REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 356 OF 1998

IN THE MATTER OF THE ESTATE OF JOSEPH MAPESA NAKUKU (DECEASED)

RULING

1. These proceedings relate to the estate of Joseph Mapesa Nakuku, who died on 22nd July 1988. The letter on record from the Assistant Chief of Matiha Sub-Location, dated 6th July 1998, is unhelpful to the extent that it does not state the persons who survived the deceased, for it merely says that Bernard M. Khasakhala Mapesa and Kanoti Makale Mutuli were the rightful heirs to the estate without indicating the relationship between them and the deceased.

2. Representation to the estate was sought by Bernard M. Khasakhala Mapesa, through a petition lodged in this cause on 21st July 1998, in his purported capacity as son of the deceased. He listed himself and Kanoti Makale Mutuli, as the sole survivors of the deceased, in their purported capacities as children of the deceased. He expressed the deceased to have had died possessed of a property known as Butsotso/Ingotse/1110. Letters of administration intestate were made to Bernard M. Khasakhala Mapesa on 20th November 1998 and a grant was duly issued to him dated 20th November 1998. I shall accordingly hereafter refer to him as the administrator.

3. The administrator the lodged a Motion herein, on 7th October 2000, dated, curiously, 7th November 2000, seeking confirmation of his grant. He identified the survivors of the deceased to be himself, Kanoti Makale Mutuli and an Erastus Apeniko Aseka, without disclosing the blood relationship between the deceased and the said Erastus Apeniko Aseka. He proposed that the property be shared out unevenly between the three individuals identified as survivors of the deceased. When the matter came up before Waweru J on 18th December 2001, the administrator disclosed that the deceased had married four times, and proceeded to name the four wives of the deceased – Rael Barasa, Agneta Akhalakwa, Rebecca Mung'oni and Bereneda Khatondi; and their children – Adriano Ambiakha, Micah Kanambo, Hezron Kaunda, Protus Luseno and the administrator. There were thirteen daughters too, whose names were not disclosed to the court, but who were all said to be married. He too disclosed that his siblings were not in court. He said that the deceased had died possessed of three parcels of land, that is to say there were two others besides the one he had disclosed, and whose details he had not disclosed in his papers. Waweru J did not confirm the grant at that sitting, instead he directed the administrator to obtain official search certificates of the two parcels of land not before the court, and to have the certificates filed in court. The court also directed that at the next hearing all the surviving widows and the surviving male children attend court.

4. It would appear that the directions given by Waweru J. on 18th December 2001 were not complied with. No official search certificates on the two parcels of land that the administrator had alluded to were filed in court, neither were the surviving widows and all the male children of the deceased presented in court at the next hearing of the Motion on distribution. The next hearing happened on 25th March 2004. Waweru J. had since left the station, and the matter was placed before GBM Kariuki J. The administrator misled the court into believing that he had turned up in court with his two alleged brothers, Kanoti Makale Mutuli and Erastus Apeniko Aseka, and that they had agreed on distribution. Nothing was said about the directions that Waweru J had given on 18th December 2001, and indeed the matter proceeded as if those directions had never been made. The grant was confirmed on 25th March 2004, and a certificate of confirmation of grant was issued on 7th April 2004 in the terms proposed in the Motion dated 7th November 2000.

5. On 3rd May 2013 a summons dated 9th May 2012 was lodged at the registry by a Protus Mapesa, in his purported capacity as a beneficiary of the estate. I shall hereafter refer to him as the applicant. He sought rectification of the grant. He narrated that the grant had been made to a Onami Wesonga and was confirmed on 17th April 2004. His case was that a property known as Butsotso/Ingotse/556 had not been placed before the court for distribution. He proposed that the same be shared between three individuals who had not been mentioned previously, that is Micah Kanambo Mapesa, Hezron Kaunda Mapesa and himself. He did not indicate the relationship between the three and the deceased.

6. The application dated 9th May 2012 elicited an affidavit of protest from Hezron Kaunda Mapesa, sworn on 5th December 2013, who I shall refer to hereafter as the respondent. He averred that the deceased was his father, who, he said, had three sons, being the late Micah Kanambo Mapesa, Protus Luseno Mapesa and himself. The late Micah Kanambo Mapesa died on 24th June 2003 Micah Kanambo Mapesa, and was survived by five sons, being Abisai Mapesa Kanambo, Elphas Amachavo Kanambo, Japheth Amoi Kanambo, Yohana Juma Kanambo and Odongo Isaya Kanambo. He conceded that Butsotso/Ingotse/556 was not distributed at the confirmation of the grant, and he proposed that it be shared out equally between the sons of the deceased equally, with the share of late Micah Kanambo Mapesa going to his five sons.

7. The respondent swore a supplementary affidavit on 16th September 2016, giving more details. He explained that whereas he was a son of the deceased, the administrator was his half-brother. He explained that the deceased had married four wives: Rebecca, Rael, Agneta and Bedneta. Rebecca had one son, the administrator herein; while Rael was the mother of late Micah Kanambo Mapesa; Agneta was the mother of Hezron Kaunda; and Bedneta was the mother of Protus. He stated that the deceased died possessed of only two assets, being Butsotso/Ingotse/556 and 1110. He stated that the deceased had settled the family of Rebecca on Butsotso/Ingotse/1110. The other houses were then settled on Butsotso/Ingotse/556. He claimed that the house of Rebecca had initiated their own cause to share out Butsotso/Ingotse/1110 between Bernard M. Khasakhala Mapesa and two buyers. He stated that Butsotso/Ingotse/556 was to be shared equally between the remaining three houses.

