



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 369 OF 2014

IN THE MATTER OF THE ESTATE OF MADONGO WASIRWA alias MATONGO WASIRUA (DECEASED)

RULING

1. This cause relates to the estate of Madongo Wasirwa, who died on 27th April 1992. According to a letter from the Assistant Chief of Kivaywa Sub-Location, dated 7th May 2014, the deceased was survived by seven individuals, being three sons, Were Munyang'oli, Hezron Wafula and Wanyonyi Madongo, one daughter, Recheal Silaho, four purchasers, being Isaac Madongo, Shiundu Musama, Martin Maranga and African Healing Ministry, and a granddaughter, named as Nanyama Kufuru.

2. A petition was lodged herein on 14th May 2014, by Wafula Madongo and Rachel Silako Ematongo, in their capacities as son and daughter, respectively, of the deceased. They listed the survivors of the deceased to be four sons, one daughter and one granddaughter, being Wafula Madongo, Were Munyang'oli, Wanyonyi Madongo, Martin Munago, Rachel Silako Ematongo and Nanyama Kufuri. The deceased was said to have died possessed of a property described as North Kabras/Kivaywa/105. Three liabilities were listed, being Isaac Madongo, Shiundu Musama and African Healing Ministry. Letters of administration intestate were duly made to the petitioners on 5th September 2014, and a grant was duly issued on 9th September 2014. I shall refer to the two petitioners hereafter as the administrators, or the administrator and the administratrix, respectively.

3. A summons for confirmation of grant was lodged herein on 9th June 2015, by the administrators. The persons identified in that application as the survivors of the deceased are the four sons and one daughter, Wafula Madongo, Jim Shiundu Musawa, Isaac Madongo, Martin Shikuku Barasa and Rachel Silako Ematongo. The name of the granddaughter is omitted, and there is no explanation for the omission. The names of the survivors listed appear to differ substantially from those listed in the petition. The sole property of the estate is proposed to be shared out amongst the five survivors at uneven proportions, as follows:

- (a) Wafula Madongo – 0.819 HA
- (b) Isaac Madongo – 0.654 HA
- (c) Martin Sikuku Barasa – 0.157 HA
- (d) Jim Shiundu Musawa – 0.3 HA
- (e) Rachel Silako Ematongo – 0.07 HA

4. The summons was purported to have been filed simultaneously with a consent on distribution dated 8th June 2015, signed by the five individuals who are the beneficiaries of the distribution proposed in the application.

5. The summons dated 6th June 2015 was placed before the Judge for hearing on 25th April 2016. Mwita J, in compliance with the proviso to section 71(2) (d) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(4) of the Probate and Administration Rules, interviewed the administrators, to satisfy himself that they had ascertained all the persons beneficially entitled to the estate and that all such persons had been allocated shares in the estate. The administrators disclosed that the deceased had died a polygamist, having married twice. One wife was said to be deceased, while the other was described as being still alive. The cause herein had been initiated by the children from the house of the dead wife, while it was said that the surviving spouse had her own property. The court noted that some survivors or beneficiaries had been left out of the petition, and their shares had not been reflected in the distribution. Mwita J adjourned the matter to enable the administrators disclose all the beneficiaries, through a further affidavit.

6. A supplementary affidavit was filed herein on 24th December 2018, sworn on 14th December 2018, by Wafula Madongo. In that affidavit, the administrator identified the survivors of the deceased as four individuals, being himself, the late Rachel Silako Ematongo, the late Munyang'oli Were and Wanyonyi Shadrack Madongo, being sons and daughter of the deceased. He proposed that North Kabras/Kivaywa/105 be shared out amongst the four of them so that Wafula Madongo took 0.95 HA, the late Rachel Silako Ematongo 0.21 HA, the late Munyang'oli Were 1.05 HA and Wanyonyi Shadrack Madongo Nil. It is averred that Wanyonyi Shadrack Madongo had been

erroneously included in the succession cause, even though he was a son of the deceased, since he had benefitted from an *inter vivos* transfer by the deceased, of a property known as North Kabras/Kivaywa/103, which was registered in his name, and did not form part of the estate. He states that the said Wanyonyi Shadrack Madongo be excluded from the distribution of North Kabras/Kivaywa/105. In the same affidavit he has another proposed mode of distribution, as follows:

- (a) Wafula Madongo - 0.95 HA;
- (b) the late Rachel Silako Ematongo - 0.21 HA, to be shared equally by her children, Jackline Wayeko and Metrine Nela;
- (c) the late Munyang'oli Were -1.05 HA, to be shared equally between Jacklyn Nambande Madongo, the widow of the late Isaac Madongo, a son of the deceased who had bought 0.8 HA from Munyang'oli Were and 0.25 HA to Martin S Barasa, another buyer;
- (d) Jim S. Musawa , a buyer – 0.3 HA; and
- (e) Healing Spirit Church of Kenya, a buyer – 0.03 HA.

7. Wafula Madongo, filed another summons for confirmation on 24th December 2018, dated 20th December 2018. I shall refer to him as the applicant. He listed ten individuals as the survivors of the deceased, without disclosing how those individuals related to the deceased. Those listed are Wafula Madongo, Rachel Silaka Emodongo, Jackline Wayeko, Metrine Nela, Munyang'oli Were, Jacklyn Nambane Madongo, Martin S. Barasa, Jim S. Musawa, Healing Spirit Church of Kenya and Wanyonyi Shadrack Madongo. It is proposed that the said ten individuals share the sole asset, North Kabras/Kivaywa/105 as follows:

- (a) Wafula Madongo – 0.95 HA
- (b) Rachel Silaka Emodongo - Nil
- (c) Jackline Wayeko) -
- (d) Metrine Nela) – to share 0.21 HA jointly
- (e) Munyang'oli Were - Nil
- (f) Jacklyn Nambane Madongo - 0.8 HA
- (g) Martin S. Barasa – 0.25 HA
- (h) Jim S. Musawa -
- (i) Healing Spirit Church of Kenya – 0.03 HA
- (j) Wanyonyi Shadrack Madongo - Nil

8. The application dated 20th December 2018, was filed simultaneously with a consent on distribution, in Form 17, filed pursuant to Rule 40(8) of the Probate and Administration Rules, purportedly signed by all the beneficiaries, except Rachel Silaka Emodongo and Wanyonyi Frederick Madongo.

9. The children of the late Rachel Silako Ematongo, Jacklyn Wayeko and Metrine Nela, filed an affidavit on 4th March 2019, sworn on 18th February 2019. They state that their mother was entitled to 0.21 HA of North Kabras/Kivaywa/105, and they aver that they had sold the share to Jimmy S. Musawa, and propose that the same be devolved directly to him.

10. The applicant filed another supplementary affidavit on 2nd January 2020, sworn on 23rd December 2019, essentially to aver that the deceased had sold 0.03 HA from North Kabras/Kivaywa/105 to Healing Spirit Church of Kenya, which interest the church later surrendered to Shiundu Musawa. He prays that the said Healing Spirit Church of Kenya be removed from the schedule of persons beneficially entitled, to be replaced with Jimmy Shihundu Misaho.

11. I shall consider the two summonses for confirmation of grant simultaneously.

12. The matter came up for confirmation of grant before me on 21st January 2020. Seven individuals attended before me, being Wafula Madongo, Jackline Wayeko, Metrine Nela, Jacklyn Nambane, Martin Barasa, Jim Musawa and Zebedayo Shing'oli. The administrator informed the court that Wanyonyi Shadrack, Rachel Silaka and Munyang'oli Were were dead. Jackline Wayeko and Metrine Nela supported the application, and stood by their affidavit sworn on 19th December 2019. Jacklyn Nambane, Jim Musawa, Zebedayo Shing'oli and Martin Barasa also supported the application.

13. For avoidance of doubt, this is what section 71 of the Law of Succession Act, says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

14. In confirmation applications, there are two principal factors for the court to consider, appointment of the administrators and distribution of the estate. The principal purpose of confirmation is distribution of the assets.

15. Before considering appointment of administrators and distribution of the assets, that is before the confirmation application is considered on its merits, it is important that I address the proviso to section 71(2) (d) of the Law of Succession Act, which requires that the court be satisfied that the administrators have ascertained all the persons beneficially entitled to a share in the estate, and have identified their respective shares. It goes on to say that the court should not confirm the grant before it is so satisfied. That would make it a sort of condition precedent to confirmation, that the court is satisfied that all the persons beneficially entitled have been ascertained and their shares identified, failing which the court should not consider the application on its merits. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons 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? When the matter was placed before Mwita J on 25th April 2016, the court being mindful of the proviso and Rule 40(4) of the Probate and Administration Rules, sought to be satisfied that the administrators had ascertained all the persons beneficially entitled and allocated them their shares in the estate. The administrator, Wafula Madongo, disclosed to the court that the deceased had been a polygamist, who had married twice, and had children with the two wives. One wife was said to be dead, and the other alive. The court noted that the administrators had disclosed only one house of the deceased, and, therefore, there was no compliance with the proviso to section 71(2) (d) and Rule 40(4). The court then adjourned the application, which is allowed under section 71(2) (d) of the Law of Succession Act, and gave leave to the administrator time to file a further affidavit to disclose the other members of the family of the deceased, and to allocate them shares in the estate.

17. For avoidance of doubt, this is what Mwita J ordered on 25th April 2016:

“I note from the file and even after interrogating the petitioner that there are beneficiaries who have not been included in this petition and their shares are not reflected in the mode of distribution.

For that reason, summons for confirmation of grant is hereby adjourned.

A hearing date to be fixed at the registry and all beneficiaries be present on the next hearing date.

The petitioner to file an affidavit to show all the beneficiaries of the estate of the deceased.”

18. Mwita J was prompted to give those orders and directions after the administrator, Wafula Madongo, made the following oral statement before the Judge, certainly at the prompting of the Judge. He said:

“We have summons for confirmation of grant dated 8th June 2015. We have agreed on the mode of distribution. My father had two wives. My mother is deceased. My stepmother is alive. She has her own parcel of land. My mother had seven children, four are alive.”

19. The direction that the administrator files a supplementary affidavit was so that he could disclose the members of the other house of the deceased, that is the persons whose existence he had not disclosed in his petition. The administrator did file a supplementary on 24th December 2018, but that affidavit did not address the issues the subject of the directions by Mwita J. It did not disclose the surviving spouse of the deceased and her children, together with the property that he claims belonged to that house. The administrator filed a second summons for confirmation of grant on 24th December 2018, without withdrawing the earlier one, and contrary to the directions by Mwita J., similarly, in that application, he did not address the concerns raised by Mwita J, regarding the members of the second house of the deceased. It would appear that the administrator simply ignored the orders and directions of Mwita J of 25th April 2016, and simply did his own things. It would be well for the administrator to understand that court orders should be taken seriously. They are not suggestions or propositions, but commands. They must be obeyed. Failure to obey court orders has the effect of dragging the matter, for the court would not allow the matter to move to the next step before the orders are obeyed, since they were made for a reason.

20. What Mwita J was doing in making those orders was to make it clear that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules were not complied with as some of the survivors of the deceased were left out. It was mentioned by the administrator that the deceased had two wives. The names of the surviving spouse and her children were not disclosed. It is alleged that that house had its own land, suggesting that it was so minded it ought to file its own succession cause with relation to the land that was due to that house. This cause relates to the estate of the deceased, Shadrack Matongo Wasilwa. The law does not envisage that several succession causes be filed in respect of the estate of the same person, unless of course the person died partially testate and partially intestate, where it is permissible to file separate causes, one in testacy and the other in intestacy. Where he died wholly intestate, such as in the instant case, there should only be one succession cause, where all the assets that the deceased died possessed of are listed, and where all the members of his family or survivors are listed from all the houses, if he was a polygamist.

21. 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)...”

22. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrator herein only disclosed members of the family of his mother’s house and left out the other house. That created an impression to the court that the individuals listed were the sole survivors of the deceased. The deceased had a surviving spouse. That information came from the mouth of the administrator at the oral argument of the application on 25th April 2016. The survivors of the deceased from the second house were not disclosed to the court. Therefore, there was no compliance with section 51(2) (g), and once again, by extension, with the proviso to section 71(2) (d) and Rule 40(4).

23. That points to procedural defects in the manner the grant was obtained, to the extent that the administrator did not comply fully with the requirements of section 51(2) (g). There was misrepresentation to the extent that he did not disclose all the persons who survived the deceased. He misled the court into believing that the deceased did not have a second family. There was concealment of important matter from the court as a result. That meant that a fairly good number of survivors was locked out of the succession process.

24. The administrator, of course, sought to explain why he did not disclose them. He said that cause was only meant for his mother’s house. I have already stated that he had initiated a cause in the estate of his late father. He should have listed all the survivors of the deceased, from all his two marriages. He knew that the deceased had a second family, and I presume that he knew their names. He had no reason at all to exclude them. He should have listed them and listed the property that he thought was due to them. He was obliged to. He could not carry out a valid succession process without them, and if he did, he would then encounter the obstacles that he is now facing.

25. The distribution proposed by the administrator only provides for one side of the family, and leaves out the other side of the family, whose members have not even executed the consent document in Form 17. There was not compliance at the confirmation process with the said provisions to the extent that the administrators had not disclosed the second family of the deceased and they had not listed all the assets

that the deceased died possessed of, meaning the property that they claim was due to that second family. It meant that the administrators had not fully ascertained all the persons who were beneficially entitled to the estate of the deceased, for both sides of the family of a dead polygamist are his survivors, who are beneficially entitled to shares in his estate. It would mean that the confirmation application was premature as the administrator had not completed the exercise of ascertaining all the persons beneficially entitled to shares in the estate, the assets of the estate and the shares due to each of the individuals that they had identified.

26. What comes out very clearly to me, from the material before me, is that the deceased was survived by other family members apart from the four sons and one daughter disclosed in the petitioner. Going by the proviso to 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, the administrator had not ascertained those individuals, and, therefore, the matter was not ripe for confirmation. He misled the court into believing that he had ascertained all the persons who were beneficially entitled to the estate. Confirmation of grant cannot be allowed under the circumstances.

27. What emerges from the above, is that the administrators had not, since their appointment, not 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.

28. By ascertaining persons who are beneficially entitled means identifying the persons 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, who the administrators herein omitted, from the petition and the application for confirmation of grant, are the surviving spouse and children of the deceased, who are, for purposes of Part V of the Law of Succession Act, survivors of the deceased, and, therefore, persons who are beneficially entitled to a share in the estate of the deceased.

29. 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.

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.

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.”

30. The administrators knew about the second family of the deceased. They knew that for a fact, and there was nothing for them to ascertain so far as that second house was concerned. 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. I reiterate that the proviso to section 71(2) and the provision in Rule 40(4) of the Probate and Administration Rules were not complied with, and, therefore, the confirmation application was fundamentally flawed.

31. 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. Such survivors or dependants include the second house of the deceased. 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.”

32. 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, 39 and 40 of the Law of Succession Act, being surviving spouses and all the surviving children of the deceased, whether they would be taking a share in the property or not. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased. In this case the application for confirmation of grant was supported by consents in Form 17, but which disclosed the names of members of one house only.

33. Rule 40(8) of the Probate and Administration Rules, does not declare so in loud language, but it quietly 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. Under that provision, a confirmation application may be disposed of by the court without hearing any party, so long as no affidavit of protest has been filed and all the persons beneficially entitled have executed consents in Form 17. However, where there is an affidavit of protest on record or where any person who is beneficially interested in the estate has not signed the consent in Form 17, then the court should not proceed to give orders on distribution before it has heard such persons. That is the purport of Rule 40(8).

34. From the language of Rule 40(8), the court has to address the question as to whether the other persons beneficially interested in the estate have had a say to the distribution proposed. That is the utility of Form 17. The input of the other persons beneficially entitled to the estate to the proposed distribution is through Form 17. If it is found that they have not executed any consents in Form 17, then the court ought to arrange to hear them. It gives a platform for beneficiaries who are not administrators and who do not file affidavits of protest an opportunity to be heard. Rule 40(8) is in mandatory terms, and should be read together with Rule 41(1), with respect to such persons being heard, Rule 41(1) says as follows:

“At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall hear the applicant and each protestor and any other person interested, whether such person appear personally or by advocate or by a representative.”

35. The first consideration in confirmation applications, as stated in section 71(2) (a), is about confirmation of administrators, based on whether they were properly appointed, and if so properly appointed whether they went about the exercise of administering the estate in accordance with the law, and whether the administrators would continue to administer the estate in accordance with the law, if confirmed. I have already raised issues with the appointment of the administrators. They did not comply with section 51(2), and, therefore, the process of obtaining the grant was not without problems. They can be accused of obtaining the grant through a defective process, and also of using fraud, misrepresentation and concealment of matter from the court. The failure, at confirmation of grant, to disclose all the family members and to list all the assets, also opens them to accusations of failing to diligently administer the estate, and more so where they failed to obey or comply with the orders of Mwita J of 25th April 2016. An administrator who knows what he is doing would not so blatantly ignore express court orders. I will not make any determinations at this stage as to whether the administrator herein ought to be confirmed, that I shall deal with at the final determination of the summons for confirmation of grant.

36. 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. I believe I have exhaustively addressed this issue. The administrator informed the court that there was a property under the control of the second family, which meant that he had not disclosed all the assets of the estate. There cannot be proper distribution of assets of an estate, where only half of the estate is distributed. For fair distribution all the assets ought to be put on the table. That has not been done, and, therefore, the application is not complete.

37. The third consideration is how the assets of the estate should be distributed amongst the persons that have been identified as survivors of the deceased. Given that not all the assets have been disclosed and not all the family members or survivors have been disclosed, it may imprudent to venture to address the matter of the allocation of shares of the assets among the survivors. There must be a complete ascertainment of the assets and the persons beneficially entitled before an effort is made to identify the shares of the persons said to be beneficially entitled.

38. The administrators raised issue with the listing of Wanyonyi Shadrack Madongo as a survivor of the deceased. He argued that he was beneficiary of an asset from the deceased during lifetime. In his view, he ought to be omitted from the list of the survivors. That proposal runs counter to the tenor of section 51(2) (g), which requires disclosure of all the surviving spouses and children of the deceased. Every member of the immediate family of the deceased must be disclosed. The provision is about disclosing persons who had survived the deceased, and not those who were entitled to a share in the estate. Wanyonyi Shadrack Madongo ought to be listed in the petition and the summons for confirmation as a survivor, and at the hearing of the confirmation application the fact that he got a lifetime gift should be disclosed. Section 42 envisages that such lifetime gifts be taken into account during distribution. The challenge would be how the court would take them into account if the lifetime beneficiary is not disclosed in the confirmation, and the fact that he had so benefited disclosed.

39. The granddaughters of the deceased ask the court to order direct devolution of the share due to their late mother, to a person to whom they claim to have sold that share to. That request is not feasible. In the first place, the property has not been distributed, and, therefore, the same did not pass to the two granddaughters. The two did not have title to the property. They could, therefore, sell it to anyone, and anyone who has purported to buy the interest bought nothing, for the sellers had nothing to sell, for the property did not vest in them. It cannot, therefore, be devolved directly to the person to whom they purported to have sold it to. Secondly, the said transaction was contrary to section 45 of the Law of Succession Act. It amounted to intermeddling with the estate as the two granddaughters had no authority to sell estate property. Intermeddling with estate property is in fact a criminal offence, under section 45. Thirdly, section 82 of the Law of Succession Act is emphatic that immovable assets of the estate are not to be sold before confirmation of grant. The grant herein has not been confirmed, and, therefore, the immovable assets of the estate cannot be sold. If sale must happen, then leave of court will be required. Any such sale would be null and void, and the court should give no regard to it.

40. So that the parties are clear on what I have addressed above, I do hereby cite the said provisions:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) ...

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) ...

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of t”

41. I believe that I have said enough. The orders that I am inclined to make at this stage, on the application dated 17th April 2015, are as follows:

- (a) That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) of the Law of Succession Act;**
- (b) That the administrators are hereby directed to comply with the directions given by Mwita J on 25th April 2016, in the next thirty (30) days of the date of this ruling, in default of which the grant made to them shall automatically stand revoked;**
- (c) That the matter shall be mentioned after thirty days for compliance and further directions; and**
- (d) That the final orders on the summonses for confirmation of grant dated 8th June 2015 and 20th December 2018 shall be made only after compliance with the orders given above.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE