



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 302 OF 2002

IN THE MATTER OF THE ESTATE OF RAMADHAN KWEYU AMULABU (DECEASED)

JUDGMENT

1. The certificate of death serial number 555231, dated 15th June 2000, indicates that the deceased person to whose estate this cause relates, was known as Ramadhan Kweyu Amulabu, who died on 4th March 1997. There is a letter on record from the office of the Assistant Chief of Isongo Sub-Location, dated 23rd January 2002. It indicates that the deceased had been survived by a widow, Rukia Ashioya Kweyu, four sons, being Anthony Wakhu Olich, EKI, BII and Saidi Amulabu Kweyu, and three daughters, named as Lydia Namusia Silas, Rosemary Waswa Namajanja and Everlyne Naliaka Wangila. A buyer, known as Pamela Nawire Kulubi is also listed as a survivor. The deceased is said to have had died possessed of a property described East Wanga/Isongo/385.

2. Representation to his estate was initially obtained by Rukia Ashioya Kweyu in her capacity as widow, letters of administration intestate were made to her on 12th September 2002, and a grant was duly issued to her dated 23rd September 2002. That initial grant was revoked by GBM Kariuki J in a ruling that was delivered on 17th December 2004, upon the finding that the deceased had two wives. The court made a fresh grant to Rukia Ashioya Kweyu and Besi Hamusinda Senagi Kweyu. A certificate of the said grant eventually issued to them, dated 1st February 2005. I shall hereafter refer to the two as the first and second administratrices, respectively. They were directed to file a summons for confirmation of their grant within thirty (30) days.

3. In compliance with the said directive the administratrices lodged a summons herein on some unclear date in August 2005, dated 24th June 2005, for confirmation of their grant. The said application appears to only bear the thumbprint of the first administratrix. The purported affidavit accompanying the summons is unsigned but it bears the name of the first administratrix. It lists the survivors of the deceased to be all the persons listed in the Assistant Chief's letter mentioned in paragraph 1, and includes the name of the second administratrix. It proposes distribution of a property that is not mentioned in the affidavit in certain proportions, as follows:

- (a) Rukia Ashioya Kweyu – 9 acres
- (b) Antony Wakhu Olich – 4 acres
- (c) Rosemary Waswa and Lydia Namusia Silas – 4 acres jointly
- (d) Saidi Amulabu Kweyu – 1 acre
- (e) Besi Hamusinda Senagi Kweyu – 3 acres to hold the same in trust for EK and BK, minors.

4. The second administratrix swore an affidavit on 10th February 2006 in reply to the application. She concurs with the first administratrix on most of the survivors of the deceased, but differed with her on certain respects. She explains that Lydia Namusia Silas and Rosemary Waswa Namajanja are daughters-in-law of the deceased and not his daughters. She states that Everlyne Naliaka Wangila and Antony Wakhu Olich were not dependants of the deceased, but does not describe who they were. She makes proposals on distribution which she says were approved by their clan, as follows:

- (a) Rosemary Waswa Namajanja and Lydia Namusia Silas – 6 acres
- (b) Saidi Kweyu – 5 acres
- (c) EK and BI (minors) – 5 acres
- (d) Ambani Kweyu – 5 acres.

5. In between the first administratrix filed a summons dated 16th May 2008, under section 47 against persons that she named as respondents

and interested parties. The important thing about the said application is the averment that the deceased had sold part of his property to a person known as Thomas Lutta Machwanda. That had not been disclosed in the petition, for it had not been mentioned that there were creditors of the estate. She goes on to aver that in 2006, the alleged buyer and the two administratrices agreed to sell a part of the portion that the buyer had bought to Beneah Chimeleni Nyapola. A copy of the sale agreement of 2006 is annexed to the supporting affidavit. When the said application was placed before the judge on 23rd June 2008, the court, while giving directions for service and disposal of the application, reminded the administratrices as follows:

“The administrators are reminded that before a grant is confirmed, resulting in the distribution of the estate, their authority is limited. Therefore those who benefit therefrom, to the exclusion of other beneficiaries may have to account to the said beneficiaries, and to the court.”