8. Directions were given on 3rd April 2017 for disposal of the application by way of oral evidence. No directions were given for filing of witness statements but the parties on their own volition and without leave of court proceeded to file witness statements, which was altogether unnecessary as the proceedings on record are by way of an application supported by affidavits. I would have disregarded the witness statements for the above reasons, were it not for the consent that the parties recorded on 14th March 2019, whivh cause Butsotso/Ingotse/556 to be in the schedule of assets and agreed to have the application disposed of on the basis of the said statements. I shall invoke Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules, and consider the said witness statements despite their filing being quite unnecessary in view of the affidavits and also despite their being filed absent of court's leave or directions.

9. The first statement was filed by the respondent, Hezron Kaunda Mapesa. He reiterated the contents of his two affidavits. He averred that Charles Okutoi and Adriano Imbiakha did not have a claim to Butsotso/Ingotse/556 as they had benefitted from gifts *inter vivos*. Bernard M. Khasakhala had had Butsotso/Ingotse/1110 devolved to him at the confirmation of the grant. He proposed that the said property be shared out amongst the surviving sons, that is to say himself, Protus Luseno and the late Micah Kanambo, whose sons are to take his share equally.

10. The second statement on record was filed by Adriano Imbiakha Mapesa. He was from the first house, and said that he got his share of the estate from the deceased during his lifetime. He stated that the deceased had bought Butsotso/Indangalasia/416 and 417, which he caused to be registered directly in his name. He stated that the only persons who did not get lifetime shares were the applicant, the respondent and the late Protus Luseno Mapesa. He stated that the three occupied Butsotso/Ingotse/556, and the deceased person's wish was that the three share out the property equally. He stated that he had no claim whatsoever to the estate.

11. The third statement on record was filed by the respondent's witness, the administrator herein, Bernard M. Khasakhala. He stated that the deceased had awarded him Butsotso/Ingotse/1110, while the respondent, Protus Luseno and the late Micah Kanambo were meant to share Butsotso/Ingotse/556 equally. He mentioned that he had petitioned for letters of administration intestate in respect of Butsotso/Ingotse/1110 and that the same had been transferred to him.

12. The applicant's statement followed. He mentioned that the deceased had distributed North Butsotso/Indangalasia/356, 416 and 554 to Charles Okutoi, Adriano Ambiakha and the administrator. The statement is expressed in rather inelegant language and some of the matters stated in there are not quite clear. It would have been wiser for the parties to give *viva voce* evidence since the same has a way of bringing out the facts more clearly, particularly in a contested matter such as this one.

13. There is a statement by a Musa Mukweyi, who claimed to be a stepson of the deceased, but without identifying who his mother was. He confirmed that the deceased died a polygamist, having married four times. He identified the assets that the deceased owned as Butsotso/Ingotse/556 and 559. Butsotso/Ingotse/559 was allegedly transferred to the name of one of the wives, Rebecca, during the deceased's lifetime, while the remaining widows were to share out the other property, Butsotso/Ingotse/556. He averred that Butsotso/Ingotse/556 was marked on the ground, so that two of the widows were entitled to 3.5 acres while one wife was entitled to 7 acres. He did not explain the criteria for the said sharing between the said widows.

14. The applicant filed another statement giving details that were slightly different from his earlier statement. He referred to land that the deceased shared out in 1979 without citing any land reference number. He said the same was shared out between three wives, Agneta – 3.5 acres, Bedneta – 7 acres and Rael – 3.5 acres. He averred that the deceased then bought a 4-acre piece of land whose land reference details he did not disclose, and which he said only the respondent knew the details and was the one exclusively using it. He said that all the sons of the deceased had specific portions of land given to them. He stated that Charles Okutoi was given Butsotso/Ingotse/552, Julius Musungu was given Butsotso/Ingotse/569, Adriano Imbiakha was given Butsotso/Indangalasia/416 and 417, and Bernard Khasala was given Butsotso/Indangalasia/415. He stated that there were other sons who were deceased, that is to say Julius Musungu and David Osore, who had families and who had their own parcels of land. He stated too that Charles Okutoi and Micah Kinambo were also deceased, but had left behind families. He also stated that the wives of the deceased herein were all dead, and they had left their children on the land that the deceased had allocated them. He stated that Butsotso/Ingotse/1110 was a subdivision from Butsotso/Ingotse/569, which was the parcel of land to which the late Julius Musungu was entitled to.

15. The parties to this cause have not done this matter much justice. The facts that they have disclosed are jumbled up, as none of them have sought to place a clear record before the court of who the actual survivors of the deceased were and which assets actually made up the estate. The picture that I have managed to recreate from the vague and jumbled up facts placed on record is that the deceased herein died a polygamist, having had contracted four marriages during his lifetime. Those four marriages produced numerous children, both sons and daughters. Curiously, while the names of the sons were disclosed, those of the daughters were not. The parties were contented to just say that the said daughters got married. That was notwithstanding the fact that the deceased died in 1988, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force on 1st July 1981, which treated sons and daughters equally. The first wife of the deceased was called Rael Barasa and she begat three sons and four daughters. The sons were named as Charles Okutoi, Adriano Imbiakha and Micah Kanambo. As stated above, the names of the four daughters were not disclosed. The second wife was Agnetta Akhalakwa alias Khalekwa, who begat one son and two daughters. The son's name was given as Hezron Kaunda, the respondent herein. The names of the two daughters were not disclosed. The third wife was Rebecca Mung'oni alias Mugoni. She had one son and four married daughters. The son in question is the administrator of the estate, Bernard Khasala alias Khasakhala, while the names of the four daughters were not disclosed. The last wife was Bereneda alias Bedneta Khatondi, who had one son and three married daughters, whose names, again, were not disclosed. The son was Protus Luseno, the applicant herein. There are other individuals who have been mentioned by some of the parties as having been sons of the deceased, but they have not been linked to any of the wives of the deceased. I have in mind Julius Musungu, David Okore and Kanoti

16. The other important aspect of an estate are the assets which make it up. When the administrator sought representation to the estate of the deceased herein, he stated on oath that the deceased had died possessed of only one property, being Butsotso/Ingotse/1110. The applicant and the respondent then came on the scene later to say that he also owned a property known as Butsotso/Ingotse/556, and further that he had other assets that he had transferred to some of the members of his family during his lifetime. The landed assets that the parties have referred to as belonging to the deceased during his lifetime are Butsotso/Ingotse/552, 556, 569 and 1110, and Butsotso/Indangalasia/415, 416 and 417. The parties allege, but without proof, by way of either copies of title deeds or search certificates or green cards, that Butsotso/Ingotse/552 and 569, and Butsotso/Indangalasia/415, 416 and 417 were distributed by the deceased *inter vivos* to Charles Okutoi, Adriano Imbiakha, Julius Musungu and Bernard Khasala alias Khasakhala. That would then suggest that the only assets that formed part of the estate of the deceased as at the date of his death were Butsotso/Ingotse/556 and 1110, although there is an allegation that Butsotso/Ingotse/1110 was actually a subdivision, under dubious circumstances, from Butsotso/Ingotse/569, a property that had been allocated to the late Julius Musungu by the deceased. The title documents on record indicate that Butsotso/Ingotse/556 was registered in the name of the deceased on 7th October 1968 and was still in his name as at 11th October 2001. Butsotso/Ingotse/1110 is recorded as having been registered in the name of the deceased on 11th January 1972, and was still under his name as at 7th July 1998, but was transferred to the names of Bernard M. Khasakhala Mapesa, Kanoti Makale Mutuli and Erastus Apeniko Aseka on 25th July 2016, after the administrator's grant was confirmed on 25th March 2004.

17. The cause started on a wrong footing. Although from the entire record, as I have attempted to demonstrate above, the deceased died a polygamist, survived by several widows and children, the assistant Chief who wrote the letter dated 6th July 1998, to introduce the administrator to the court, did little justice to the matter. While knowing that the deceased was a polygamist, as he should have known, survived by several widows and children, he misrepresented to the court the actual facts and distorted the whole picture, by suggesting that the administrator and another person, who was not even a child of the deceased, were the actual survivors of the deceased. The administrator compounded that lie or falsehood, by swearing an affidavit on 14th July 1998, to support his petition, by averring that it was only himself and Kanoti Makale Mutuli, who had survived the deceased. The facts deposed in affidavits and averments made in statements filed later herein established that that was a white lie. The deceased had several other sons, some alive and some dead but leaving behind survivors. Kanoti Makale Mutuli was not a son of the deceased. The administrator no doubt knew that for a fact as when he made an oral statement before Waweru J on 18th December 2001 on the survivors of the deceased, where he named the wives and sons of the deceased, he did not name the said Kanoti Makale Mutuli as one amongst his brothers. His siblings, in their filings, whether affidavits or statements, did not name him as one of their brothers. Indeed, one of them identified him as a buyer of a portion of Butsotso/Ingotse/1110 from the administrator. Yet, the administrator swore an affidavit and filed it in court, in which he sought to have the court believe that Kanoti Makale Mutuli was one of the only two surviving children of the deceased.

18. That deception was compounded at the confirmation of the grant. In the affidavit that the administrator swore on 7th November 2000, in support of the Motion of even date, which sought confirmation of his grant, he identified the survivors of the deceased to be himself, Kanoti Makale Mutuli and Erastus Apeniko Aseka. Other than describing these individuals as persons who had survived the deceased, he did not mention the actual relationship between them and the deceased, whether they were sons or grandsons or siblings of the deceased. The concept of survivors is a creature of Part V of the Law of Succession Act, which deals with intestate succession. The provisions in section 35 through to section 42 point to individuals who are connected by blood or kinship to the deceased, by either being his children or parents or siblings or other blood relatives up to the eight degree. The only non-blood kin would be a surviving spouse or adopted children. To allude to a person being a survivor of the deceased is to say that that person has blood ties to the deceased or is related to him on account of being his or her spouse or is a child that the deceased adopted whether formally or otherwise. There are averments on record, which the administrator has not controverted, to the effect that the said Kanoti Makale Mutuli and Erastus Apeniko Aseka were not survivors of the deceased, but persons who had allegedly bought a portion of estate land from the administrator. It would, therefore, be false to claim that they were persons who had survived the deceased. When the administrator appeared before Waweru J on 18th December 2001 and gave a breakdown of the sons of the deceased, he did not give the names of Kanoti Makale Mutuli and Erastus Apeniko Aseka as being some of them. That lie was further perpetuated by the administrator on 25th March 2004, when he appeared before GBM Kariuki J, to prosecute his confirmation application. He presented Kanoti Makale Mutuli and Erastus Apeniko Aseka as his brothers, and the two addressed the Judge and asserted that they were indeed brothers of the administrator. Never mind that Waweru J had given very clear directions on 18th December 2001 that at the hearing of the said confirmation application, the administrator was to bring to court the surviving widows and sons of the deceased that he, the administrator, had identified before Waweru J on 18th December 2001, and who did not include Kanoti Makale Mutuli and Erastus Apeniko Aseka. In the confirmation proceedings the administrator did not disclose his real siblings to the court, and proceeded as if they did not exist.

19. The other important fact that was concealed from the court by the administrator related to disclosure of daughters. When the administrator addressed Waweru J on 18th December 2001, he did mention that the deceased had sired several daughters with his four wives. Indeed, the number of daughters exceeded that of the sons. Yet, the names of the daughters were not disclosed in the letter from the Chief, nor in the petition, nor in the confirmation application.

20. Succession law is about distribution of the property of a dead person. Indeed, the whole process is about the property. A person who does not leave behind any property is said to have no estate, and there would be no basis for conducting succession proceedings to his estate for there would be nothing to distribute. That being the case, it is critical that the person seeking representation should disclose all the assets that the deceased died possessed of, for that is what constitutes the estate of the deceased. From the material on record, it would appear that the deceased died possessed of several assets, but two are certain, Butsotso/Ingotse/569 and 1110. The administrator disclosed only one in his petition and in his application for confirmation of his grant, Butsotso/Ingotse/1110. It transpired that that was the only property that he was interested in. He knew that Butsotso/Ingotse/556 was also estate property, going by his witness statement filed herein on 14th November 2016. Yet, he left out this property in his schedule of the assets of the estate, even though He had petitioned for representation to the estate of the deceased. His approach was selfish and reeked of self-centeredness.

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 are in subsection (2)(g)(h), which state as follows:

"Application for Grant

51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(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) a full inventory of all the assets and liabilities of the deceased..."

22. My reading 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 only disclosed himself, but not his siblings. In his own admission before Waweru J on 18th December 2001, some of the widows of the deceased were still alive as at that date, yet he did not disclose them in his petition, and, therefore, there was no compliance with section 51(2)(g). Section 51(2)(h) requires a full inventory of all the assets of the deceased. The administrator knew the assets of the deceased that were available for distribution, as demonstrated above, but he chose to disclose only that one asset that he was interested in. Again, he did not comply with the mandatory requirements of section 51(2)(h) of the Law of Succession Act.

23. Confirmation of grants is provided for under section 71 of the Act. It paves way for distribution of the capital assets, such as land. It is confirmation of the administrators as well as approval of the distribution proposed. The court looks at whether the administrator was appointed through due process, and also whether he has gone about his duties of administration of the estate properly and in keeping with the law. On distribution, the critical provision is the proviso to section 71(2), which requires that the court be satisfied as to the identities of and shares of all the person beneficially entitled. That would mean that the administrator ought to ascertain all the persons who are beneficially entitled to the estate before he places before the court a proposal on the distribution of the estate. For avoidance of doubt the said provision states as follows:

"71. Confirmation of grants

(1) …

(2) …

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."

24. It would appear to me that it was in an effort to satisfy that proviso that Waweru J pushed the administrator on 18th December 2001 to make disclosures with relation to who the actual survivors of the deceased were. That would mean the Judge probed beyond the bare averments made in the Motion dated 7th December 2000, so as to be satisfied as to the respective identities and shares of all the persons beneficially entitled to the estate of the deceased. The matters that the administrator addressed were not in his affidavit in support of the Motion, that is about the wives and children of the deceased, and the assets of the estate. No wonder the court, after those disclosures, postponed the Motion, in accordance with section 71(2)(d), for the administrator to conduct searches on some of the assets he alluded to and to bring to court the surviving widows and children of the deceased. He could only have done that at the prompting of the court.

25. The record of 18th December 2001 reads as follows:

"18/12/2001

Coram: Waweru J

Wasike, CC. English to Kiswahili

Petitioner present

Petitioner: Application for confirmation of grant. Deceased was my father. He had 4 wives. One of them is death (sic). They are as follows with their respective children:

(1) RAEL BARASA MAPESA (alive)

(i) ANDRIANO IMBUYAKHA – alive, absent

(ii) MICHA KANAMBO – Alive, absent

Plus 4 married daughters

(2) AGNETA AKHALAKWA (Dead)

(i) HEZRON KAUNDA – Alive, absent

Plus 2 married daughters.

(3) REBECCA MUNG'ONI (Alive)

(i) Petitioner

Plus 4 married daughters.

(4) BERENEDA KHATONDI (Alive)

(i) PROTUS LUSENO. Alive, absent

Plus 3 married daughters.

The estate pf the Deceased comprises 3 parcels of land as follows:

(1) BUTSOTSO/INGOTSE/1110 1.6 Ha

I do not recall the other two parcels of land.

COURT: Matter is SOG. The Petitioner to verify the LR Nos. of the other two parcels of land of the deceased and to file in court their respective certificates of official search before re-fixing the matter for hearing. All the adult surviving widows and male children of the Deceased to attend court at the next hearing."

26. The directions by Waweru J were no doubt intended to bring back the matter on the right course, specifically to comply with the proviso to section 71(2) of the Law of Succession Act, as well as to list all the surviving widows and children of the deceased and a full inventory of all the assets of the estate as envisaged in section51(2)(g)(h) of the Act. For a fair and equitable distribution of the estate, all the assets of the estate ought to be placed on the table and all the persons beneficially entitled to a share in the estate must be involved in the process. That, no doubt is what Waweru J was driving at.

27. Disappointingly, the administrator did not comply with those directions. There is nothing on record to indicate whether he ever conducted searches on the two assets that he had alluded to, for he never filed the certificates of official search on the two assets before the next hearing as directed, contrary to the directions of 18th December 2001. Secondly, at the administrator did not at the next hearing of the Motion dated 7th December 2000 avail the surviving widows and male children of the deceased, contrary to the directions of 18th December 2001.

28. I have already mentioned elsewhere that when the said Motion was next fixed before a Judge, it was not Waweru J, for it appears that he had since left the station. The matter was placed before another Judge, who had not previously handled the matter. That was on 25th March 2004. The proceedings of 18th December 2004 were not alluded to. The matter proceeded as if the directions of 18th December 2001 were never made. The administrator presented some individuals before the Judge, probably in purported compliance with the said directions, but those individuals were not the persons that he had named in court on 18th December 2001, as the surviving spouses and children of the deceased. The administrator claimed that those individuals were his brothers, and the two individuals affirmed that allegation, and the court proceeded to confirm the grant.

29. The proceedings as captured on 25th March 2004 are as follows:

"25 – 3 – 2004

Coram – Before GBM Kariuki J

Mudoto CC

Petitioner present

Petitioner: I have put down the manner we have agreed to distribute the estate. It is in para. 7 of my affidavit. My two brothers have agreed.

Kanoti Makale Mutuli a beneficiary sworn states

I agree to take one acre. My brothers will take 1.825 acres and 1.25 acres. It is agreed.

Erastus Aperiko Aseka. Sworn states.

I agree to the distribution. I shall get 1.25 and Bernard MK Mapesa 1.825 acres and Kanoti 1 acre.

Court: I am satisfied that the Grant was rightly issued. I am also satisfied that there is no application for dependency pending. I am satisfied too that the provisions of the Law of Succ. Act Cap 160 have been followed. Accordingly, I confirm the Grant. The estate of the decd shall be distributed as per paragraph 7 of the estate (sic) of the Petitioner sworn on 27.2.2004. it is so ordered."

30. I trust that if the directions of 18th December 2000 had been complied with, it would not have been necessary for the parties to conduct the proceedings that are the subject of this ruling, for compliance with the said directions would have brought on board all the survivors of the deceased and all the assets that comprised the estate of the deceased. Waweru J, no doubt, intended that the correct procedure be followed by ensuring that all the survivors of the deceased participated in the proceedings and all the assets of the deceased were placed on the table. The administrator disregarded those directions, and that has had the effect of throwing these proceedings into disarray and that has pushed the matter back to square one, as it were, by taking the parties back to the very beginning of the entire process.

31. The application that I am tasked to determine is dated 9th May 2012. I suppose that it is premised on section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules. I must state from the very outset that the said application is very poorly conceived and very badly drafted. In the first place, it is not clear from the prayers what the applicant seeks. It would appear that no orders can be granted based on the prayers as framed. The principal prayers state as follows:

"(1). THAT the grant of letters of Administration (sic) issued to the said Protus Mapesa and confirmed in this matter be rectified in the following aspects as provided for by rule 43(1) of the probate and Administration rules (sic).

(2). THAT the parcel of land BUTSOTSO/INGOTSE/556 is not listed in the confirmed grant.

(3) …"

32. Secondly, the application is brought at the instance of Protus Mapesa, who is described on the face of the summons as administrator of the estate. In prayer 1 it is alleged that a grant of letters of administration was made to him. The record before me indicates that there is only one grant of letters of administration intestate issued in this cause, not to Protus Mapesa, but to Bernard M. Khasakhala Mapesa on 20th November 1998, on the basis of his petition that was lodged herein on 21st July 1998. That grant was never revoked. Bernard M. Khasakhala Mapesa was never removed as administrator. Protus Mapesa has never been appointed as an administrator of the estate, and no grant of letters of administration intestate was ever issued to him out of this cause.

33. Thirdly, in his affidavit in support of the application, the applicant, Protus Mapesa, does not describe himself as an administrator, but, instead, as a beneficiary of the estate. That would mean that the application and the affidavit sworn in support of it are not in sync. In the affidavit, he avers that the grant had been made to a Onami Wesonga. Curiously, other than in this affidavit, the name of Onami Wesonga has not been mentioned anywhere else, either by the administrator of the estate or the applicant herein or the respondent or any of the witnesses who filed statements herein. Onami Wesonga appears to be a fictitious character who has nothing to do with this cause, and whose mention in the said affidavit is a mystery.

34. Fourthly, the applicant avers in his affidavit that the grant was confirmed on 17th April 2004. I have perused through the handwritten record of the proceedings and there is nothing in there to indicate that the court ever sat on 17th April 2004. The last court appearance was on 25th March 2004, when GBM Kariuki J. confirmed the grant on record. The matter went into a lull until 3rd May 2013 when a Simiyu from the firm of Messrs. Kiveu & Company Advocates visited the court's registry to have the application dated 9th May 2012 fixed for hearing.

35. Fifthly, the application is premised on section 74 of the Act and Rule 43(1) of the Probate and Administration Rules, which provide for rectification of grants. The provisions provide for correction of certain types of errors on the face of a grant. Section 74 states as follows:

"*74. Errors may be rectified by court*

Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly."

While Rule 43(1) says as follows:

"43 Rectification of grant

> *(1) Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons … for such rectification through the registry and in the cause in which the grant was issued."*

36. The sense that I can make out of the application dated 9th May 2012 is that the applicant says that a certain property, Butsotso/Ingotse/556, had been omitted at the confirmation of the grant. He would like to have included in the schedule of the assets, and to have it distributed in the manner proposed in his affidavit.

37. Several issues arise from the substance of the application. Firstly, the provisions of section 74 and Rule 43(1) refer to the rectification of a document. The document referred to in the two provisions is a grant of representation, whether full or limited. The provisions are clear that they are limited to rectifications or alterations being made to such grants, limited to the matters set out in the two provisions. For there to be rectification, there must be errors. The errors must be with respect to the defined matters – (a) names or descriptions of persons or things, (b) time or place of death of the deceased, and (c) the purpose of a limited grant.

38. In the instant case, the summons and the affidavit sworn in its support are not clear on the document that they seek to have altered or rectified. That is the document that has the errors sought to be rectified. No document has been identified as having errors that require rectification. The document envisaged by section 74 and Rule 43(1), as stated above, is the grant of representation. Form P&A 41, which prescribes the format of the grant, makes no provision whatsoever for indication of the assets that comprise the estate, so the issue of omission of an asset from the face of the grant can be of no consequence. Perhaps, the applicant had the petition in mind, and was complaining about the omission of the asset from the schedule of the property of the estate as set out in the affidavit in support of the petition. Section 74 and Rule 43(1) are limited to grants of representation, and do not apply to errors in petitions. Perhaps, he was thinking of omission in the certificate of confirmation of grant. Again, the two provisions are limited to grants of representation, and a certificate of confirmation of grant is not a grant of representation. The certificate of confirmation of grant is an extract from orders that the court makes at confirmation of grant, and any errors in it are not for curing under sections 74 and Rule 43(1). The remedy available in such cases ought to be an application for a review of the confirmation orders from which the certificate is derived.

39. I must emphasize that the only document that is available for rectification or alteration under the provisions of section 74 and Rule 43(1) is the grant of letters of administration intestate that was made and issued to the administrator herein, Bernard M. Khasakhala Mapesa on 20th November 1998. The only errors on the face of that document that can be rectified or the only particulars on the face of it that can be altered relate to the names or descriptions of any person or thing, or the time or place of death, or the purpose of a limited grant. It has not been demonstrated that there is an error on the face of the grant that was issued on 20th November 1998.

40. The applicant refers to a confirmed grant. The court in this cause has issued only one grant, that dated 20th November 1998. The court did not issue a second one, known as confirmed grant. Rather it is the grant of 20th November 1998 that was confirmed on 25th March 2004. Certificate of confirmation of grant was issued on 7th April 2004 as evidence or proof of the said confirmation of the grant. I have already stated that that certificate of confirmation of grant is not a grant. It is not the confirmed grant. It is a mere certificate providing proof that the grant on record has been confirmed. For that reason, any errors on the face of the certificate of confirmation of grant cannot be equated with errors on the face of the grant itself, and the correction of such errors, if any, fall outside the ambit of section 74 and Rule 43(1).

41. The other issue is that, from the language of Rule 43(1), an application for rectification of a grant can only be mounted or made by the holder of the grant. A grant is personal to the individuals in whose name it is issued. Consequently, if there are any errors or mistakes on the face of the document appointing him administrator, it should his responsibility to move the court appropriately, to have the errors or mistakes rectified. In the instant matter, the applicant is not an administrator. He does not hold a grant. By dint of Rule 43(1) he lacks the requisite locus to bring an application under section 74 and Rule 43(1).

42. I believe that I have said enough on the application dated 9th May 2012. It is so confused, convoluted and fundamentally flawed that it cannot possibly provide basis for grant of any orders.

43. However, in view of the matters that I raised earlier with regard to the manner that the grant herein was obtained and confirmed, I believe that there is a case for me to intervene in the matter *suo moto*. Section 76 of the Law of Succession Act allows me to revoke a grant on my own motion where I am satisfied that grounds exist for revocation of the grant. The provision states as follows:

> *"76. Revocation or annulment of grant A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

44. Under section 76 of the Law of Succession Act, a grant may be revoked on three general grounds. The first is where the process of obtaining the grant was flawed. It would be flawed where there were fundamental defects in the process, such as where the applicant failed to observe some procedure or where the applicant did not meet the basic qualifications or the process was dependent on an invalid document, such as a will. It would also be flawed, where the process is founded on fraud or misrepresentation or concealment of information from the court. The second ground would be where the grant was obtained properly and procedurally, but the administrator subsequently fails in the administration of the estate by either failing to apply for confirmation within the period that the law requires him to, or fails to proceed diligently with administration of the estate, or fails to render accounts as and when required to. The final ground is where the grant has become useless and inoperative, usually through subsequent events, such as the death of a sole administrator.

45. In the instant case, the matter turns on the first general ground. The administrator was qualified to apply for representation as a child of the deceased. However, there were fundamental flaws in the whole process of obtaining the grant. In the first place, the administrator obtained the grant through fraud and misrepresentation. He disclosed only himself as a child of the deceased, yet at the time he sought representation, some of his mothers and his siblings were alive. He concealed them from the court, and created the impression that he was the sole surviving immediate relative of the deceased alive. Secondly, he put forward an individual who was not a child of the deceased and passed him of as a son of the deceased. He swore an oath to that effect. That meant that he lied on oath that that individual, Kanoti Makale Mutuli, was a son of the deceased. He also concealed from the court some of the assets of the deceased.

46. The other flaw in the process arises from failure to comply with Rule 7(7) of the Probate and Administration Rules as read with section 66 of the Act. Section 66 sets out the order of preference with regard with who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

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

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

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

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

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

(c) the Public Trustee; and

(d) creditors …"

and

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

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

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

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

48. In the instant case, the deceased was survived by several children, including the administrator herein, and also three widows. According to section 66 of the Law of Succession Act, the widows had priority to administration over the administrator herein. By virtue of Rule 7(7),

the administrator ought to have either gotten the three widows to consent to his applying for representation, or to have gotten them to renounce their right to administrator, or caused citations to issue to them requiring them to either apply for representation or to renounce that right. I have perused the record before me, and I have noted that the only consent on record is by Kanoti Makale Mutuli, dated 14th July 1998. There is nothing on record to indicate that the widows filed any consent to allow the administrator petition for representation, neither is there any evidence that they had renounced their right to the same, nor had any citations been issued to them. The consent by Kanoti Makale Mutuli was of no consequence, for it did not amount to a compliance with Rule 7(7) in any way. The said document is also false, for the said individual purported in it to be a son of the deceased and a younger brother to the administrator, facts that were not true, for he was neither a son of the deceased nor a brother of the administrator. He did not have a prior right to administrator, indeed, he had no right at all to administration, and there was no point of him executing the consent in question.

49. Upon obtaining representation through a flawed process, the administrator could have somewhat redeemed himself during the process of confirmation of his grant, by complying with the provisions in the proviso to section 71(2) of the Law of Succession Act, by properly ascertaining the persons who were beneficially entitled to the estate, and the assets that made up the estate, and proposing a distribution of those assets amongst the persons ascertained as beneficially entitled to the assets. He did not avail himself of that opportunity, for in his application for confirmation of his grant, he omitted his mothers and his siblings, and some of the assets, and only listed himself and two non-family members as the survivors of the deceased, which was a perpetuation of the lie in his petition for representation. When his flawed application for confirmation of grant was placed before Waweru J on 18th December 2001, the good Judge threw to him a lifeline, by requiring him to properly ascertain all the assets that made up the estate and to file documentation relating to them, and to get all his mothers and siblings, the real survivors of the deceased, to attend court at confirmation. That would have redeemed him. He did not take the chance, instead he ploughed on with his flawed and fraudulent process.

50. Certainly, a process which was flawed as that carried out by the administrator ought not be allowed. Parties to a succession process must do the right thing, by taking the proper steps as stipulated in the law. Taking shortcuts, concealing material from the court, relying on outright lies, and deliberately disregarding court directions cannot be described as the proper thing, or due process. It is what impunity is all about. It is for the purpose of addressing such improprieties that section 76 of the Law of Succession Act exists.

51. I have addressed, in the body of this ruling, matters touching on confirmation of grants. I have referred to the proviso to section 71(2) of the Act, on ascertainment of beneficiaries and assets. There is also section 42 of the Law of Succession Act. It is critical and should come into play at confirmation of grant. It covers *inter vivos* gifts. For distribution to be fair, any lifetime gifts to any of the beneficiaries must be disclosed, and brought to the distribution table so that the court can take them into account in working out a sharing of the estate which is equitable. It is what is known as bringing assets to the hotchpotch. Section 42 says:

> *"42. Previous benefits to be brought into account*
>
> *Where—*
>
> *(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*
>
> *(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."*

52. In the instant case, it was alleged that some of the houses and children of the deceased received *inter vivos* gifts from the deceased. It was even suggested that the administrator was one of them. He was said to have had benefitted from one of the assets amongst North Butsotso/Indangalasia/356, 416 and 554, and also from Butsotso/Ingotse/1110. The suggestion being that the administrator was ultimately getting a share of the estate much larger than he was entitled to.

53. Then there is the issue of the daughters of the deceased. The deceased died in 1988, long after the Law of Succession Act came into force on 1st July 1981. His estate, therefore, fell for distribution, not under Luhya customary law, but under the provisions of the Act on intestacy as set out in Part V of the Act. Under those provisions, no distinction is made between male and female children, nor between married and unmarried children. It envisages equal distribution of the estate amongst all the children. That spirit comes alive in section 35(5) and 38 of the Law of Succession Act. Where the deceased died a polygamist the provision that guides the distribution of the polygamist's estate is section 40, but then that provision has to be read together with the provisions in section 35 to section 38, inclusive, of the Act, according to section 40(2). Sections 35(5), 38 and 40 state as follows:

> *"35. Where intestate has left one surviving spouse and child or children*
>
> *(1)* …
>
> *(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 …

37 …

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

39 …

40. Where intestate was polygamous (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."

54. These provisions of the Law of Succession Act should be read together with Article 27 the Constitution of Kenya, 2010, which stipulates that every person is equal before the law and has a right to equal protection and equal benefit of the law. Under Sub-Article (3) men and women have the right to equal treatment. Article 27 states as follows:

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

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

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

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

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

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

55. The position taken in this matter regarding the daughters of the deceased is disturbing. None of the parties who are active in the litigation in this cause appear to have much regard for the daughters. Their names have not been mentioned by any or either of the parties in their filings. It would appear that the daughters are more in number than the sons, and the sons appear to hold this misguided view that the estate of the deceased was for sharing only amongst the sons, to the total exclusion of the daughters. The parties appear to still cling to a position that daughters were children of a lesser god, where they ceased to be treated as children of their fathers once they got married, and the estates of their fathers would be distributed as if they did not exist or were never born or did not matter. That position no longer obtains in view of the constitutional and statutory provisions that I have cited above. Daughters have equal rights with sons when it comes to distribution of their father's estate, whether they are married or single. The fact of marriage is an irrelevant consideration. They are children of the deceased, just like the sons. They must be involved in the succession process, and included in the distribution of the assets. Should they not be interested in taking a share in the estate, they have the liberty to waive their right to a share in the estate through renunciation, which should be documented in the court file by way of either an affidavit or a deed of renunciation or by their attending court and publically stating their position.

56. In these proceedings, the daughters of the deceased do not feature at all. No consideration has been made to them at all. There is no evidence as to whether they were ever made aware of the existence of the proceedings. There is no proof that, even if they were made aware, they either consented to their exclusion, or waived their rights to statutory inheritance or renounced the same. Certainly, it is not proper to exclude them in the manner that they have been in this matter, and it cannot be said that due process has been observed where such a large constituency of the survivors of the deceased are left or ignored or taken for granted.

57. In the end, the orders that I shall make in this matter are as follows:

(a) That the application herein dated 9th May 2012 for rectification of the grant herein is hereby dismissed;

(b) That the grant on record made on 20th November 1998 to Bernard M. Khasakhalia Mapesa is hereby revoked;

(c) That as a consequence of (b) above, the confirmation orders made on 25th March 2004 are hereby set aside, and the certificate of confirmation of grant dated 7th April 2004 is hereby annulled or cancelled;

(d) That the Land Registrar responsible for Kakamega County is hereby directed to cancel any land transactions on Butsotso/Ingotse/1110 that might have been carried out on the basis of the confirmation orders of 25th March 2004 and the certificate of grant dated 7th April 2004, and shall revert the subject property to the name of the deceased herein;

(e) That I hereby appoint Hezron Kaunda Mapesa, Protus Luseno Mapesa, Bernard M. Khasakhalia Mapesa and Abisai Mapesa Kanambo administrators of the estate of the deceased, and a grant of letters of administration intestate shall issue to them accordingly;

(f) That the administrators appointed in (e) above shall move the court appropriately within forty-five (45) days of the date of this ruling for confirmation of their grant in which application they shall take into account all the matters that have been raised in this my ruling, as well as the directions given by Waweru J on 18th December 2001;

(g) That should any of the survivors of the deceased not find favour with the distribution proposals to be made in the proposed confirmation application the subject of (f) above, they shall be at liberty to file affidavits of protest;

(h) That the matter shall thereafter be mentioned for compliance and further directions, on a date to be appointed at the delivery of this ruling;

(i) That any party aggrieved by the orders made in this ruling has twenty-eight (28) days to move the Court of Appeal appropriately; and

(j) That each party shall bear their own costs of the instant litigation.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15th DAY OF August, 2019

W. MUSYOKA

JUDGE