deceased was survived by thirteen (13) sons. It is the same thirteen individuals who are listed in the column for survivors in the affidavit sworn in support of the petition for representation. The petition itself makes reference to daughter, but none of the daughters of the deceased were listed. It is these same thirteen individuals who were presented to the court in the confirmation application.

17. However, at the oral hearing of the confirmation application, on 10th December 2018, Johnstone Namai Otieno, the applicant in the confirmation application dated 25th April 2018, informed the court on oath that the deceased had also been survived by a widow, Refa Anyodo, and fourteen daughters (14), being Dorica Onindo, Rose Mukhwana, Margaret Namai, Lorna Mukhwana, Emily Mukwambo, Rosalinda Lukale, Sylipha Amumbwa, Dina Okoth, Fatuma Omududu, Christabel Biere, Frida Otieno, Nerea Otieno, Florence Mung’asia and Rosebella Ambetsa. The surviving spouse testified on 11th July 2019. The two sets of individuals were not listed in the Chief’s letter, nor in the petition, nor in the confirmation application. Indeed, all indications, to the court, from the administrators, were that the deceased had not been survived by a widow nor daughters.

18. What comes out very clearly to me, from the material before me, is that the deceased was survived by a widow, thirteen sons and fourteen daughters. These are the individuals who are entitled to a share in the estate of the deceased. Unfortunately, of the twenty-four individuals who survived the deceased, the administrators only disclosed half of them, the thirteen surviving sons.

19. The question, then, that one should ask at this stage, is whether, in view of the concealment of more than half of the survivors of the deceased, the administrators had properly obtained their grant. One of the primary considerations in an application for confirmation of grant is stated in section 71(2)(a) of the Law of Succession Act, that the court be satisfied that the grant was rightly made to the administrators and the administrators were administering, and would continue to administer, the estate in accordance with the law. Under section 71(2)(b), where the court is not satisfied that the grant was obtained properly or that the administrators had not administered the estate in accordance with the law or were unlikely, after confirmation, to administer the estate in accordance with the law, it should not confirm them, instead it should revoke their grant and appoint fresh administrators. That is the effect of section 71(2) (b) and(c) of the Law of Succession Act.

20. In considering section 71(2) of the Law of Succession Act, one has to bear in mind section 76 of the Law of Succession Act, which provides for revocation of grants. Other than the court acting on the prompting of the parties, to revoke a grant, it may also act on its own motion or *suo moto*, in those cases where it stumbles on evidence that suggests that the circumstances warranted revocation of a grant, where the evidence brought the matter within the grounds for revocation set out in section 76. One of the processes through which a court may stumble on such evidence, and may act *suo moto* to revoke a grant, is where it is faced with an application for confirmation of grant under section 71, and the case before it merits consideration under section 71(2)(a)(b) and (c). The grounds upon which a grant may be revoked are set out in section 76. For the purposes of this judgment, the relevant provisions are in section 76(a) (b) and (c), where the proceedings to revoke a grant were defective in substance, the grant was obtained on the basis of fraud or misrepresentation, or was obtained on the basis of an untrue allegation whether innocently or not.

21. The relevant portions of section 76 state as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently ...”

22. Sections 71(2) (a) (b) and 76(a) (b) and (c) refer to the process of making grants. That should necessitate an examination of the legal framework for that process, which is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

“Application for Grant

51. (1) ...

(2) Every application shall include information as to—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) *in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*

(h)..."

23. I understand section 51(2) (g) to be requiring the petitioner to disclose all the surviving spouses and children of the deceased, among others. The provision is in mandatory terms. The administrators herein only disclosed themselves and the sons of the deceased from the five houses. They created an impression to the court that the thirteen sons were the sole survivors of the deceased. The deceased had also been survived by a widow and fourteen daughters, that came out clearly, at the oral hearing, from one of the administrators. The surviving spouse and the fourteen daughters were not disclosed to the court. Therefore, there was no compliance with section 51(2) (g).

24. That is, no doubt, evidence of procedural defects in the manner the grant was obtained, to the extent that the administrators did not comply fully with the requirements of section 51(2) (g). There was fraud and misrepresentation, to the extent that they did not disclose all the persons who survived the deceased. They misled the court into believing that the deceased did not have any female survivors. There was concealment of important matter from the court, to the extent that one half of the body of survivors was not disclosed. That meant that a fairly large number of survivors was locked out of the succession process. The motive for that act is unknown, but it would be wholly irrelevant. Even innocent non-disclosure still results in or leads to a revocation of grant since it gives a distorted picture of the state of the estate of the deceased.

25. The law on who qualifies to apply for representation in intestacy is section 66 of the Law of Succession Act, which sets out the order of preference, with regard to who ought to apply and be appointed administrator. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

26. For avoidance of doubt, these provisions state as follows:

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

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

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

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

(c) the Public Trustee; and

(d) creditors ...”and

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

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

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

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

27. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

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

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

28. Rule 26(1) (2) applies where representation is sought by a person with equal or lesser right to others who have not petitioned like him. In such case, the petitioner is expected to serve such persons, who have superior or equal entitlement, with notice. The individuals with superior or equal entitlement, who have not applied for representation, would signify that they had been notified of the petition by either executing their renunciation of their right to administration, or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly addressing these issues, that is by indicating that notice was given to all the other persons equally entitled and with prior right, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

29. The administrators in the instant cause, being surviving sons, had a right or entitlement to administration which was inferior or lesser to that of the surviving spouse of the deceased, and a right or entitlement to administration that was equal to that of the surviving daughters of the deceased, going by section 66 of the Law of Succession Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules together would mean the said surviving sons needed to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. They, therefore, should have obtained the consents of the surviving spouse, and of their sisters, before they applied for representation to the estate of the deceased herein.

30. From the picture that emerges above, I hold, going by section 71(2) (a) (b), that I am not satisfied that the grant herein had been obtained properly, for the reasons that should come out very clearly from the foregoing paragraphs. Secondly, I would also find that the administrators have not, since their appointment, administered the estate in accordance with the law. The proviso to section 71(2) of the Law of Succession Act, requires administrators to satisfy the court as to the identities of and shares of all the persons beneficially entitled to the estate of the deceased. The effect of this provision is that the administrators have a duty, before they seek distribution of the estate, and, indeed, solely for that purpose, to ascertain the assets of the estate and the persons who are beneficially entitled to a share in the estate. It is the persons who are beneficially entitled to a share in the estate, who ultimately get to be allocated shares in the estate.

31. The proviso, by way of repetition, for emphasis sake, says:

“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.”

The said provision is reinforced by Rule 40(4), which, again, I shall hereby repeat for emphasis, and which says, by way of imposing a duty on the administrator, that:

““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.”

32. By ascertaining persons who are beneficially entitled no doubt means identifying the person who are entitled to a share in the estate of the intestate. Under Part V, the persons who are entitled to the estate of an intestate are the survivors, that is to say the persons mentioned in sections 35, 36, 38 and 39 of the Law of Succession Act, meaning surviving spouses, children, parents and siblings of the deceased, and other relatives of the deceased up to the sixth degree. The persons that the administrators herein omitted, from their petition and their application for confirmation of grant, were a surviving spouse and daughters, who were survivors of the deceased, and, therefore, persons who were beneficially entitled to a share of the estate of the deceased.

33. The provisions that I have referred to above, say as follows:

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

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. [Act No. 8 of 1976, s. 7, Act No. 16 of 1977, Sch.]

36. Where intestate has left one surviving spouse but no child or children

(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

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

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

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39. [Act No. 8 of 1976, s. 8.]

37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

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

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

39. Where intestate has left no surviving spouse or children

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

(a) father; or if dead

(b) mother; or if dead

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

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

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

34. The surviving spouse of the deceased herein lived within the estate of the deceased and amongst the sons of the deceased. The administrators must have known that the fifth wife of the deceased, who was their mother and stepmother, had survived the deceased. They knew that for a fact, and there was nothing to ascertain, so far as she was concerned. The fourteen daughters of the deceased were the administrators own siblings. They were born among them and raised together with them. It could be that they were married, but the fact of marriage, in my view, could not have erased them from the memory of their brothers, the administrators. Again, since the fact that the deceased had daughters, who survived him, was a fact that needed no ascertainment. The fact of their non-disclosure can only be described as fraudulent and designed to mislead the court as to the true status of the estate and the family of the deceased. The court was misled, lied to and hoodwinked. There was mischief. The proviso to section 71(2) and the provision in Rule 40(4) of the Probate and Administration Rules were not complied with.

35. Rule 40(8) of the Probate and Administration Rules, is also relevant. It requires administrators, when applying for confirmation of their grants to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. It says as follows:

“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons

who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit.”

36. Rule 40(8) is unhappily drafted, in certain respects, in my view, for it uses the word ‘dependant’ in a context different from that it intended in Part III of the Law of Succession Act, and, in particular, different from the way it is defined in section 29 in that Part III. What is clear, however, is that Rule 40(8) envisages that a consent, in Form 17, be signed by all the persons beneficially entitled to the estate of the deceased. All such persons include the survivors of the deceased as identified in sections 35, 36, 38 and 39 of the Law of Succession Act, being surviving spouses and children of the deceased. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased. In this case, the application dated 25th May 2007 was not supported by consents in Form 17, while that dated 25th April 2014 was supported, alright, by a consent in Form 17, but the said consent listed only the thirteen sons of the deceased.

37. Succession, and inheritance in general, is designed as a means of transferring property from one generation to the next. It is often referred to as intergenerational transfer of property. The property moves from the parent to the children. Of course, where the deceased did not have children, the dynamics would change, the property would pass from the deceased to the parents, and where there are no parents to the siblings, and in the absence of siblings, to other relatives. Where there are children and a surviving spouse, and since it is intended to be intergenerational, the ultimate destination of the property remains the children, but the surviving spouse will still have to be protected as he or she may have been dependent on the property of the deceased, and the remaining spouse would be prejudiced or inconvenienced or deprived, should the property pass directly to the children without regard to him or her. In such case, the property initially passes to the surviving spouse during the lifetime of the surviving spouse, and thereafter, upon the demise of the surviving spouse, to the children. The surviving spouse would not have the property absolutely. He or she would only be entitled to a life interest, that is to user of the property during lifetime, after which, determination of the life interest, the same passes to the children absolutely.

38. Life interest is provided for in sections 35, 36 and 37 of the Law of Succession Act, which I have cited above. From the language of those provisions, it is quite clear that where there is a surviving spouse, the children would have no access to the property over which the surviving spouse enjoys life interest. That would mean that as between the surviving spouse and the children, the surviving spouse would have a superior claim to the property. He or she would be entitled to the property first before it moves to the children. Their interest comes first followed by that of the children. A distribution of the estate which, therefore, disregards the life interest of the surviving spouse, and grants the children prior rights in the estate over the surviving spouse, is inconsistent with section 35 of the Law of Succession Act. The interests of the surviving spouse must, therefore, be addressed first before any consideration can be given to the rights of the children.

39. The administrators in this matter appear to entertain the view that the fact of their being male children somewhat elevates their interest in the estate over the interests of the female survivors, be they spouses or children. That view is fallacious. I have addressed the position of a surviving spouse above, and I believe that would be sufficient to demonstrate the fallacy of the position held by the administrator herein so far as the interests of surviving widows is concerned. There is nothing in the Law of Succession Act, or any other written law for that matter, that provides that the interests of sons in the estate of their deceased father trump the life interest of the surviving widow of their deceased father. If anything, it is the life interest of the surviving spouse which overrides the interests of the sons of the deceased. The children cannot possibly have absolute access to the property of their deceased father so long as the said widow remains alive and unmarried.

40. Regarding the daughters, the Law of Succession Act is gender neutral. It makes no distinction between sons and daughters. The reference in the Act to children would mean both sons and daughters. There not a single provision in the Law of Succession Act which gives sons a superior claim or right in the estates of their parents over the daughters. I have ploughed through all the provisions in the Law of Succession Act and I have not come across any reference to sons and daughters. I have seen references to wife, husband, brother and sister, but not son and daughter. That can only mean that when it comes to children, there is no distinction into sons and daughters, nor discrimination, nor categorization, nor classification. Sons and daughters are treated equally, and it would mean that when it comes to distribution of the estate of the intestate the children take equally, male and female, sons and daughters.

41. In Part V of the Law of Succession Act, distribution amongst the children is provided for in sections 35 and 38, in both they take equally. I shall repeat, that would mean all the children, be they male or female, sons or daughters, would be entitled to share the estate equally, unless any one of them opts out. Let me cite the two provisions for emphasis:

“35(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.”

42. The deceased person herein died in 1991, ten years after the Law of Succession Act came into force in 1981. The estate of the deceased, therefore, fell for distribution in accordance with Part V of the Act, by virtue of section 2(1) of the Act. That being the case, the fourteen daughters of the deceased were entitled to a share in the estate of their deceased father. It was, therefore, wrong for the administrators to have excluded them from the schedule of the survivors of the deceased. They were survivors of the deceased in equal measure with the sons. It was also wrongful for the administrators to have failed to list them as survivors in the confirmation application, and to have failed to make

provision for them. Daughters are entitled, under the Law of Succession Act, to a share in their father's estate. It is fallacious of the sons to presume that the entire estate is theirs to dole out to their mothers and sisters at will. They have no such right. The property is available in equal measure to sons and daughters. The daughters are entitled to their share unless and until they renounce that share in writing or openly in court at the hearing of the confirmation application.

43. Sections 35 and 38 of the Law of Succession should be read together with Article 27 of the Constitution, 2010, which envisages equal treatment of both men and women before the law in all spheres of life, including succession. For avoidance of doubt, Article 27 states:

“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

44. The failure by the administrators to list the daughters of the deceased in the petition, and indeed, their total exclusion from the entire process, when the law in fact provides for them is discriminating. The failure to provide for them in the distribution proposed in the two summonses for confirmation of grant means that there has been non-compliance with the provisions of the Constitution of Kenya, with respect to non-discrimination based on gender. There is also no full compliance with the provisions of the Law of Succession Act, which envisages equal sharing of the estate of an intestate amongst all his children, unless any of the children expressly exclude themselves from benefit by waiving or renouncing their right to inherit. I have noted from the record that none of the daughters of the deceased filed consents to support the proposed distribution, neither are there any documents on record evidencing that they had waived or renounced their right to inherit their father's estate.

45. In addition to the constitutional provisions is international law. Kenya is a signatory to many international instruments which urge equal treatment of men and women. Article 2 of the Constitution has made these international instruments part of the Kenyan law, and the principles stated in them are of application in Kenya without the necessity of their being domesticated through local legislation. The Charter of the United Nations reaffirms the faith in the equal and inalienable rights of all members of the human family, meaning men and women; while the Universal Declaration of Human Rights affirms the inadmissibility of discrimination generally, and proclaims that all human beings are born free and equal in dignity and rights, and everyone is entitled to all these rights and freedoms without distinction of any kind, including that based on sex.

46. The states signatory to the International Covenant on Civil and Political Rights undertake to respect and ensure to all individuals, within their territories and subject to their jurisdiction, the rights recognized in the Covenant, without distinction of any kind, including sex. One such right is stated in Article 26 of the Covenant, to the effect that all persons are equal before the law and are entitled, without discrimination, to the equal protection of the law, and, in which case, the law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, such as race, colour, sex, among others. Similarly, the states signatory to the African (Banjul) Charter on the Human and Peoples' Rights ensure that all individuals within their territories and jurisdictions enjoy the rights recognized and guaranteed in the Charter. Under Article 3 of the Charter, every individual is entitled to enjoyment of those rights and freedoms without distinction based on sex, among others. Of particular relevance are those stated in Articles 3 and 18, relating to every individual being equal before the law and the entitlement to equal protection before the law, and the state having a duty to ensure elimination of every discrimination against women and to ensure that the protection of rights of women as stipulated in international declarations and conventions.

47. For the purpose of this judgment, the Convention on the Elimination of All Forms of Discrimination against Women is particularly important. Kenya is signatory to the said Convention, by which it has condemned discrimination against women in all forms, and committed itself to eliminate discrimination against women. Here below I cite the relevant Articles of the Convention on the Elimination of All Forms of Discrimination against Women:

“Article 1

For the purposes of the present Convention, the term “discrimination against” women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms

in the political, economic, social, cultural, civil or any other field.

Article 2 ...

State Parties condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women ...

Article 3...

Article 4...

Article 5

State Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) ...

Article 6...

Article 7...

Article 8...

Article 9...

Article 10...

Article 11...

Article 12...

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits ...

(b) ...

(c) ...

Article 14...

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

Article 16 ...”

48. What emerges from these international instruments is that discrimination of individuals based on their sex or gender has no place in modern society. Most of these instruments are not new. The Charter of the United Nations dates back to 1945, while the Universal Declaration of Human Rights was adopted by the United Nations in 1948. The International Covenant on Civil and Political Rights dates back to 1966, the Convention on the Elimination of All Forms of Discrimination Against Women to 1979 and the African Charter on Human and Peoples Rights to 1981. Kenya has ratified all these instruments, the International Covenant on Civil and Political Rights in 1972, the Convention on the Elimination of All Forms of Discrimination Against Women in 1984, the African Charter on Human and Peoples Rights in 1992.

49. The substance of the instruments has been domesticated in Kenya through a number of pieces of legislation. The Law of Succession Act is one of them, to the extent that it provides for the equal treatment of members of both gender with respect matters of succession, ranging from administration to distribution. The principles have also been embraced through the Constitution, 2010. Indeed, the Constitution has gone further and provided for the direct application of such instruments without having them domesticated. The principles and standards around how women's issues should be dealt with, in such matters as succession, are not just subject to municipal law, they are global. Anyone person in 2020, who believes that widows and daughters, can be treated in the manner that the administrators herein are handling them, is living in the past. The international instruments place an obligation on the estate to eliminate discrimination against women and to ensure the protection of their right to equal treatment. I am alive to the fact that the court is part of the state, the obligation stated above, therefore, falls upon me also, to ensure that the women, who have a right to the estate, herein, are not discriminated against, and to ensure that that right is protected in any event.

50. So that the parties are able to understand the context in which international law, and international treaties and conventions, apply in Kenya, I will cite the portions of Article 2 of the Constitution, which are relevant to this judgement, and they are sub-Articles (1)(4)(5) and (6). They say as follows:

“2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) ...

(3) ...

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

51. The second consideration should be whether the assets of the estate have been ascertained. This is critical as the succession cause is all about distribution of the property that the deceased died possessed of. According to the petition, the deceased died possessed of a property known as Marama/Lunza/247. A certificate of official search, dated 21st November 2002, filed in court together with the petition, indicates that Marama/Lunza/247 was registered in the name of the deceased on February 1967 and a certificate of title was issued to him on 26th January 1978. The said property was still in his name as at the date of his death. Subsequent searches indicate that the said property has since been transferred to the names of the administrators. It would appear that the deceased had no other property.

52. The third consideration is how the assets of the estate ought to be distributed amongst the persons that have been identified as survivors of the deceased.

53. It is common ground that the deceased was survived by a widow, thirteen sons and fourteen daughters. As he had died intestate, Part V of the Law of Succession Act ought to apply to the distribution of the assets. He died a polygamist and, therefore, section 40 of the Law of Succession Act should apply to the distribution of his assets. Section 40 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.”

54. So, the question to be grappled with is whether the administrators have complied with section 40, in the proposed distribution, by sharing out the assets equally, first of all dividing the assets into units equivalent to the total number of the children of the deceased and treating the surviving spouse as an additional unit to the children. In the proposed distribution, the total number of the children of the deceased is understated, in both applications, by half, since it is only the sons who were considered. Secondly, the surviving widow of the deceased has not been recorded in either of the applications. Thirdly, the fact that the deceased died a polygamist does not come out at all in either of the applications. Clearly, therefore, there is no compliance with the provisions of section 40 of the Law of Succession Act.

55. Section 40 envisages that at the distribution of the estate of a polygamist, the court considers the children in each house in working out the ratio of distribution of the property as between the houses that make up the household of the deceased. After that has been done, the property is then distributed in terms of section 40(2), that is distribution of the shares allocated to each house according to sections 35 to 38 of the Law of Succession Act, depending on how each individual house was constituted.

56. For the purpose of the instant case only sections 35 and 38 are relevant, for reasons that shall become clear shortly. I have set out these provisions verbatim elsewhere, but I shall repeat them here for emphasis sake:

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

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

“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.”

57. The first house of the deceased, of the late Phoebe Nyapola, comprised of children only, for the first wife was deceased, so the applicable mode of distribution of the acres due to that house in Marama/Lunza/247, is that prescribed in section 38, which applies to situations where the deceased was survived by children but no spouse. The effect of that is that the acres or hectares due to the first house should be shared equally between Joseph Swaka, Morris Asumwa, Dorica Onindo, Rose Mukhwana, Margaret Namai and the estate of the late George W. Wanguba,. The same principle and formula should also apply to the second, third and fourth houses, since in all these houses the wives of the deceased had also died, and, therefore, the property was available to the children only, to be distributed in terms of section 38 of the Act. I reiterate what is have stated elsewhere above, that children, in this context, includes daughters of the deceased.

58. In the fifth house, there is a surviving spouse and children. The acres allocated to that house, after working out the ratios, under section 40(1), should be distributed in accordance with the scheme of distribution set out in section 35. The surviving spouse takes the share for that house during life interest, and upon determination of life interest the property would be shared equally by the children in that house according to section 35(5). That should mean that the acres or hectares assigned to the fifth house should devolve upon Refa Anyodo, during her lifetime, and thereafter to Alexander Mukabwa, Festo Akwere, Christabel Biere, Frida Otieno, Nerea Otieno, Florence Mung’asia and Rosebella Ambetsa, in equal shares.

59. As the administrators have not fully disclosed all the survivors of the deceased and have proposed a distribution that leaves out slightly over half of the persons beneficially entitled to the estate, I am, not persuaded that they have satisfied me in terms of the proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules. I doubt whether the matter is ripe for distribution of the estate. The estate cannot possibly be distributed in the manner proposed by the administrators.

60. So, the question that I ask at this point is whether I should confirm the administrators as such? I reiterate what I have stated above. I do not believe that the administrators herein are trustworthy persons who should be allowed to continue to hold the office of administrators. I reiterate that the office of administrator of an estate of a dead person is an office of trust, for the holder of that office holds estate property, which does not belong to him, on behalf of those beneficially entitled to it, trusting that he shall manage the same according to the law, and ultimately distribute it to those entitled in due time. The administrators in this cause have suppressed information from the court. They have hidden critical information that would assist the court to exercise its discretion on appointment of administrators. They have sought to disinherit their mother, the surviving spouse, and their sisters.

61. However, before I make final orders, on whether to confirm the said administrators or to remove and replace them, I shall get them to do the right thing first, what they should have done when they sought representation to the estate. They shall file an affidavit, in which they shall disclose all the survivors of the deceased, that is to say, widows, sons and daughters. Since the deceased died a polygamist, the schedule shall list all the children according to their respective houses. The daughters of the deceased, who should be the natural candidates for appointment as administrators to take the place of the current administrators are not in the picture, in terms of being involved in these proceedings. They do not appear to be even aware that these proceedings are ongoing. I cannot purport to give orders to have the estate distributed without them being brought on board. Should the administrators ignore the directions that I shall give them on the way forward, I shall consider appointing another administrator, who is neutral, to complete administration, or until the daughters are traced and brought on board. I may have to consider the Public Trustee, who is the administrator of last resort, but the administrators have a second chance, to redeem themselves.

62. The issue of the land, the subject of distribution, being subjected to survey works to determine occupation on the ground, was raised. Indeed, the second application is founded on the notion of the actual occupation on the ground being the basis for the distribution that the court should adopt. This is linked to the argument that the deceased had distributed his property before he died.

63. Let me deal first with the question as to whether the deceased had distributed his property before he died. It was said that that distribution only benefited three of the sons. No documents were produced, yet disposal of land, in whatever circumstances, ought to be founded on a memorandum in writing. That is the spirit of section 3(3) of the Law of Contract Act, Cap 23, Laws of Kenya. I am alive to the fact that that

statute refers to sale of land, but the spirit that emerges from that provision is that any person who urges that land had been disposed of to them, ought to provide a memorandum in writing to support that allegation. If the deceased really intended to dispose of his land to some of his sons, in the manner that was claimed by the applicant in the second application, then he would have caused the property to be transferred to the names of the said sons during his lifetime. That would mean that the process of subdivision would have started with consents under the Land Control Act, Cap 302, Laws of Kenya, being obtained leading up to survey work being done, mutations and finally registration. None of that was done. There is, therefore, no evidence that the deceased distributed his property to the sons as alleged. He might have shown them where to put up houses and till the land, but that alone is not enough, it does not amount to *inter vivos* transfer. I am, therefore, not satisfied that there were any such *inter vivos* transfers. That then would mean that there is no basis for distributing the property as occupied by the sons.

64. The matter of land being surveyed before distribution is undertaken appears to be a popular approach to distribution in intestacy here at Kakamega. Such an arrangement usually would favour the older members of the family as against the younger members of the family. That is so as the older members of the family would have ventured out their parents' homestead earlier, and would have, over time, tilled a large part of the land before the deceased passes on. The younger family members would lag behind given their place at birth, and many tend to be school children at the time of death. Such young persons would be disadvantaged as by the time the property is being shared out, as per occupation on the ground, most of the land would have been taken by their older siblings. That arrangement is not fair or just. The law is about equity, and there is none in that approach, and it is something that should be frowned upon. Being older, within the order of birth, does not accord the older children any superior rights or claims on the land over the rest of the children. The argument about distribution being based on actual occupation of the land is selfish and should be dismissed. Even equal distribution of the estate amongst all the children is still regarded as not good enough for the younger members of the family. The perceived unfairness of the succession process to the younger children of the deceased has exercised the minds of the courts over time. In *Rono vs. Rono and another* (2005) 1 EA 363, for example, Omolo JA expressed the opinion, with regard to equal distribution, that the same still worked injustice for the younger children who still needed to be maintained, educated and generally seen through life.

65. The deceased herein died intestate after the Law of Succession Act had come into force. Part V of the Act provides for equal distribution of the property amongst the children. All the children are to be treated equally at distribution, regardless of whether they are old or young, male or female, married or unmarried, with one child or one hundred children. The law makes no reference at all to the order of birth being taken into account at distribution, neither does it mention actual occupation on the ground as a factor in determining the acreage or share to which each of the children should be entitled to. The relevant provisions are in section 35(5) and 38 of the Law of Succession Act, and I have set them out verbatim at paragraph 56 of this judgement.

66. In view of what I have stated above, I shall make the following orders and give the following directions:

(a) That I hereby postpone confirmation of the grant herein, in terms of section 71(2)(d) of the Law of Succession Act, and direct the administrators to file an affidavit in which they shall disclose the names of all the spouses and all children of the deceased, indicating who among those listed was dead;

(b) That for purpose of (a) above, 'all the children' of the deceased shall include daughters of the deceased, whether married or single;

(c) That where any of the children of the deceased are themselves dead, the administrators shall list all the surviving children of any such dead children of the deceased, irrespective of their sex or gender;

(d) That the matter shall thereafter be mentioned to confirm compliance and to assess whether there would be need to hear the other persons beneficially entitled in terms of Rule 41(1) of the Probate and Administration Rules; and

(e) That I shall make final orders only after the administrators comply with the directions that I have given above.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF FEBRUARY 2020

W. MUSYOKA

JUDGE