6. That said application attracted response from the second administratrix and the persons named in it as respondents and interested parties. The second administratrix denied knowledge of the alleged sales of a portion of the estate asset to Thomas Lutta Machwanda and Beneah Chimeleni Nyapola. She asserted that the two were strangers to the estate and were not entitled to a share therefrom. She averred that two of the respondents and interested parties, Lydia Silas and Rosemary Namachanja, were daughters-in-law of the deceased and, therefore, persons who were beneficially entitled to a share from the estate. The responses by Lydia Silas and Rosemary Namachanja were word for word similar. They both asserted that they were persons beneficially entitled to shares in the estate, by virtue of being daughters-in-law of the deceased. They averred that they were unaware of the alleged sales to Thomas Lutta Machwanda and Beneah Chimeleni Nyapola, and asserted that the allegations about the sales were not true. The application dated 16th May 2008 was subsequently marked as withdrawn on 27th November 2008.

7. The first administratrix swore an affidavit on 17th November 2008, where she revised her proposed mode of distribution on grounds that some things had changed. She proposed that :

- (a) Rukia Ashioya Kweyu be given 2 acres for her during life interest and to hold in trust for her minor son, Ayub Ambani Kweyu;
- (b) Rosemary Waswa and Lydia Namusia Silas be allocated 2 acres jointly;
- (c) Rosemary Said widow of Said Amulabu Kweyu be given 1 acre;
- (d) Antony Wakhu Olichu nephew of the deceased be given 2 acres;
- (e) Beneah Chimeleni Nyapola, purchaser – 4 acres;
- (f) Florence Idd, daughter-in-law be given 2 acres to hold in trust for her minor sons, EK and Benson Indumuli;
- (g) Pamela Nabwire Kulubi, purchaser be allocated 4 acres;
- (h) Besi Hamusinde Seneki be allocated life interest in the shares of Florence Idd and Rosemary Saidi ; and
- (i) Everlyne Wangila, in-law be allocated 2 acres.

8. A summons was lodged herein on 6th February 2009, dated 6th February 2009, by the second administratrix, seeking that the name of Sade Amulabu Ramadhan be removed from the schedule of survivors and be substituted by that of his widow, Jane Njeri Amulabu alias Jane Njeri Njenga. The said survivor had died on 25th December 2005 and a grant *ad litem* had been made to the said Jane Njeri Amulabu alias Jane Njeri Njenga on 6th October 2008. That application was granted by consent on 29th April 2009.

9. Another application was lodged herein on 7th June 2010, by the second administratrix, of even date. It sought orders against the first administratrix. It was sought that she be restrained from disposing of estate property, an inhibition be issued to inhibit registration of dealings with respect to portions that had been hived off the estate property, cancellation of the said subdivisions and cancellation of titles issued pursuant to those subdivisions. The second administratrix averred that despite the grant not being confirmed, the first administratrix had caused the sole estate asset, East Wanga/Isongo/385, to be subdivided and the register closed, new titles were issued in respect of the resultant subdivisions being East Wanga/Isongo/3230, 3231, 3232 and 3233. She averred that the first administratrix was in the process of disposing of the said subdivisions. She attached a copy of a green card for East Wanga/Isongo/385, to evidence that the title was closed on 28th October 2009 upon subdivision into East Wanga/Isongo/3230, 3231, 3232 and 3233. She also attached copies of official search certificates, all dated 16th December 2009, which evidence that East Wanga/Isongo/3230 was registered in favour of the two administratrices, East Wanga/Isongo/3231 was registered in the name of the first administratrix, East Wanga/Isongo/3232 was registered in the name of Pamela Nawire Kulubi and East Wanga/Isongo/3233 was registered in the name of the second administratrix. The application was placed before Lenaola J on 22nd July 2010, and was granted, so that the first administratrix was restrained, inhibitions issued, the subdivisions were nullified and the property reverted to the estate and the titled cancelled.

