REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 549 OF 2016

IN THE MATTER OF THE ESTATE OF SETH NAMIBA ASHUMA (DECEASED)

JUDGMENT

1. The application for determination is a summons for revocation of grant, dated 19th February 2019. It seeks revocation of a grant of letters of administration intestate made on 27th December 2013 to Jenifa Amukhula Matioli, who I shall refer to hereafter as the administratrix. It is brought at the instance of Wycliffe Moses Chibole, who I shall refer hereafter as the applicant, on grounds that the grant on record had been obtained in a process that was defective in substance, fraudulent and founded in false statements, untrue allegations and concealment of matter from court.

2. His case, as set out in the supporting affidavit, is that the deceased was his step brother, who had three daughters, namely the late Matilta Lily Ndari Anguba, Jenifa Amukhula Matiolo and Eunice Atenya Ochaya. The deceased was said to have had died possessed on Marama/Shibembe/294 and 1101, which were consolidated on the ground, and occupied by the deceased and his family. He states that upon the demise of the deceased, he was anointed and mandated by the clan, in consultation with the widow, to inherit the land and take charge of the affairs and manage the assets of the deceased, inclining Marama/Shibembe/294 and 1101. He claims that the deceased had sold Marama/Shibembe/294, but he, the applicant, in an effort to recover the land, with the concurrence with the late widow of the deceased, paid a sum of Kshs. 28, 000.00 as refund, supposedly to the person who had bought the land. He also claims to have had carried out the requisite customary law rites with the knowledge of the late widow and the daughters, which made him the guardian of the estate. He states that after the demise of the deceased, he occupied the land and tilled it uninterrupted for over thirty (30) years. He expresses surprise that the administratrix obtained representation to the estate without consulting him as guardian. He complains that all the beneficiaries were not included in the schedule of beneficiaries, instead she listed strangers.

3. The applicant has attached, to his affidavit, a document, dated 17th June 1978, purported to be by the hand of the late widow of the deceased, Florah Ocholi. The document claims that Marama/Shibembe/313 was given to the three daughters of the deceased, while Marama/Shibembe/294 was given to a grandson, and after the grandson was taken away by his father, the deceased sold it to Jared O'ngale. It goes on to say that after the deceased died she sold the same land, Marama/Shibembe/294, to Peter Nehondo, and refunded O'Ngale his money. This was after the family decided that the land ought not to be sold. She stated that she was given Kshs. 28, 000.00 by the applicant to refund Nehondo. She states that she was selling the land to the applicant together with another smaller piece of land.

4. The administratrix swore an affidavit on 23rd July 2019. She states that she followed the correct procedures in obtaining representation to the estate, and getting the grant confirmed. She further states that the applicant is not a child of the deceased, and he is, therefore, not entitled to benefit from the estate. She asserts that she is a daughter of the deceased. She states that the applicant had filed a similar application in Butere SPMCSC No. 56 of 2012, which is this same cause before it was transferred from the lower court, and that application was dismissed. She asserts that the applicant confirms to be a stepbrother of the deceased, and not his son. He is, therefore, not entitled, she submits to apply for revocation of the grant. She avers that what the applicant should do is to sue to recover the money that he allegedly paid to the deceased. She has attached documents from Butere SPMCSC No. 56 of 2012; however, none of them indicate that the lower court had determined a similar application.

5. The parties took directions that the application for revocation be disposed of by way of written submissions. Both sides have filed their written submissions. I have read through them and I have noted the arguments that they have made.

6. The record reflects that the deceased herein died on 5th April 1965. The letter from the Chief of Marama South Location, dated 28th October 2013, indicates that he was survived by two daughters, named as the administratrix and Eunice Atenya. There was an earlier letter dated 22nd July 2013, from the same Chief, addressed to court, confirming the administratrix as a daughter of the deceased.

7. Representation to the estate was sought vide a petition lodged in Butere SPMCSC No. 56 of 2012, on 1st November 2013, by the administratrix, in her capacity as daughter of the deceased. She expressed the deceased to have had died possessed of Marama/Shibembe/294 and 1101, and to have been survived by the individuals mentioned in the Chief's letter, that I have mentioned above, that is to say the administratrix and Eunice Atenya. Letters of administration intestate were made to her on 1st November 2013, a grant was duly issued, dated

27th December 2013. The administratrix filed, on 22nd September 2014, a summons for confirmation of grant, dated 7th July 2014. The confirmation application was heard on 13th October 2016, and was granted. I notice, though, that a certificate of confirmation of grant was not issued.

8. Subsequently, a summons for revocation of grant was filed in Butere SPMCSC No. 56 of 2012, dated 8th January 2015, by the applicant herein. It was placed before Hon. MI Shimenga, Resident Magistrate, who ruled on 28th April 2016, basing herself on a decision in *Francis Muteru Gathogo vs. Winnie Nyanjugu & 2 others* (2014) eKLR, that she had no jurisdiction to determine the revocation application, and dismissed the same. Subsequent to that, the applicant moved the High Court, in Kakamega HC Misc. Appl. No. 372 of 2018, for transfer of Butere SPMCSC No. 56 of 2012, to the High Court, for the purpose of getting the grant revoked. That order was granted on 8th November 2016, and Butere SPMCSC No. 56 of 2012 was transferred to the High Court at Kakamega, and allocated a fresh number.

9. The law on jurisdiction has changed so that the magistrate's court now has jurisdiction to revoke grants that it has power to make, like that one in Butere SPMCSC No. 56 of 2012. Parliament passed the Magistrates' Courts Act, No. 26 of 2015, to align it to the Constitution, 2010. The new legislation amended the Law of Succession Act, Cap 160, Laws of Kenya. The said amendments were effected through sections 23 and 24 of the Magistrates Courts Act, and affected sections 48 and 49 of the Law of Succession Act. The amendments state as follows –

> '23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –
>
> "Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates Courts Act, 2015."
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> 24. Section 49 of the Law of Succession Act is amended –
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> a. by deleting the words "Resident Magistrate" and substituting therefor the words "Magistrate's Court"; and
>
> b. by deleting the words "one hundred thousand shillings" and substituting therefor the words "the pecuniary limits set out in section 7(1) of the Magistrates Courts Act, 2015."'

10. The relevant amendment, for the purpose of this ruling, is that effected through section 23 of the Magistrates' Courts Act 2015, which amended section 48(1) of the Law of Succession Act. Section 48(1), prior to the amendment, provided for the jurisdiction of the magistrate's court with respect to succession causes brought under the Law of Succession Act, and was emphatic that a magistrate's court could entertain any application within a succession cause, save an application for revocation of grant under section 76 of the Law of Succession Act, which was the exclusive preserve of the High Court. Section 48(1) of the Law of Succession Act, before its amendment by section 23 of the Magistrates Courts Act, 2015, stated:

> "48(1). Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:
>
> Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act …"

11. The amendment to section 48(1) of the Law of Succession Act, effected through section 23 of the Magistrates Courts Act, 2015, was to remove the portion of that provision which referred to section 76 of the Law of Succession Act, and that meant that the jurisdiction to revoke grants of representation was no longer the preserve of the High Court. The amendment extended jurisdiction to the magistrates' courts, so that they could, henceforth, revoke grants that they had power to make.

12. Section 23 of the Magistrates' Courts Act , 2015, says:

> "'23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –
>
> "Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates Courts Act, 2015."

13. The Magistrates Courts Act, 2015, commenced on 2nd January 2016. The amendment to section 48(1) of the Law of Succession Act became effective from that date, meaning that from date onwards the magistrate's court had power to revoke grants made by that court. It meant that effective from that day the High Court lost the exclusive jurisdiction to revoke grants made by magistrates' courts; and, therefore, obviating the necessity to have applications filed at the High Court for revocation of grants made by the magistrate's court.

14. The effect of the above is that as at 18th April 2016, when Hon. Shimenga was declaring that she had no jurisdiction to entertain the revocation application before her and proceeded to dismiss the said application, the new law was already in force, and had conferred on her the requisite jurisdiction to entertain the revocation application that was before her, to revoke the grant made by that court, if a case was

made for it. Therefore, that revocation application ought to not to have been dismissed. Equally, the application for transfer of the matter in Butere SPMCSC No. 56 of 2012 to the High Court, so that the High Court could address the issue of revocation of grant of grant made by the magistrate's court, was needless.

15. Now that the magistrate's court has jurisdiction to revoke grants that it has power to make, I should, ideally, remit the matter back to the Butere court, so that the application on record can be disposed of within the new jurisdiction. However, to save the parties the agony of having to keep moving up and down, I shall determine the application, but thereafter order that the file in Butere SPMCSC No. 56 of 2012 be returned to that court for finalization.

16. The application for determination seeks revocation of grant. The Law of Succession Act provides for revocation of grants under section 76, which states 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;
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> (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;
>
> (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
>
> (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
>
> (ii) to proceed diligently with the administration of the estate; or
>
> (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
>
> (e) that the grant has become useless and inoperative through subsequent circumstances."

17. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or lost the soundness of his mind or was adjudged bankrupt.

18. In the instant case, the applicant anchors his case on the first general ground, that there were issues with the manner the grant was obtained. He has raised arguments about the process of obtaining the grant having had challenges. He has not complained about anything that would bring the case within the second general ground, nor the third ground. My understanding of his case is that the process of obtaining the grant was defective, as the administratrix used fraud, misrepresentation and concealed matter from the court. The applicant's principle argument is that his consent was not obtained before the grant herein was sought.

19. The framework for applications for grants of representation 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)..."

20. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased, and any grandchild of the deceased whose own parent is dead. The provision is in mandatory terms. The administratrix herein only disclosed herself and her sister. She and her sister were the only survivors of the deceased. The applicant was not a child of the deceased, nor a spouse of the deceased to warrant being disclosed. Equally, he was not a sibling of the deceased. He was a stepbrother of the deceased, section 51 does not provide that stepbrothers be disclosed. If it was intended that stepbrothers be disclosed, the law would have, no doubt, stated so, just as it has done in section 39 of the Law of Succession Act. I find that the administratrix fully complied with section 51(2) (g).

21. There is nothing from the above to indicate procedural defects in the manner the grant was obtained, as the administratrix complied fully with the requirements of section 51(2) (g). There was no fraud nor misrepresentation. The administratrix did not mislead the court. There was no concealment of important matter from the court, as the applicant was not a survivor of the deceased to merit disclosure, in terms of section 51.

22. 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 in intestacy. 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.

23. 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. "

24. 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."

25. 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 notify such persons with 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.

26. The administratrix in the instant cause, being a surviving daughter, had a right or entitlement to administration which was superior or prior to that of a half-brother of the deceased, and a right or entitlement to administration that was only equal to that of her surviving sister, the other daughter of the deceased, going by section 66 of the Law of Succession Act. I refer to a halfsibling, because that is what section 39 of the Law of Succession Ac refers to. That would mean that only halfsiblings would be entitled, for they would share some common blood with the deceased. The applicant herein does not claim to be a half-brother of the deceased. He asserts that he was a stepbrother, which is not the same thing as a half-brother. There is no blood connection between stepbrothers, and therefore there is no biological kinship. In such case, a stepbrother, that is non-blood relative of the deceased would have no entitlement whatsoever to the administration of the estate of the deceased.

27. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the said surviving daughter of the deceased did not need to comply with the requirements of Rules 7(7) and 26, since these provisions apply to persons who seek representation while they had an equal or lesser right to administration. The applicant had no entitlement to administration of the estate of the deceased as a stepbrother of the deceased. He could have some entitlement as a half-brother, if he was one, but that entitlement was way inferior to that of the daughters, and there would have been no need at all for the administratrix of comply with Rules 7(7) and 26. She did not have to obtain the consent of the applicant before applying for representation to the estate of the deceased herein.

28. The applicant argued that the clan had appointed him guardian of the estate, and that he had performed some customary rites to enable him take charge. The deceased herein had died in 1965, but representation had not been sought until 2013. Under section 2(2) of the Law of Succession Act, Part VII, which deals with administration of estates, applies to estates of persons who died before the Law of Succession Act came into force in 1981, like the deceased herein. Section 66 of the Act, which I have referred to here above, is housed in Part VII, and, therefore, the administratrix still had a superior claim to administration over the applicant.

29. I understand the applicant to be pegging his claim to administration on customary law, which allows discrimination of women. I understand him to say that the widow and daughters of the deceased, being women, could not administer the estate, since that was the preserve of men, and that was why the clan anointed him as guardians. That would have worked in another dispensation, and especially that which prevailed before the Law of Succession Act came into force in 1981. The applicant did not take advantage of that dispensation to obtain representation of the estate of the deceased herein prior to 1st July 1981. When the Act came into force it gave women equal right to men to administer estates of their late relatives. The administratrix clearly beat him at the tape. It is now too late for him.

30. In addition to that, there is the Constitution, 2010, which was promulgated before the instant cause was initiated in 2013. Article 27 of the constitution envisages that men and women be accorded equal treatment, and that women should not be discriminated. That injunction against discrimination applies to succession, not only with respect to distribution of the assets of the estate, but also to the administration of the estate. As between a child of the deceased and a stepbrother of the deceased, a child has a bigger claim to the estate, and to push her out of the way, merely because of her gender would be discriminatory, and the Constitution outlaws discrimination on such grounds. Looking at the provisions in Article 27 of the Constitution, I do not see how the applicant, as a stepbrother, could claim to have a superior right to administration and the assets of the estate of the deceased herein over the children of the deceased.

31. Article 27 of the Constitution 2017 says:

> ""*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."

32. This is not just a matter of municipal or local law. International law also applies to the matter, and has imposed universal standards when it comes to how women are to be treated, generally. Article 2 of the Constitution states that international law is part of Kenyan law, and that any treaty or convention ratified by the Kenyan state forms part of the Kenya. The latter bit would mean that such treaties and conventions, as are ratified by Kenya, would have the force of law in Kenya whether domesticated or not. I will cite the portions of Article 2 of the Constitution, which are relevant to this ruling, that is to say 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."

32. Among the conventions that the Kenyan state has ratified is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1984. By appending its signature to that convention, Kenya condemned discrimination against women in all forms, and committed itself to eliminate the vice. The relevant Articles of the Convention on the Elimination of All Forms of Discrimination against Women state as follows:

"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 the 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 …"

33. The standards that are set by the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women require that women be treated equally with men in all spheres of life, including succession. They frown upon women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughters of the deceased, who the surviving immediate blood relativee of the deceased, to be overlooked, so that the deceased's estate is devolved upon the deceased's stepbrother instead of the deceased's own daughters. To sanction such a development or devolution would be to go contrary to the law as stated in the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women.

34. The applicant appears to anchor his case on customary law, and to say that the deceased died in 1965, long before the Law of Succession Act came into force in 1981, which then meant that distribution of the estate should be based on customary law, which does not allow women to inherit, and, therefore, where a man had daughters only, as appears to have been the case here, then his estate should go to his distant relatives instead of his immediate female relatives, such as daughters. That comes out clearly from the applicants argument that he had been nominated by the clan to take charge of the deceased's estate, and to take care of both the widow and the children.

35. It is correct to argue that for a person who died intestate in 1965, as is the case of the deceased herein, his estate fell for distribution in accordance with customary law, and administration of the estate was also to be done under customary law. The applicant says that he took over administration on that basis. That also appears to be the purport of section 2(2) of the Law of Succession Act, which provides as follows:

"2. Application of Act

(1) …

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death."

36. However, under section 2(2), an administration of the estate of a person, dying before the Law of Succession Act commenced would only be fully subject to African customary law, where the administration was sought before the Law of Succession Act came into force on 1st July 1981. For after 1st July 1981, the latter part of section 2(2) of the Law of Succession Act would become applicable, and the administration of an estate of a deceased person sought after that date then had to come under that portion of the section 2(2) which says:

"…but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

37. The assets of the estate, that is to say Marama/Shibembe/294 and 1101, were registered in the name of the deceased on 30th September 1966 and 14th October 1970, respectively. Being registered land meant that administration and distribution of the property had to be subjected to the written law as opposed to unwritten customary law. Substantive customary law applies to land held under customary law tenure, but for registered land, the applicable law would be the legislation governing such land, and in the event of death, the administration of suchland and the process that would lead up to the transmission of such land would be governed by statute law. Prior to the coming into force of the Law of Succession Act in 1981, the intestate estates of Africans were administered either under the relevant customary law or the Indian Probate and Administration Act of 1881 or both. The Indian Probate and Administration Act of 1881, no doubt, would apply where some of the assets were subject to some form of statutory registration, as transmission of which property would required some court order, usually in the form of a grant of representation. To have the land transmitted from the dead to living, an African would then need to move the

court, under the Indian Probate and Administration Act of 1881, for administration of the registered land.

38. In the context of the instant case, prior to 1st July 1981, the prevailing legal environment, in the area of inheritance, favoured the applicant, basing his case then, as he now does, on customary law, and was against the administratrix. However, the coming into force of the Law of Succession Act, as seen above, radically changed the matrix to favour the administratrix, and to turn against the applicant. He should have taken advantage of the circumstances that favoured him, prior to 1st July 1981, by getting representation to the estate of the deceased under the Indian Probate and Administration Act of 1881, and thereafter having the estate conveyed to him on the basis of distribution under customary law. Under the legal regime now prevailing, he cannot possibly have an advantage over the children of the deceased, for the reasons that have been set out above. It would be worth of note that in the early 1970s, the courts were already beginning to question the whole matter of discrimination of women with respect to such matters. See *Re Kibiego* [1972] EA 179.

39. It may be argued that the substance of customary law still applied to the estate given that the deceased died before the Law of Succession Act, going by section 2(2) of that Act, and that the only thing that has changed is the right to administration, which favours the children, by virtue of section 66 of the Law of Succession Act, and Rules 7(7) and 26 of the Probate and Administration Rules. That could very well be so. But the Law of Succession Act was passed in 1972, although it came into operation in 1981. There have been quite some considerable legal developments after 1972 and 1981. One of them is the ratification of the Convention on the Elimination of All Forms of Discrimination against Women by Kenya in 1984 and the promulgation of the new Constitution of Kenya on 27th August 2010. The provisions carried in the two legal instruments, on the rights of women, completely trump or override section 2(2) of the Law of Succession Act, to the extent that it allows application of laws that are discriminatory against women.

40. The applicant appears to assert that he is entitled to the assets of the estate on account of the fact that he had certain arrangements with the late widow of the deceased. He has cited a document dated 17th June 1978. From what I have seen from the record, the late widow of the deceased was never appointed administratrix of the estate. The estate therefore never vested in her, and she could not legitimately enter into any contractual arrangements that would have bound the estate. The land did not vest in her, and any purported dealings with it, during that time, amounted to intermeddling with the estate. Representation to the estate of the deceased was made only once, in Butere SPMCSC No. 56 of 2012, to the administratrix herein. It means that she is the only one to whom the assets of the estate ever vested in. Whatever dealings the applicant and the late widow of the deceased had had no backing of the law. The said dealings gave the applicant no head start with respect to the estate as against the children of the deceased.

41. Finally, the applicant appears to stake his claim on the principle of adverse possession, that he has been in occupation of the land for the last thirty years. The concept of adverse possession is not one of succession law. A person cannot, therefore, cite it as a basis for being treated equally with the rightful heirs of the deceased. The mandate of a probate court is distribution of the assets of the estate to the persons beneficially entitled. Persons beneficially entitled to such assets do not include trespassers who would want to rely on the doctrine of adverse possession. The doctrine is one of property or land law, and it involves the party relying on it suing the property owner in a suit, properly instituted for that purpose of a declaration that the trespasser is entitled to the property by dint of adverse possession. Adverse possession is about occupation and user of property, and by virtue of Articles 162(2) and 165(5) of the Constitution 2010, the High Court has no jurisdiction to determine any disputes that centre on occupation and use of land. I cannot, therefore, pronounce the applicant to be entitled to the estate assets on that basis, and if even I had such jurisdiction, the proper thing would be that the applicant would still have to sue separately for a determination in that respect. Neither can he be tread as a creditor of the estate. His claim has been resisted by the administratrix, he should, ideally, have moved the appropriate court for determination of his rights as against the estate. As matters stand, he holds no valid decree of a court of law declaring him as entitled to any of the assets of the estate.

42. In view of everything that I have said, the final orders that I shall make in this matter, in the circumstances, are as follows:

a. That I do not find any merit in the application dated 19th February 2019, and I hereby dismiss the same;

b. That I hereby direct that the court file, in Butere SPMCSC No. 56 of 2012, be returned to that registry, where it belongs, for finalization of the matter;

c. That I note that a certificate of confirmation of grant issued out of the instant cause, on 29th March 2017, yet this court did not make the grant that was confirmed on 13th October 2016, neither did it confirm it, and, therefore, there was no legal basis for issuance of the said certificate, the same is hereby cancelled;

d. That a fresh certificate of confirmation of grant shall issue out of Butere SPMCSC No. 56 of 2012, which is the court that made and confirmed the grant in question;

e. That the administratrix shall have the costs of the application; and

f. That should any of the parties be aggrieved by the orders made herein, there is liberty to move the Court of Appeal, appropriately, within twenty-eight days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE