REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 346 OF 1990

IN THE MATTER OF THE ESTATE OF JOSEPHAT ETABALE MATSUKU (DECEASED)

RULING

1. This matter relates to the estate of the late Josephat Etabale Matsuku, who, according to certificate of death, serial number 214900, dated 15th October 1990, died on 24th February 1972. A letter from the Chief of Marama East Location, dated 12th October 1990, indicates that he hailed from Shianda Sub-Location of Marama East, where he was buried. He was said to have had been survived by a widow, Selifa Mmbone, and twelve children, being six sons and six daughters, whose names have not been indicated.

2. Representation to his estate was sought in a petition that was lodged herein on 17th October 1990, by Selifa Mmbone Etabale, in her capacity as widow of the deceased. She described herself as the sole widow of the deceased, and identified the other survivors as Paul Ngei, Francis Omboko, James Inyangala, Peter Ojango, Evans Imbayi and Kerabu Libuku. The deceased was indicated to have had died possessed of a property known as Bungoma/Tongaren/413. Letters of administration intestate were made to the petitioner, Selifa Mmbone Etabale, on 2nd April 1991. A grant to that effect was made on 13th May 1991.

3. There is a letter on record, from the Chief of Tongaren Location, dated 25th October 1994, which indicates that the deceased was a resident of Tongaren Location, Tongaren Sub-Location. He was said to have had married three wives, and had eight children with them. The three wives are listed as Selifa Mmbone, Mary Wamboi Etabale and Elina Naliaka Etabale. The children of Selifa Mmbone, the first wife, are Paul Ngei Etabale, Francis Amboge Etabale and James Nyangala Etabale. The children of the second wife, Mary Wamboi Etabale are said to be Agnes Aseka Etabale, Rachel Wairimu Etabale and Alice Alwanga Etabale. Evans Chemiati Etabale and Caleb Mutai Etabale are said to be the children of the third and last wife, Elina Naliaka Etabale. The deceased is expressed to have had died possessed of Bungoma/Tongaren/413 and other parcels of land in Butere and Nakuru. It is stated, in the letter, that the petitioner, Selifa Mmbone, had sold a portion of the land to John Mudasia Mugedo and Samwel K. Apono, to settle debts owed to the Settlement Fund Trustees (SFT) and the Agricultural Finance Corporation (AFC).

4. There was a court appearance on 18th January 1995, where Mary Wamboi and Elina Naliaka were in attendance. Mary Wamboi addressed the court, disclosing that she and Elina Naliaka lived on Bungoma/Tongaren/413, and they were all widows of the deceased. They accused the first widow, Selifa Mmbone Etabale, of having obtained representation alone, and of selling portions of the estate. Thereafter the court proceeded to cancel the grant that had been issued to the Selifa Mmbone Etabale on 13th May 1991, and directed that a fresh grant of letters of administration intestate issue, to the three widows, Mary Wamboi Etabale, Selifa Mmbone and Elina Naliaka Etabale. A grant of letters of administration intestate was duly issued to them, of even date. I shall refer to the three widows as the administratrices.

5. The grant was confirmed on 27th November 1995, on an application dated 8th April 1995, in the presence of the applicants who had brought it. The only property placed before the court, for distribution, was Bungoma/Tongaren/413, which was shared out equally between the three widows, with each one of them taking five acres. A certificate of confirmation of grant, in those terms, was issued, dated 27th November 1995.

6. The application that I am called upon to determine, is the summons for revocation and annulment of grant, dated 16th September 2015. It is brought at the instance of Paul Ngei Etabale and James Inyangala Etabale, who I shall refer hereafter as the applicants. They seek that the certificate of confirmation of grant, issued on 27th November 1995, be annulled, or, in the alternative, that they, the applicants, be appointed as additional administrators to the estate of the deceased.

7. The grounds upon which the application are premised are set out on the face of the application, while the factual background to the application is narrated in the affidavit sworn in support of it, by Paul Ngei Etabale, on 13th October 2015. With respect to the grounds, it is averred that the grant was obtained and confirmed secretly and fraudulently, without making a full disclosure of all the children of the deceased, and without taking into account their respective shares. It is also averred that the administratrices did not obtain the consents of the applicants. The applicants also aver that they had equal and prior rights as children in the first house to administration of the estate. The administratrices are accused of concealing matter from the court, and of intermeddling with the estate by disposing of it to third parties. They are also accused of allocating to themselves five acres of the land, to the exclusion of the applicants, and that they have denied the applicants use of the land.

8. In the supporting affidavit, Paul Ngei Etabale, who I shall refer hereto as the first applicant, avers that he is a son of the deceased from the first house, and that the administratrices were the widows of the deceased, and, therefore, his mothers. He further avers that the deceased had nine children whose names he gives as Francis Amboka Etabale, Paul Ngei Etabale, James Inyangala Etabale, Jane Mulonja Etabale, Peter Ochango Etabale, Evans Imbayi Etabale, Caleb Lipuku Etabale, Alice Njeri Etabale and Recho Etabale. He indicates that the daughters of the deceased were all married. He states that the deceased had acquired Bungoma/Tongaren/413, during his lifetime, which measured fifteen (15) acres or thereabout, through a loan from the Settlement Fund Trustees. He argues that the property was acquired with resources contributed by the deceased and the first widow, the applicants mother, Selifa Mmbone Etabale. He avers that all the survivors resided on the land, and had erected homes thereon. He states that the three widows each had been settled by the deceased on five acres, and it was only after the deceased passed on that there was interference with that arrangement. He states that the administratrices had informed them that they were to file for letters of administration, on the understanding that once the grant had been confirmed they would sit as a family and agree on how the children were to be allocated shares. He avers that after confirmation, the family was not called to agree on that. He states that he only learnt later that the administratrices had gone to court and had had the grant confirmed without their knowledge. He states further that there had been a longstanding dispute after they leant that the administratrices had sold off portions of the land, claiming that they were raising money to offset the balance of the loan due to the Settlement Fund Trustee. He asserts that the widows have allocated to themselves a lion's share of the property to the detriment of the children. He states that while he appreciates that land was sold to offset justified debts, then the persons who bought the land ought to be allocated their respective shares, and the balance of the land shared out amongst the survivors of the deceased. He would like the applicants to represent the children since the administratrices were not doing justice. He further argues that the applicants were not involved in the proceedings, since the administratrices intended to disinherit the lawful heirs.

9. There is a second affidavit in support of application, sworn by the mother of the applicants, the first widow of the deceased, who is one of the administratrices, Selifa Mmbone Etabale, on 21st January 2016. She sets out the same facts as those deposed by the first applicant. She says that the confirmation orders of 27th November 1995, allocated the widows five acres each, and excluded the children and other liabilities of the estate. She states that the family had sat on 30th October 1989, with the help of clan elders, and agreed that four acres of the land be sold to offset loans outstanding with the Settlement Fund Trustees and the Agricultural Finance Corporation. She avers that her co-administratrices did not implement the distribution ordered by the court, which meant that they ended up with a lion's share of the estate, while she was left with only ¼ acre. She asserts that the four acres were indeed sold, and the proceeds applied to pay just debts of the estate. She states that the four acres should be transferred to the persons who had bought them, and thereafter the balance of the estate should be shared out amongst the children of the deceased. She states that when it became apparent that her co-administratrices were not willing to share the land on merit, she moved the matter to court, in the Tongaren Land Disputes Tribunal and the Kimilili law courts, where she was awarded three acres of the land, while the other widows were given four acres each, with the balance of the four acres going to the buyers. She concede to the three acres, but her co-administratrices colluded with the beneficiaries to push her and her children to a space measuring ¼ acre. She would like orders on distribution made on 27th November 1995, set aside and the estate redistributed in a manner that she considers fair, in the spirit of the distribution ordered by the Kimilili court, so that the three widows and the nine children share the land equally.

10. Annexed to that affidavit of the first widow are several documents to support her case. There is a copy of minutes of a meeting that was held on a date in 1989, which is unclear, in Kiswahili, the same should have been translated into English, which is the language in which these proceedings are being conducted. The said proceedings of the clan resolved on how the property was to be distributed. A portion was to be sold to settle debts, and the balance of the acreage was to be shared amongst the survivors of the deceased. There is a copy of a demand notice, dated 4th August 1989, addressed to the deceased, with regard to Plot No. 413 Tongaren, for a sum of Kshs. 6, 882.00. It would appear that some amounts of money were paid on 25th August 1989 and 27th October 1989, being Kshs. 800.00 and Kshs. 12, 000.00, respectively. There are two official receipts numbers 598522 dated 29th August 1989 and 887086, dated 27th October 1989, of Kshs. 800.00 and Kshs. 12, 000.00, respectively, being money received from the deceased, in respect of Plot No. 413. The money was paid by John Mudasia Mugedo. There also copies of two documents being receipts in respect of money received by the Agricultural Finance Corporation, both dated 9th October 1989, for sums of Kshs. 13, 227.50 and Kshs. 18, 942.50, from Samuel K. Apono/Selifa Mmbone Etabale. There is also copy of a decree in Kimilili RMC Misc. Application Number 43 of 1996, which shared out an undisclosed piece of land between the three administratrices and buyers.

11. The reply to the application is by Mary Wamboi Etabale, one of the administratrices. I shall refer to her, for the purpose of this ruling, as the respondent. She states that the said application was being brought too late in the day, twenty-five years after the event. She avers that one of the other co-administratrices had since passed on, Elina Naliaka Etabale. She asserts that the deceased had allocated each of the widows five acres out of Bungoma/Tongaren/413 during his lifetime, which they were to hold in trust for each of their respective families. She states that that property Bungoma/Tongaren/413 was still registered in the name of the Settlement Fund Trustees. She asserts further that the deceased died in 1972, before the Law of Succession Act, Cap 160, Laws of Kenya, came into force, and that meant that his estate fell for distribution in accordance with Bukusu customary law, which envisaged equal distribution between the three houses of the deceased. She accuses her co-administratrix of disclosing only the sons of the deceased, and suppressing the names of the daughters of the deceased. She avers that prior to representation being sought, the family had sat with the assistance of clan elders and leaders of the provincial administration, where it was agreed that each of the widows or houses gets five acres each, to be thereafter distributed amongst the children in each house. She asserts that there was total agreement on that matter. She accuses the applicants of having sat on their rights for twenty years, since they knew all along that the grant had been confirmed, but chose to do nothing about it. She reiterates that the deceased had shown each of the three families their respective portions on the ground, and they had settled on the grounds in accordance with that arrangement, something that the applicants had averred to in their application. She goes on to state that James Inyangala Etabale was not a child of the deceased, and describes him as an intermeddler with the estate. She accuses her co-wife of using her sons, the applicants, to get more land, given that the other widows either did not have sons, or did not have as many sons as the first widow. She asserts that the deceased was the first registered owner of the subject property contrary to what was being alleged by the applicants. She asserts that Selifa Mmbone Etabale had sold portions of the land to strangers, terming such transactions as illegalities. She argues that her consent, and that of the other widow, were not sought before the sales were done. She further accuses Selifa Mmbone Etabale of attempting to change the terms of the distribution ordered by the court through clan elders, and the matter was escalated to the provincial administration, where it was advised that the matter be referred back to court. Regarding the order from the Kimilili court, she argues that the High Court had already distributed the estate, and a magistrate's court could not purport to change the terms of that distribution thereafter. In any case, she argues, the decree from the Kimilili court was no longer effective since twelve years had since expired. She has attached to her affidavit a rather faint copy of a certificate of official search on Bungoma/Tongaren/413, which purports to show that that property was still registered in the name

of the Settlement Fund Trustees.

12. Directions were given, on 4th October 2018, that the summons for revocation of grant, dated 16th September 2015, be disposed of by way of written submissions. The directions were taken only in the presence of Mrs. Chunge for the applicants in that application. There has been compliance for both sides have filed their respective written submissions. The applicants filed theirs, dated 20th December 2018, on 9th January 2019; while the respondent filed hers, dated 4th April 2020, on 5th June 2020.

13. In their written submissions, the applicants do no more than regurgitate the factual background that they had set out in their application, and the affidavits sworn in support of the application. The only new thing is that the applicants make a proposal for distribution of the estate, should the court be minded to revoke the grant or set aside the orders that the court made on distribution, so that four acres out of Bungoma/Tongaren/413 be devolved upon the buyers, with the balance being shared out equally between the three wives of the deceased, whether dead or alive, and nine of the children.

14. On her part, the respondent submits that the widows had not agreed on disposal on a portion of the estate of the deceased. Secondly, she submits that the mother had all the opportunity, since the date the grant was confirmed, to raise the issues that she was raising now, but she did not avail herself of the opportunity. Thirdly, she cites section 2(2) of the Law of Succession Act, Cap 160, Laws of Kenya, to argue that the estate of the deceased ought to be distributed in accordance with customary law, as opposed to section 40 of the Law of Succession Act. Based on the relevant customary law, she argues that the estate ought to be shared out equally between the three houses of the deceased, and that that was what had happened at confirmation of the grant. She argues that under Bukusu customary law property is not distributed to the children directly. She submits that the process of obtaining the grant could not be faulted in any way. On the matter of the consent on distribution, she argues that the issue of not executing the consents was being raised too late in the day. She submits that that consent was given at the family meeting that both sides refer to. On the liabilities, she submits that the said issue was never raised all these years, and the fact that liabilities have not been settled cannot be a basis for revoking a grant. It is asserted that he who alleges must prove, and that no proof had been provided to support the argument that the family sat and agreed to dispose of property to settle debts.

15. The application that I am called upon to determine is premised on section 76 of the Law of Succession Act. The said provision states as follows:

> ““*76. Revocation or annulment of grant*
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> *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;*
>
> *) 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.”*

16. Section 76 empowers the court to revoke grants of representation, whether on application by the parties, or on its own motion. The grounds upon which that discretion may be exercised are set out in the provision. There are five grounds. The first one is where the process of obtaining the grant was defective. That would be where the petitioner is not qualified for appointment as personal representative, or where some procedural step was omitted, or such similar technical issue. The second ground is where the process is attended by fraud, such as where the petitioner relies on a false statement or conceals some matter from the court. The third ground is where the petition makes some untrue allegation of fact, whether the same is made innocently or inadvertently. The fourth ground would be where the petitioner, upon being appointed personal representative, whether as executor or administrator, fails in some of their duties as such. It could be where they fail to apply for confirmation of their grant of representation within the period prescribed in law, or fails to proceed diligently with administration of the estate, or fails to render accounts as and when required to. The fifth and final ground is where the grant has become useless or inoperative, following some subsequent events, such as the death of a sole personal representative, or through mental or physical infirmity of a sole personal representative which renders him incapable of discharging his duties as such, or where the sole personal representative has been adjudged bankrupt.

17. The first three grounds have something to do with the process of obtaining the grant, so that the issues around these grounds relate to

problems at the initiation of the succession or probate cause. The three are concerned with the process through which the personal representatives were appointed. The other two grounds kick in after the personal representatives have been appointed as such. The first of the two grounds are about failure to discharge with duties relating to administration, such as failing to do what a personal representative is required to do in law. The second of the two grounds is about change in circumstances, after the personal representative has been appointed, which have the effect of rendering the grant inoperative or useless. The death of a sole personal representative is one of them, as there would be no one to carry out the duties of personal representative thereafter. Bankruptcy of the sole personal representative is another. Under section 56 of the Law of Succession Act, a bankrupt is not qualified for appointment as a personal representative. That would mean that a person who is appointed personal representative and is subsequently adjudged bankrupt, he would automatically cease to be qualified to hold the office, and his grant becomes useless and inoperative.

18. From the language of section 76 of the Law of Succession Act, it is should be obvious that dissatisfaction with the orders on distribution of the estate is not one of the grounds upon which a grant may be revoked. The only reference to the confirmation process is in section 76(d)(i) of the Law of Succession Act, and it has something to do with failure by a personal representative to apply for confirmation of their grant within the period allowed in law. A grant is not liable for revocation on grounds that a personal representative obtained confirmation orders that displeased the person applying for revocation of the grant. A party who feels that the orders granted by a court at confirmation of grant are not fair or just or have errors or the process of obtaining confirmation was attended by procedural defects, should not move the same court for revocation of the grant, but should instead apply for either review of the orders, if grounds exist for review of the said order, or setting aside of the orders, or appeal against them.

19. The application dated 16th September 2015 has nothing to do with the process of obtaining the grant being attended by problems, such as the process being defective, or there being fraud and misrepresentation. Neither is it about the administratrices failing to discharge any of the duties, targeted by section 76(ii), that would expose a grant to revocation. Neither has the grant become useless, nor inoperative, for two of the administratrices are still alive. The applicants are not concerned about how the grant was obtained, but rather they complain about the confirmation process. Strictly speaking, the application dated 16th September 2015 is, therefore, not a proper application for revocation of grant, since the grounds raised in support of the application do not fall within any of the five grounds listed in section 76 of the Law of Succession Act. No defects in the process of obtaining the grant have been cited, no fraud or misrepresentation at obtaining the grant was cited, no evidence has been tendered to demonstrate failure to discharge the duties mentioned in section 76(d), and the grant has not become useless or inoperative.

20. The record is quite clear that it was the first widow, the mother of the applicants, who had initially obtained representation to the estate. She had informed the court that she was the only widow or wife of the deceased. When it came to light that the process that she had used to obtain the grant was defective and fraudulent, the court, on its own, revoked her grant on 18th January 1995, and appointed fresh administrators, who included her. The grant of 18th January 1995 is the one that the court confirmed on 27th November 1995. I have not been told that the process of obtaining the grant of 18th January 1995 was defective or was based on fraud or misrepresentation or concealment of any facts from the court. No evidence was tendered to suggest that any such defects or fraud or misrepresentation or concealment of matter from court existed.

21. Since there is no proper application for revocation of grant before me, what should I do with the application dated 16th September 2015? How should I deal with it? Should I just dismiss it? Should I do substantive justice by overlooking the technical shortcomings exhibited in it, and just focus on the issues raised in it about the process through which confirmation was of the grant was obtained?

22. This is a family matter. It is a dispute within the family for distribution of family wealth. It is clear, from the filings, that the family is not at peace, with respect to the process through which the grant was confirmed. It will be prudent that the court revisits the process to satisfy itself that the parties did the right thing, particularly by ensuring that all those who ought to participate in the confirmation process got an opportunity to participate in the process. That way the family gets justice, in terms of having everyone involved in the process, so that when final orders are made, the input of everyone affected would be placed on record.

23. Would that amount to I, a Judge of the High Court, sitting on appeal on an order made by another Judge of the High Court, exercising concurrent jurisdiction? I do not think so. It is not about the merits of the decision of 27th November 1995, but the procedure that led up to the decision. It is something that the court can exercise the power of review or setting aside over, where the process was problematic. Should I seek to exercise that power to review the process where the order complained of was made twenty years before the instant application was filed? The grant was confirmed in 1995, while the instant application was filed in 2015, yet it would appear that the estate was not distributed as per the confirmation orders of 1995. The very fact that the distribution orders had not been implemented for twenty years could speak volumes about the process, and the more the need to shine the spotlight on the process through which the confirmation orders were made. I shall, therefore, review the process that led up to the orders of 27th November 1995.

24. Confirmation of grants of representation is provided for under section 71 of the Law of Succession Act, which provides as follows:

> ““*Confirmation of Grants*
>
> *71. Confirmation of grants*
>
> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
>
> *(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*
>
> > *(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the*

estate according to law, confirm the grant; or

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

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

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

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

25. In confirmation applications, there are two principal factors for the court to consider, appointment of the administrators and distribution of the estate. Before a court considers matters of appointment of administrators and distribution of the assets, that is before it looks at the merits of the confirmation application, it is important that the court addresses the proviso to section 71(2) (d) of the Law of Succession Act, which requires the court to 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 require that the court ought or should not confirm the grant before it is so satisfied. It would mean that the court should be satisfied that all the persons beneficially entitled to a share in the estate 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.

26. The provisions in the proviso to section 71(2), have been reproduced through Rule 40(4) of the Probate and Administration Rules, in the following terms:

"*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."*

27. Rule 40(4) makes it a duty, on the part of the applicant, in a confirmation application, to ensure that the court is satisfied of the matters set out in the proviso, by properly ascertaining the persons beneficially entitled to the shares, and identification of their respective shares. Have the provisions of the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? In the Motion, dated 8th April 1995, which sought confirmation of grant, the applicants were two of the three administratrices, that is to say Mary Wamboi Etabale and Elina Naliaka Etabale. They identified the three widows of the deceased as the only survivors of the deceased. They did not list the children of the deceased as survivors or heirs. The question to ask is whether that disclosure satisfied the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules? Had the applicants properly satisfied the requirements of the two provisions?

28. Rule 40 of the Probate and Administration Rules guides the process of obtaining confirmation of grants. Under Rule 40(1)(2) provides for the filing of a summons in either Forms 108 or Form 109. Under Rule 40(3), the summons filed under Rule 40(1) ought to be supported by an affidavit containing the information stated in that provision. Rule 40(3) provides as follows:

"*Save in the case of whole or partial intestacy or where the application is brought by virtue of section 71(3) of the Act, there shall be filed with the summons an affidavit containing the following information and particulars so far as known to the applicant –*

(a) the names, ages and addresses of the children of the deceased by whom he was survived (whether or not they were being maintained by him immediately prior to his death) and of such of his parents, stepparents, grandparents, grandchildren whom he had taken into his family as his own, brothers, sisters, half-brothers and half-sisters, as were living at his death and were being maintained by him immediately prior thereto with full details of the manner and extent and for what period they were being or had been so maintained;

(b) in the case of a male deceased, his wife or wives or former wife or wives living at his death and, in the case of a female deceased, her surviving husband if he was being maintained by her immediately prior to her death with full details of the manner and extent and for what period he was being or had been maintained."

29. The provisions in Rule 40(3) are in mandatory terms. The details or particulars or information to be contained in the affidavit has been set out in the provision. Clearly, the applicants did not comply with the requirements in Rule 40(3), since the applicants only disclosed themselves as the widows of the deceased. They did not disclose the children of the deceased, as envisaged in Rule 40(3)(a) of the Probate and Administration Rules. That would, by extension, mean that there was no compliance with the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules.

30. As stated above, the mother of the applicants, to the instant application, who is one of the administratrices, was not one of the applicants in the confirmation application. One of the administratrices is dead. The other surviving administratrix is the respondent to the instant application. In her affidavit in reply to the instant application, she has sought to justify the nondisclosure of the children, on the basis that the estate was to be distributed according to Bukusu customary law, and under that law only the widows are entitled to inherit, and thereafter share the property passing to them amongst the children. For that reason, she and her co-applicant did not see any need to list the children as survivors or heirs, since the property was to pass to the widows in trust for their children.

31. The deceased died in 1972, and, therefore, the respondent is correct in stating that the estate was for distribution in accordance with customary law, by dint of section 2(2) of the Law of Succession Act. Section 2(2), in addition to stating that the estates of persons dying before the Law of Succession Act came into force on 1st July 1981 were to be distributed in accordance with the law and custom that was in application before the Act came into force, states that Part VII of the Law of Succession Act was to apply to such estates, that is of persons who died before the Law of Succession Act came into force. Part VII provides for administration of estates, and carries provisions on procedures on administration. Section 71 is located within Part VII, which means that it applies to estates that are both subject to section 2(1)(2) of the Act, that is to estates of both categories of dead persons, those who died before and after the Act came into force on 1st July 1981. Rule 40 of the Probate and Administration Rules was made pursuant to section 97 of the Law of Succession Act, and it provides the procedures that give life to section 71 of the Law of Succession Act. By virtue of section 2(2) of the Law of Succession Act, any person who seeks distribution of the estate of a person who died intestate before 1st July 1981, such as the deceased in the instant case, must comply with the requirements of Rule 40 of the Probate and Administration Rules, inclusive of Sub-Rule (3) thereof.

32. I have closely read through Rule 40 of the Probate and Administration Rules and section 71 of the Law of Succession Act, and I have not seen any single provision which supports the case advanced by the respondent. There is nothing in those provisions that makes an exception to distribution of estates of persons who died before 1st July 1981, or sets out a process for administration of such estates which is different from that for estates of persons dying after the Law of Succession Act came into force.

33. Although the respondent argued that the estate was to be distributed in accordance with Bukusu customary law, no effort was made to place the content of the Bukusu customary succession law, to support the contention that she was making in her affidavit, that under that under Bukusu customs, the estate passes first to the widow, and it is thereafter shared amongst the children in each house.

34. The law with respect to proof of customary law is quite clear. The Evidence Act, Cap 80, Laws of Kenya, provides for it at section 51, which states as follows:

> "*51. Opinion relating to customs and rights*
>
> *(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.*
>
> *(2) For the purposes of subsection (1) the expression "general custom or right" includes customs or rights common to any considerable class of persons."*

35. The Civil Procedure Act, Cap 21, Laws of Kenya, also provides for proof of existence of a custom, under section 87, in cases where the issue arises. Since section 3 of the Civil Procedure Act saves special jurisdiction and powers, and the Law of Succession Act provides for such special jurisdiction and powers. It may not be necessary to pay too much attention to the provision in the Civil Procedure Act. Section 3 of the Civil Procedure Act, for avoidance of doubt says:

> "*In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."*

36. The Law of Succession Act does not deal with proof of customary law in the body of the Act. The same is, instead, provided for in the subsidiary legislation to the Act, made pursuant to section 97, the Probate and Administration Rules, at Rule 64, which states as follows:

> "*Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination."*

37. The courts have stated, in such cases as *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* [1965] EA 735 and *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* [1992] 2 KAR 292, or customs are required to be established as facts by parties who seek to rely on them, so long as the same are not notorious or documented. Judicial notice may be taken of the content of a particular custom where the same has attained notoriety.

38. The applicants in the confirmation application did not adduce evidence on the relevant Bukusu customs governing the distribution that was ordered by the court. Eugene Cotran, *Restatement of African Law: 2 Kenya II Law of Succession,* Sweet & Maxwell, London, 1969, at pages 45 and 46, states as follows, on the intestate distribution of a deceased Luhya, of which the Bukusu is part:

> "1. Estate of a married man with one wife, sons and daughters
>
> > (a) LAND. The land is shared among the sons so that each son receives a slightly larger share than his immediate junior. The widow is entitled to use or cultivate a portion of the youngest son. Daughters receive no share.
> >
> > (b) LIVESTOCK. …
>
> 2. Estate of a married man with two or more wives, sons and daughters
>
> (a) LAND.

(i) Each house keeps that land which was allocated to it during the husband's lifetime.

(ii) Land, which has not been allocated to any house, is divided among the houses with reference to the number of sons in each house.

Local variation. Among the Idakho, Isukha, Tiriki and Maragoli, the land is divided among the sons irrespective of the number of sons in each house.

The rules of distribution within each house are the same as in 1(a) above.

(b) LIVESTOCK …"

39. From the above, it is quite obvious that evidence must be led or treatises and case law cited on the relevant customary law. That was not done, and, therefore, it cannot be said that the distribution ordered was based on any known customs. Secondly, it is also clear that the number of children in each house was relevant factor, which meant that the matter of the number of children in each house ought to have been placed before the court, through the affidavit in support of the application, if indeed, Rule 40(3) of the Probate and Administration Rules did not apply, which was not done. The two applicants proceeded as if the widows were the only persons who had survived the deceased.

40. The estate herein fell for administration after the Law of Succession Act came into force in 1981. That being the case, as stated elsewhere, administration of the estate has to be in accordance with Part VII of the Law of Succession Act. Confirmation of grants is a process under Part VII, and the procedures for it are in Rule 40 of the Probate and Administration Rules. Rule 40(8), of the Probate and Administration Rules, is relevant. It requires administrators, when applying for confirmation of their grants, to file a consent in Form 37, contemporaneously with the confirmation application, signed by all dependants and other persons who may be beneficially entitled. Such survivors or dependants include all the children 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 37 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 in chambers on notice in Form 74 to the applicant, the protestor and such other person as the court thinks fit.*"

41. Let me paraphrase Rule 40(8) of the Probate and Administration Rules. It envisages that a consent, in Form 37, be signed by all the persons beneficially entitled to the estate of the deceased. Such persons include the surviving spouses and all the surviving children of the deceased, be they sons or daughters, whether they would be taking a share in the property or not. Rule 40(8) is in mandatory terms. Form 37 must be signed by all the survivors of the deceased. In this case the application for confirmation of grant was not supported by the consents in Form 37. Indeed, the said application was signed by only two of the administratrices, and no one else.

42. Rule 40(8) of the Probate and Administration Rules requires administrators, when applying for confirmation of their grants, to file a consent in Form 37, 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 having to hear any party, so long as no affidavit of protest has been filed and so long as all the persons beneficially entitled have executed consents in Form 37. 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 37, 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).

43. Through Rule 40(8), the court addresses the question as to whether the other persons beneficially interested in the estate have had a say in the distribution proposed. That is the utility of Form 37. The input of the other persons beneficially entitled to the estate to the proposed distribution is through Form 37. If it is found that they have not executed any consents in Form 37, then the court ought to arrange to hear them. Rule 40(8) is in mandatory terms, and should be read together with Rule 41(1), with respect to such persons being heard, which 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.*"

44. Looking at the application dated 8th April 1995, it is clear that none of the persons beneficially interested in the estate did execute a consent in Form 37 as envisaged in Rule 40(8). It bears repeating that Rule 40(8) of the Probate and Administration Rules is in mandatory language. The provisions in Rule 40(8) were not observed in these proceedings. It was only democratic, just and fair that all the persons beneficially entitled to a share in the estate of the deceased, who include the applicants in respect of the instant application, got to participate and have a say in the distribution of the assets of the estate of their late father. To that extent the application dated 8th April 1995, did not meet the standards set for such applications by the Probate and Administration Rules.

45. Secondly, the language of Rules 40(8) and 41(1) envisage that all the persons entitled to a share in the estate file affidavits of protest and are heard, whether they have filed such affidavits or not, at the hearing of the application. Affidavits of protest can only be filed by such persons as may have been served with the application, and equally such persons may be heard at the hearing of the application as were served with notice of the scheduled hearing.

46. The confirmation application came up for hearing on two occasions. Firstly, on 5th April 1995, when it was adjourned on account of the

absence of the respondent. The applicants were recorded as being present, and the respondent absent. Whereas it is clear who the applicants were, the two administratrices who had brought the confirmation application, it was not clear who the respondent was, for the application did not name a respondent. Secondly, no one filed an affidavit in response to the application. Thirdly, there is no affidavit of service on record to demonstrate whether or not the said application had been served on anyone for the purpose of the hearing scheduled for 5th April 1995. The record indicates that the confirmation application was heard on 27th November 1995, in the presence of the applicants, presumably the two who had filed the confirmation application. Again, the record does not have an affidavit of service as evidence that the other administratrix and the children of the deceased, the persons beneficially interested in the estate, had been served with a hearing notice in respect of the said hearing.

47. Without evidence of notice of hearing on both occasions, and more crucially, notice that the other persons beneficially entitled to the estate, that is to say the other administratrix and the children, it cannot be said that they were given the opportunity to file a response to the application, by way of affidavit of protest, or to be heard at the confirmation hearing. Rule 40(6) provides for filing of affidavits of protest by anyone wishing to object to a proposed confirmation. Such protest affidavits can only be filed by persons who are aware of the filing of the application, and, in law, such awareness is through service of the application on all those affected.

48. Let me go back to Rule 40(8). It provides for how confirmation applications are to be disposed of. The matter is placed before the registrar whether or not affidavits of protest have been filed, who may allow the application, without hearing the parties, if all the persons beneficially entitled have filed their consents in Form 37. Where affidavits of protest have been filed and where consents in Form 37 have not been filed, the registrar ought not dispose of the application without hearing the parties, instead he should fix the matter for directions before a Judge, for matters filed at the High Court, or the magistrate, for matters at the magistrate’s court, with notice to the administrator who filed the confirmation application, the protestor and such other persons as the court may think fit. Such other persons would include persons who have not executed consents in Form 37, and who are beneficially entitled to a share in the estate of the deceased.

49. In the confirmation application herein, no protest affidavits were filed, and there is no evidence as to whether the confirmation application was ever served on the persons beneficially entitled to enable them file affidavits of protest if they so wished. Secondly, the confirmation application was not supported by consents in Form 37. That meant that the court could not proceed to dispose of it without hearing the parties. What should have been done was to have the matter listed for mention before a Judge for directions on the disposal of the application, with the notices required in Rule 40(8) of the Probate and Administration Rules, to the two applicants, the third administratrix and the children of the deceased, among other persons beneficially entitled to a share in the estate of the deceased. The omission to comply with Rule 40(8) meant that the persons beneficially entitled to a share in the estate, who were not applicants, were robbed of an opportunity to be heard at the confirmation hearing.

50. It should be emphasized that the mandate of the probate court is distribution of the estate of a deceased person. Distribution is, therefore, at the core of probate and succession proceedings. The succession cause is initiated solely for the purpose of having the estate distributed, and the cause is at an end once the court makes orders at confirmation of the grant. The confirmation hearing is, therefore, the most critical process in a probate cause. It is for that reason that Rules 40 and 41 of the Probate and Administration Rules envisage a democratic process, where the administrators ought to make an effort to ascertain all the persons who are beneficially entitled to a share in the estate, bring the confirmation application to their notice so that they can file responses by way of affidavits of protest and obtain consents in Form 37 for those of them who have not filed affidavits of protest. The two Rules also require the court to afford each of the persons beneficially entitled a say in the distribution, should such persons be minded to be heard. That way everyone gets an opportunity to be heard, even if the final orders are made against them. It is important that that process be adhered to strictly in order to lend integrity and credibility to the process. For as long as orders on distribution are made without affording all affected an opportunity to be heard, there would be no closure to the matter, for there would always be a ring of injustice and unfairness around it.

51. The respondent raised issue with the time taken to file the instant application. The answer to that should be that the office of an administrator is for life. Beneficiaries are entitled to approach the court for accounts at any time, and especially where distribution has not been completed. The instant application calls for an account with respect to how confirmation of the grant was obtained. There is no limitation of time with respect to that. Indeed, there is no limitation of time where injustice and unfairness are at play. Consequently, it is my finding that the applicants are not guilty of *laches*, with respect to calling the administratrices to account for their administration, for the process of confirmation of grant is part of the administration exercise.

52. The other issue is with respect to the property the subject of the distribution in the confirmation application, that is to say Bungoma/Tongaren/413. The applicants to the confirmation application did not exhibit a copy of the title deed of the said property, or any other document of title or evidencing ownership of that property by the deceased. The respondent only attached a certificate of official search to her response to the instant application, to demonstrate that the said property is still registered in the name of the Settlement Fund Trustees. The document attached by the respondent is a little blurred and some of the details are not clear. However, it tallies with another certificate of official search lodged herein simultaneously with the petition for grant. It is dated 16th November 1990. It indicates that Bungoma/Tongaren/413 was registered on 26th July 1977, in the name of the Settlement Fund Trustees. The parties have not lodged on record any other document showing that the ownership of the said property has changed since 16th October 1990. As it is, as at 27th November 1995, when the grant was being confirmed, and the property distributed, the same was not registered in the name of the deceased. Technically, it was not his property. The question that should arise is as to whether the same could be distributed as an asset of the estate, when the property was not in the name of the deceased.

53. Section 3 of the Law of Succession Act defines “estate” as “*the free property of a deceased person*.” Immovable property, such as Bungoma/Tongaren/413, can only be described as belonging to the person whose name appears in the deed of ownership. Documents of title are issued by the state through the Land Registration Act, Cap 300, Laws of Kenya, and the said documents are evidence of ownership according to section 26 of the said Act, which states:

> “*Certificate of title to be held as conclusive evidence of proprietorship.*
>
> *26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by*

the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

54. Consequently, according to government records, Bungoma/Tongaren/413, does not form part of the estate of the deceased. If the deceased had bought it, the administratrices ought to have perfected his title by causing the same to be transferred from the name of the Settlement Fund Trustees to that of the deceased. It was their duty to have the transfer done, before they mounted their confirmation application. That would mean that the grant was confirmed prematurely. The administratrices got the court to distribute an asset that did not belong to the estate. It is little wonder that since 27th November 1995 they have been unable to have the confirmation orders implemented, for they cannot possibly be executed when they seek to distribute a property belonging to another.

55. There was talk about debts and liabilities of the estate, and that one of the administratrices disposed of a portion of the property in order to settle those debts. There were documents placed on record that would appear to support that contention. Of course, there are issues that the said administratrix was selling portions of an asset that was yet to be perfected, in terms of being transferred to the name of the deceased. She sold property that was still in the name of the Settlement Fund Trustees, no wonder the alleged buyers are yet to get their titles, and are still awaiting completion of the administration process. The administratrix ought not have purported to sell the property when it was still in the name of the Settlement Fund Trustees. She should have had the transfer done first, so as to bring the property to the name of the deceased, once any debts with the Settlement Fund Trustees were settled.

56. Secondly, there is no evidence of the alleged sales, by way of sale agreements, given the provisions of 3(3) of the Law of Contract Act, Cap 23, Laws of Kenya, which requires that any sale of land ought to be supported by a memorandum in writing. The documents that Selifa Mmbone Etabale put on record, through her supporting affidavit, are not in the form of a memorandum in writing with respect to sale of land. They are merely documents that show monies were paid to the alleged creditors, the Settlement Fund Trustees and the Agricultural Finance Corporation. Whether there was such sale is something that should have been brought out at the hearing of the confirmation application, by having the same disposed of *viva voce*.

57. Thirdly, the alleged sales appear to have been carried out sometime before 27th November 1995, that would mean before grant was confirmed. The property purported to be sold was immovable property. Section 82 of the Law of Succession Act bars disposal of immovable assets of the estate before the grant is confirmed. That does not mean that such property cannot be sold. In view of the proviso to section 82(b)(ii), such property can only be sold with leave of court. There is nothing in the record before me which indicates that any such leave had been obtained. Selifa Mmbone Etabale justified her actions by saying that she had obtained leave of the clan to do so. Well, administration of the estate herein was sought after the Law of Succession Act had come into force. Administration of the estate ought to be strictly in accordance with the provisions of the Law of Succession Act and the relevant subsidiary legislation made under it. The Law of Succession Act and the Probate and Administration Rules do not assign any role to clans or elders with respect to administration of estates, and they cannot exercise any function with respect to administration of estates unless directed to do so by the court. Clans or elders have no authority nor power under the Act and the Rules to authorize disposal of estate assets, that power or authority is reserved for the courts.

58. The relevant portion of section 82 of the Law of Succession Act provides as follows:

"*82. Powers of personal representatives*

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

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(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) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

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

(c) …"

59. The purported decision to dispose of estate assets and, it would appear, some of the disposals or all of them happened before representation or administration of the estate was granted to anyone. The property did not, therefore, at that time vest in any of the surviving widows or children of the deceased by virtue of section 79 of the Law of Succession Act. None of them could, therefore, exercise the powers

that are conferred on administrators by section 82 of the Law of Succession Act. Any actions carried out by any of the survivors of the deceased before representation was obtained amounted to intermeddling with the estate of the deceased. Section 45 of the Law of Succession Act outlaws handling of estate assets by persons who have no authority to handle it, and such authority is only conferred by a grant of representation. It is a criminal offence to intermeddle with the estate according to section 45(2). Such illegalities cannot possibly be a basis for conferring legitimacy to any disposal of estate assets.

60. The provisions of sections 45 and 79 of the Act state as follows:

> "*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.*"
>
> "*79. Property of deceased to vest in personal representative*
>
> *The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."*

61. Selifa Mmbone Etabale may want to argue that she was eventually appointed administrator and thereby conferred with the authority that she did not have when she got into those transactions. That may well be so, but a grant of letters of administration does not operate retrospectively, to authenticate or validate acts of the administrator undertaken before the grant was made. It is only a grant of probate that has that effect, for it relates back to the date of death of the deceased, rather than the date of the making of the grant, and it has the effect of giving validity to the intermediate acts of the executor, undertaken between the date of death and the date of the making of the grant. The explanation is that the executor is appointed by the will of the deceased, and not the grant of probate, and the office of executor becomes effective upon death, and not the making of the grant. The making of a grant of probate is nothing more than confirmation of the validity of the will and appointment of the executor as such. Letters of administration are effective from the date of the making of the grant, and the appointment of the administrator into office is effective from the said date. That is the effect of section 80 of the Law of Succession Act. See generally *Kothari vs. Qureshi and Another* [1967] EA 564, *Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd* HCCC No. 543 of 2005, *Otieno vs. Ougo and another (number 4)* [1987] KLR 407, *Troustik Union International and another vs. Mrs. Jane Mbeyu and another* [1993] eKLR*, Martin Odera Okumu vs. Edwin Otieno Ombajo* HCSC N9479 of 1996, *Coast Bus Services Limited vs. Samuel Mbuvi Lai* CACA No. 8 of 1996, *Ganinjee Glass Mart Ltd & 2 others vs. First American Bank Ltd* [2007] eKLR, among others.

62. For avoidance of doubt, section 80 provides as follows:

> "*80. When grant takes effect*
>
> *(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.*
>
> *(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.*"

63. A grant of letters of administration cannot invalidate the intermediate acts of the administrator done without authority before his appointment as administrator. That would mean that if the alleged sales were carried out before the grant was confirmed, they were so carried out without authority, and were nullities.

64. A decree was passed in Kimilili RMCMis. Applic. No. 43 of 1996, dated 5th December 1996, which purported to distribute an undisclosed property in accordance with some award made by elders. In the first place the said decree is vague, for it does not identify the property that was being distributed by the elders. Secondly, the High Court was already seized of the matter in this cause, and, therefore, there was no basis for the same matter to be placed before any tribunal or subordinate court to determine what the High Court had already determined. The High Court had already distributed the estate through the orders of 27th November 1995, the magistrate's court could not purport thereafter to make other orders distributing the same property, if indeed the said orders touched on Bungoma/Tongaren/413. The magistrate's court could not sit on appeal on an order of the High Court. If Selifa Mmbone Etabale was dissatisfied with the confirmation orders of 27th November 1995, she ought to have moved the Court of Appeal appropriately. Otherwise moving the magistrate's court to make orders that contradicted orders made by the High Court was a waste of time and an exercise in futility, for the orders made by the magistrate's court were and are a nullity.

65. I have already dealt with the issue of revocation of grant, and found that there is no proper application in that respect before me. I shall, therefore, not revoke the grant on record. I note that the applicants are from the first house, appointing them would mean that the first house is over- represented in administration. If anything, it should be the third house asking for an administrator to be appointed to substitute the widow from that house. Widows have priority, with respect to entitlement to administration, over the children of the deceased. That is the effect of section 66. Under section 81, once one of several administrators dies, the powers of the dead personal representative vest in the survivor. That is what should happen here.

66. In view of what I have stated above, it should be clear that the proceedings that were carried out on 27th November 1995 did not conform with the relevant procedural law, and are open to setting aside, to allow the parties start the process of confirmation of grant afresh, in complete compliance with section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. As stated above, the confirmation application was filed and disposed of prematurely, before the administratrices had had the asset of the estate transferred to the name of the deceased. The property that was purported to be distributed did not belong to the deceased.

67. The final orders that I shall make herein are as follows:

(a) That Selifa Mmbone Etabale and Mary Wamboi Etabale are hereby confirmed to be the administratrices of the estate of the deceased, and it is hereby directed a grant of letters of administration intestate issues to them accordingly;

(b) That the orders made on 27th November 1995, on confirmation of grant, are hereby vacated or set aside, and the certificate of confirmation of grant, issued on even date, is hereby cancelled;

(c) That the administratrices confirmed in (a), above, shall cause registration of Bungoma/Tongaren/413 to be transferred from the name of the Settlement Fund Trustees to the name of the **deceased, upon settlement of any debts or liabilities due to the said Settlement Fund Trustees, and they shall thereafter apply for confirmation of their grant only after perfecting the said title in that respect; and**

(d) That any party aggrieved by the orders made herein has the liberty to move the Court of Appeal, appropriately, within twenty-eight (28) days of the making these orders.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF September 2020

W. MUSYOKA

JUDGE