10. Another application was filed on 18th December 2010, dated 14th December 2010, by Pamela Wawire Kulupi, claiming to be a widow of the deceased, seeking to be allowed to harvest cane from East Wanga/Isongo/3232, which the court had ordered cancelled on 22nd July 2010. The application was placed before Lenaola J on 22nd December 2010 and was granted. It was directed that the cane be harvested by Mumias Sugar Company Limited and the proceeds of sale be deposited in court. There was compliance, a sum of Kshs. 50, 572.40 was deposited in court on 1st April 2011.

11. Another round of affidavits in support of the confirmation application were filed by the administratrices. The affidavit of the first administratrix was sworn on 22nd November 2011. She identified the survivors of the deceased as the two administratrices and six other individuals, whose relationship with the deceased was not disclosed, and they are Ayub Ambani, Rosemary Waswa, Lydia Namusia, Rosemary Saidi, Antony Wakhu and Florence Idd. The property available for distribution was identified as 21 acres of East Wanga/Isongo/385. It was averred that the deceased had sold part of the land to Thomas Machwanda and Fanuel Kulubi, and Thomas Machwanda had disposed of his share to Beneah Chemeleni Nyapola. She proposed distribution as follows:

- (a) Rukia Ashioya Kweyu – 2 acres during life interest and to hold in trust for Ayub Ambani Kweyu;
- (b) Rosemary Waswa Namajanja – 1 acre;
- (c) Lydia Namusia Silas – 1 acre;
- (d) Rosemary Saidi – 1 acre;
- (e) Antony Wakhu – 2 acres;
- (f) Beneah Chimeleni Nyapola, purchaser – 4 acres;
- (g) Florence Idd – 2 acres for benefit of EK and Benson Indumuli;
- (h) Pamela Nabwire Kulubi – 4 acres;
- (i) Besi Hamusinde Seneki – life interest in the shares of Florence Idd and Rosemary Saidi ; and
- (j) Everlyne Wangila – 1 acre.

12. The affidavit by the second administratrix was sworn on 20th February 2012. She identified the same persons as those identified by the first administratrix as the survivors of the deceased. She equally identified the same assets as the first administratrix, and confirmed that the deceased had sold a portion of the estate to Thomas Machwanda and Fanuel Kulubi, and that Thomas Machwanda has since disposed of his interest to Beneah Chemeleni Nyapola. In the end she agreed with the proposals made by the first administrator.

13. Jane Njeri Amulabu alias Jane Njeri Njenga swore a supplementary affidavit on 10th February 2015 and filed it herein on 16th March 2015. She identified herself as a beneficiary of the estate by virtue of being a widow of a son of the deceased known as Sande Amulabu Ramadhan. She expressed support for the distribution proposed by the second administratrix as per the letter's affidavit of 10th February 2006. Curiously, she goes ahead to make her own proposals on distribution despite claiming that she was supporting that proposed by the second administratrix in 2006. More curiously, the proposals that she now supports had been abandoned by the second administratrix who now supports those made by the first administratrix in her affidavit of 22nd November 2011. All that would mean that the proposals she makes do not agree with those of the administratrices. She has attached a document bearing the signatures of the persons listed in her proposals. Jane Njeri Amulabu alias Jane Njeri Njenga proposes distribution as follows:

- (a) Mary Ashioya Kutindi – 2 acres;
- (b) Jane Njeri Njenga – 3 acres;
- (c) Elijah Amushinda Saleh – 1 acre;
- (d) George Amulavu Saleh – 1 acre;
- (e) Rosemary Namachanga Waswa – 1 acre;
- (f) EKW – 2 acres;
- (g) Evelyne Naliaka Wangila – 2 acres;
- (h) Antony Wakhu Olwichi – 2 acres;
- (i) Reagan Omari Saleh – 1 acre; and
- (j) Rosemary Namachanga Wakhu, Reagan Omari Saleh and Jane Njenga - 6 acres to hold in trust for the family in case of any buyer.

14. Subsequent to that Rukia Ashioya Kweyu swore an affidavit on 10th June 2016, filed in court on 17th June 2016, in which she averred that her official name, as per her national identity card, was Mary Ashioya Kutindi. She followed that with an application dated 23rd May 2017, in which she sought to adopt Mary Ashioya Kutindi as her name for the purpose of these proceedings, and to have the second administratrix, who died on 14th November 2012, to be substituted with Lydia Namusia Silas. The application dated 23rd May 2017 was

disposed of on 29th April 2019, Lydia Namusia Silas was appointed administratrix in the place of the late second administratrix.

15. Directions were taken on 21st February 2012 that the summons for confirmation of grant be disposed of by way of oral evidence.

16. The oral hearing happened on 24th April 2012 when only two individuals testified. Lydia Namusia Silas was the first to take the witness stand. She testified that she was a daughter-in-law of the deceased, being the widow of one of his sons known as Saleh Kweyu. She explained that the deceased had two wives, being Basy Amushine and Rukia. She said that the deceased had three sons, who had all died. The late Sande Amulabu, who was survived by a widow known as Jane Njeri. There was the late Saleh Kweyu Amulabu, survived by two widows, being Rose and Lydia. The third was said to be the late Iddi Wakhu Kweyu, survived by his widow, Florence Maloba, and two children, Edwin and Benson. She mentioned that the deceased possessed of East Wanga/Isongo/385, which measured 21 acres.

17. At cross-examination, she said that she married into the family in 1983. She found Pamela cultivating sugarcane on a portion of the land, and she had heard the deceased say that he had sold five acres of the land to Fanuel, the late husband of Pamela. She stated that she had no problem with the said five acres being given to Fanuel's wife. She also mentioned that she had heard that Thomas Machwanda had bought four acres of the land, which he later sold to Bernard, adding that she signed the agreement where Thomas sold the land to Bernard. She stated that she had no objection to the portion sold to Bernard being given to him. She said that she only saw the agreement selling land to Bernard but not the others.

18. Rosemary Waswa testified next. She too was a daughter-in-law of the deceased, who she said died in 1997. He had two wives, Besi and Rukia, and four sons, Sunday Amulabi, Saleh Kweyu, Iddi Wakhu Kweyu and Ambani Kweyu. She described herself as a wife of Saleh, together with Lydia. Sunday was deceased, but had left behind a widow, Jane Njeri. Iddi was also deceased, and had been survived by a wife, Florence and children, Edwin and Benson. Ambani was said to have been alive at the time of testimony. She said that the deceased died possessed of East Wanga/Isongo/385, which measured 21 acres. She stated that the proposals by the administratrices had left out Evelyne, whose husband, Amulamu, who was deceased, and who was a nephew of the deceased, being a son of the witness's uncle, a brother of the deceased. She said that the said nephew of the deceased had been given 3 acres by the deceased. She asserted that Rukia was not entitled to 9 acres and that Antony should get 4 acres. According to her, the deceased had given 3 acres to Antony and Evelyne, Sunday, also known as Said, was given 4 acres, Iddi had been given 4 acres, and Ambani 5 acres. She went on to say that the deceased had not distributed his estate before he died.

19. During cross-examination, she stated that she did not object to Ayub Ambani getting 2 acres, but she objected to Rosemary getting 1 acre. She asserted that she did not agree with the proposal made by Rukia. She said that she was not aware that the deceased had sold part of his estate to Benea Nyapola. She also said that she was unaware that Pamela's late husband had also bought land from the deceased. She explained that she utilized 1 ½ acres of the land, while Antony used 1 ½ acres of the land, and Lydia 3 ½ acres. She said that Pamela's children had planted sugarcane on the land. She testified that Rukia had two children, being Ambani and Maryamu. She stated that the first wife had three children, being Sande, Saleh and Iddi. She said that Evelyne was supposed to get 1 ½ acres. She said that she was pleading to be given 1 ½ acres.

20. What I am entrusted with determining is a confirmation application, dated 24th June 2005. In a confirmation application, the court is called upon to confirm two issues – the appointment of the administrators and the distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act says:

“Confirmation of Grants

71. Confirmation of grants

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

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

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

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

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

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

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

21. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly

appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law. I suppose that with regard to the third limb, the court will be guided chiefly by the material before it that points to whether the grant had been obtained properly and whether the administrators had administered the estate properly in accordance with the law up to the point of the filing of the confirmation application.

22. The provisions of section 71 of the Law of Succession Act, and in particular section 71(2)(a)(b)(c), should be read together with section 76 of the Act. For the purpose of determining whether, under section 71(2)(a), the administrator had been properly appointed, the court would find the criteria in section 76(a)(b)(c) useful, that is to say the court will look at the integrity of the process of obtaining the grant, in terms of its propriety. It will consider whether the process was proper or was attended by defects or by fraud or misrepresentation or by concealment of matter from the court. If it turns out to have been done properly, the grant would be confirmed, meaning that the administrator would be confirmed or approved to carry on with the administration with a view to complete it through distribution of the assets, as envisaged by section 71(2)(a). Where the process of appointment of administrators is found wanting, then section 71(2) (b) (c) would kick in. The court may go ahead and confirm the grant but entrust the administration of the estate upon someone else. That effectively means that the grant sought to be confirmed would be revoked, a fresh one made appointing someone else as administrator and the fresh grant confirmed on the spot.

23. For a court dealing with the second component of section 71(2)(a), on whether the administrator had been administering the estate in accordance with the law, section 76(d) would be relevant, for it captures what would go wrong where an administrator does not administer the estate in accordance with the law, by failing to apply for confirmation of his grant within the statutory timelines or to proceed diligently with the administration of the estate or to render accounts as and when required by the law. An administrator who fails to meet the tests set out in section 76(2) (d) cannot be trusted to continue with his duties. He would have failed totally as an administrator, and his duties ought to be handed over to someone else, as envisaged under section 71(2) (b) (c).

24. When it comes to assessing, under the third component of section 71(2) (a) of the Act, whether the administrator would continue to administer the estate in accordance with the law, section 76(e) of the Act would be relevant. An administrator whose grant has become useless or inoperative would not merit being confirmed to continue acting as such to complete administration of the estate. Infirmity of body or mind, which renders a person totally incapable, has the effect of making a grant, held by such a person, useless and inoperative, since such a person would be unable to exercise the powers vested in him under the grant, or to enjoy the rights that emanate therefrom, or to discharge the duties imposed thereby. Persons who are afflicted by senile dementia or person who become of unsound mind or who lapse into an irreversible coma, fall within the category of the persons envisaged herein. Their grants would be virtually useless and inoperative. Being declared bankrupt is another. The grant of such a person equally becomes useless and inoperative, for a bankrupt cannot hold property and, therefore, estate property cannot vest in them under section 79 of the Law of Succession Act. A bankrupt cannot exercise the powers envisaged in section 82 of the Law of Succession Act, by transacting any sort of business on behalf of the estate.

25. What is of interest to the court at this stage is whether the administrator herein was properly appointed. With regard to that it will be noted that the court will confirm the administrator to continue with administration to completion, once it is satisfied that the administrator was properly appointed. In this case, the appointment of the administratrices is not contested. The original second administratrix died along the way, and she was substituted in a process that was not contested. I note that the first administratrix had obtained administration through a process that was flawed. A revocation application was mounted, but the issue was resolved through the determination by GBM Kariuki J of 17th December 2004 which brought in the first widow of the deceased, who had been omitted from the process, as a second administratrix. I shall take it that the administratrices on record at this stage were all properly appointed.

26. The other consideration is whether the administratrices, upon their being properly appointed, went about the business of administering the estate in accordance with the law. No one has raised issue with the manner in which the administratrices have administered the estate, in terms of either not collecting assets or rendering accounts. The second administratrix, Lydia Namusia Silas, was appointed recently, on 29th April 2019, it cannot be expected that she has done much in terms of administration of the estate. The first administratrix has been in the process right from the beginning. She is the one who initiated the cause. She is the administratrix who concealed the existence of the first widow of the deceased, Bash Hamusinda Senegi Kweyu, from the court, creating the impression that the deceased had been survived by only one widow, herself. The first widow was brought on board only after she successfully prosecuted a summons for revocation of the first administratrix's grant. That issue was resolved as indicated here above by the orders of the court of 17th December 2004. Although that issue was resolved happily for everybody affected, it sent out indicators of the sort of person that first administratrix was, a cunning, devious and untrustworthy individual. That side of her manifested itself again through her activities that were laid bare in the application that the late second administratrix filed on 7 June 2010, of even date. It transpired that while the summons for confirmation of grant was still pending, meaning that before her grant had been confirmed, the first administratrix caused the estate asset, East Wanga/Isongo/385, to be subdivided into four portions, being East Wanga/Isongo/3230 to 3233, which were registered in the names of the persons indicated as she fancied. The register in respect of East Wanga/Isongo/385 was thereafter closed. As stated here above, that activity was carried out by a holder of a grant of representation before she had obtained confirmation of her grant. As a personal representative of the deceased she must have known that she had to have her grant confirmed first before that property could be distributed. Indeed that property could only be distributed by the court, and the land registrar could only allow subdivisions and registration of the subdivisions upon a court order. The first administratrix has not explained how that happened. It can only be surmised that it happened through underhand activities that were carried out in processes that were contrary to the law. The unlawful process was only reversed when the late second administratrix moved the court by her application. It cannot, therefore, be said that the first administratrix, if she can carry out such illegalities, was a person who had administered the estate of the deceased in accordance with the law.

27. The other consideration under section 71(2)(a) is whether upon the administratrices being confirmed as such they would continue to administer the estate in accordance with the law. I have stated above that Lydia Namusia Silas was appointed second administratrix only this year to substitute her late mother-in-law. She has not done much in terms of administration, therefore there is little material upon which to adjudge her adversely. The first administratrix previously concealed matter from the court, and that had to be corrected through court intervention. She did not learn from that, during pendency of the confirmation application, and despite it, she went ahead to cause the only asset of the estate to be subdivided, its register closed and new titles issued and registered in the names of other individuals. The property was restored to the estate through court intervention on application by her co-administratrix. I doubt whether such a person can be trusted to administer the estate of the deceased hereafter in accordance with the law. The court, in restoring the property to the estate, did not address

itself to first administratrix's suitability to continue discharging the duty of administratrix. There was good reason for that, that issue was not before the court at that stage, but it is now, going by the provisions in section 71(2)(a) of the Law of Succession Act.

28. Distribution of assets raises two issues. The first, and the more critical is about the assets that make up the estate. Succession is all about property, and without property there is no estate for distribution, and the question of succession would not even arise. The second issue, is the matter of the persons who are entitled to a share of the property. The two critical aspects of confirmation are brought in the proviso to section 71(2). That proviso requires that the court be satisfied, before distribution, that the administrator has ascertained all the persons who are beneficially entitled to the estate and has determined the shares of each one of them to the assets. That presupposes that all the assets available for distribution should have also been ascertained before distribution can be proposed, for distribution should be of the assets that are available for that purpose.

29. In the instant case, there is no dispute, that the deceased died possessed of only one property, East Wanga/Isongo/385. Therefore, the matter of the assets of the estate being ascertained should not be an issue.

30. The other requirement is assessment of the persons who are beneficially entitled to the assets. That would mean various categories of persons who would be entitled to a share in the estate, that would include heirs, survivors, dependants, beneficiaries and creditors.

31. The deceased died intestate, and, therefore, the court should only be concerned about who his survivors are for it is such persons who would be entitled in intestacy to a share in the estate. The issue of dependants is not relevant. From the record before me, no one applied for dependency under section 26 of the Law of Succession Act, and the court did not identify anyone as a dependant of the deceased, nor make provision for anyone under Part III of the Law of Succession Act. The responsibility of ascertaining the survivors lay with the administratrices. The initial administratrices swore numerous affidavits where names of several individuals were bandied about, but none of the initial administratrices clearly identified the individuals who had survived the deceased. It would have been expected that they would have given a clear breakdown of the deceased's wives, whether alive or dead, the deceased's children, whether dead or alive, and the deceased's grandchildren, whose own parents were dead. Distribution of the assets should be amongst the survivors, and it behooves personal representatives to go out of their way to identify them clearly. The classification into spouses, children and grandchildren is important as the different categories are entitled differently. The administratrices should not just mention or list names of individuals without categorizing them into the various classes. Where individuals, who are not immediate or nucleus family members of the deceased, such as nephews, nieces and siblings, are listed, it should be explained why they should be considered for the purpose of getting a share in the estate.

32. As indicated above, the initial administratrices were not helpful to the court. They just threw names before the court without clearly defining who these individuals were to the deceased, or they gave indications that turned out to be wholly erroneous. The only useful information was given at the oral hearing of the matter. Curiously, the administratrices in office at the time did not testify. The two witnesses who testified were not administratrices at the time. From their testimonies I was able to reconstruct the immediate family of the deceased. He had married twice. The first wife was Basi Hamusinda Senagi Kweyu and the second was Rukia Ashioya Kweyu alias Mary Ashioya Kutindi. The deceased had four sons with the two wives. Their names are Sande Amulabi alias Said Amulabi, Saleh Kweyu, Iddi Wakhu Kweyu and Ayub Ambani Kweyu. Only one daughter was disclosed, Maryamu, a child of the second wife. Three of the sons of the deceased are dead, they were children of the first wife, that is to say Sande, Saleh and Iddi. The only surviving son, Ayub Ambani Kweyu, described as a minor, is the son of the second wife. The dead sons of the deceased were all married, and they were survived by widows and children. Sande was survived by Jane Njeri Njenga, the number and names of their children were not indicated. Iddi was survived by Florence Maloba, and two sons, Edwin and Benson. Saleh was survived by his two wives, Lydia Namusia Silas and Rosemary Waswa, the number and names of their children were not indicated. These are the survivors as can be gleaned from the evidence on record.

33. Several other individuals were mentioned, who were clearly not children or grandchildren of the deceased. The first administratrix consistently mentioned the name of Antony Wakhu Olich. He was listed in the Assistant Chief's letter, and in the petition, as a son of the deceased. The initial second administratrix contested that, asserting that he was not a son of the deceased, but without explaining who he really was. At the oral hearing the two witnesses did not dwell on him. He was only mentioned fleetingly as a person entitled to a share, but they were categorical that he was not a child of the deceased for they did not mention him to be one. The first administratrix who first hoisted him as a survivor of the deceased, despite filing several affidavits, and despite the contest by the second administratrix, made no effort to explain who this individual was to the deceased, and why he should be provided for under the estate of the deceased. Antony Wakhu Olich himself did not file any papers to state his claim. Neither did he offer to testify at the oral hearing. I do not, therefore, find any basis for allocating him any share in the estate.

34. The other individual is Everlyne Naliaka Wangila. She is listed in the Assistant Chief's letter and in the petition as a daughter of the deceased. What emerges from the material before me is that she was not a daughter of the deceased, but a widow of a son of a brother of the deceased. She did not file any papers to stake her claim, and she did not avail herself at the hearing too to state her case, and justify why she should be entitled to a share from the estate of the deceased.

35. Then there are individuals who are said to have had bought property from the deceased. The administrators have a responsibility, stated in section 83(d) of the Law of Succession Act, to ascertain the debts of the estate. I trust that claimants with legitimate claims against the estate must be ascertained. The names of Thomas Machwanda, Fanuel Kulubi and Beneah Chemeleni Nyapola have been mentioned as persons who had allegedly acquired a stake in the estate through purchase. Thomas Machwanda and Fanuel Kulubi were said to have had bought portions of the property from the deceased during his lifetime, while Beneah Chemeleni Nyapola alleged acquired Thomas Machwanda's stake after the deceased died. It would appear that the survivors are not agreed on these alleged liabilities. No documentary evidence has been placed before the court of the transaction between the deceased and Thomas Machwanda and Fanuel Kulubi, despite section 3(3)(i) of the Law of Contract Act, Cap 23, Laws of Kenya, requiring that such contracts be evidenced in writing. I shall take it that the land sales between the deceased and Thomas Machwanda and Fanuel Kulubi have not been proved. In any case, this court has no jurisdiction, by virtue of Articles 162(2) and 165(5) of the Constitution, to make determinations on title to land. Ideally, the persons claiming through Thomas Machwanda and Fanuel Kulubi should have moved the relevant courts under the governing legislation to prove their titles and once they obtained decrees in their favour, either have them placed before the probate court at distribution or otherwise place the decree before the relevant land registrar from implementation of the decree. No such determination by the court has been placed before me and, therefore, there is no basis for me to consider the claimants for a share in the estate. The transaction that was entered into in 2006 happened

after the deceased had died and before a grant had been confirmed. It cannot possibly be binding on the estate. Section 82(b)(ii) of the Law of Succession Act is clear, immovable property cannot be sold before the grant has been confirmed.

36. Having dealt with the matter of the assets and the survivors, the next step should be distribution, for the proviso to section 71(2) requires that the shares of each of the survivors be ascertained. The administratrices herein have made various proposals which I shall deal with what I have stated here above in mind. The deceased died intestate in 1997, long after the law of Succession Act had come into force in 1981. His estate shall, therefore, fall for distribution strictly in accordance with Part V of the Law of Succession Act. He died a polygamist, and, therefore, section 40 of the Act shall be applicable.

37. I would have been prepared to go ahead to distribute the estate, but I believe I should give the administratrices time to retreat and get organized, in terms of properly identifying the actual survivors of the deceased. If there are other persons who appear to be also entitled to a share in the estate, they should be identified and their relationship with the deceased that would justify their getting a share in the estate explained. For persons who allegedly acquired a stake through purchase from the deceased the relevant documentary proof should be provided. I shall only make my final orders thereafter.

38. I shall no doubt have to remove the first administratrix as administrator and appoint another person to take her place. Rosemary Waswa is a suitable candidate, but she and the second administratrix are co-wives and I shall consider someone else. I believe Jane Njeri Njenga would fit the bill. She already had a grant *ad litem* in respect of the estate of her deported husband.

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

(a) That I hereby decline to confirm the appointment of Rukia Ashioya Kweyu as co-administratrix of the estate of the deceased, instead I hereby revoke the grant made on 17th December 2004;

(b) That that I hereby appoint Lydia Namusia Silas and Jane Njeri Njenga, administratrices of the estate of the deceased, and direct that a grant of letters of administration intestate be made to them;

(c) That I direct the administratrices appointed in (b) above to file a further affidavit in which they shall:

(i) list the wives of the deceased, dead or alive;

(ii) list all the children, both male and female, married or single, of the deceased through his wives identified in (i) above;

(iii) list all the spouses of the children of the deceased listed in (ii) above;

(iv) list all the grandchildren of the deceased through the persons listed in (ii) and (iii) above;

(v) list all the other relatives of the deceased entitled to a share in the estate giving details of the relationship before them and the deceased and explaining why they should be provided for; and

(vi) list all the alleged purchasers of a portion of the assets of the estate, providing documentary evidence of the transactions supporting the sales.

(d) that the administratrices shall comply with the above within forty-five (45) days;

(e) that the matter shall be mentioned thereafter, on a date to be given at the delivery of this judgment, for compliance and for further directions;

(f) That each party shall bear their own costs; and

(g) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 31st DAY OF October, 2019

W. MUSYOKA

JUDGE