In re Estate of Zakayo Murwayi Awori (Deceased) (Succession Cause 20 of 2015) [2024] KEHC 743 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 20 OF 2015

WM MUSYOKA, J

FEBRUARY 2, 2024

RULING

1. The certificate of death on record, serial number xxxx, dated 10th May 2012, reflects the name of the deceased as Zakayo Murwayi Awuor, and indicates that he died on 26th August 1980. I see a letter on record, dated 23rd August 2014, by the Assistant Chief of Sikinga Sub-Location. It identifies the survivors of the deceased to be 7 sons, being Juma Murwai, the late Jonathan Opondo Murwai, Onyango Murwai, Simon Otieno Murwai, Joseph Wesonga Murwayi, Josephat Okwero Murwayi and Henry Nyangwa Murwayi. Kennedy Balongo Sakwa and Noeline Nakhabi Makoba were listed as buyers/creditors. The deceased is indicated as having died possessed of Bukhayo/Buyofu/430.

2. Representation to the estate was sought by Simon Otieno Murwayi, in his capacity as son of the deceased. He listed the survivors of the deceased as the 7 sons, set out in the Chief's letter. Bukhayo/Buyofu/430 were listed as the property that the deceased died possessed of. Kennedy Balongo Sakwa and Noeline Nakhabi Maloba are listed as liabilities. Letters of administration intestate were made to Simon Otieno Murwayi, on 20th May 2015, and a grant was duly issued, on 26th May 2015. I shall refer to Simon Otieno Murwayi, hereafter, as the administrator. The said grant was subsequently confirmed on 2nd November 2016, on an application dated 16th May 2016. Bukhayo/Buyofu/430 was shared out unevenly between Juma Murwayi Awuor, Selina Barasa Opondo, Onyango Murwayi, Simon Otieno Murwayi, Joseph Wesonga Murwayi, Josephat Okwero Murwayi, Henry Nyangwa Murwayi. Kennedy Balongo Sakwa and Noeline Nakhabi Makoba, that is to say the 7 sons and the 2 alleged creditors. A certificate of confirmation of grant, in those terms, was issued, dated 4th November 2016.

3. A summons for revocation of grant, dated 16th July 2018, was filed herein on 19th July 2018, by Stephen Ouma. He sought revocation of the grant, and his appointment as co-administrator with the administrator. He also sought that transmissions done with respect to Bukhayo/Buyofu/430 be cancelled, and the property reverted to the name of the deceased. The grounds on the face of the application were that the proceedings to obtain the grant were defective and there was fraud and misrepresentation, for he had been left out of the estate of his father. He averred that his consent was not obtained, and that he had been rendered landless. In his affidavit in support, he averred that the deceased was his father, and the administrator his brother. He asserted that the land ought to have

been distributed equally between the children, according to the law. He further disclosed that Onyango Murwayi and Murwayi Wesonga Joseph had sold a portion of the estate land to John Makokha Makanda, in 2003. He expressed bitterness that the administrator gave land to purchasers, and left out a son of the deceased. He asserted that he ranked equally with the administrator, with respect to appointment as administrator. He attached a couple of documents to his affidavit. There was a green card for Bukhayo/Buyofu/430, showing a caution lodged in the register in 2003, with respect to the purported sale to John Makokha Makanda. There were copies of the titles issued to the individuals named in the certificate of confirmation of grant, following transmission of the estate property to them. There was an agreement of sale, dated 24th July 2003, between Onyango Murwayi, Murwayi Wesonga Joseph and John Makokha Makanda.

4. That application attracted a reply from the administrator, sworn on 8th November 2018. He conceded that Stephen Ouma was his brother. He stated that the deceased had settled his 3 elder sons before he died. He said that Stephen Ouma Murwayi was given Bukhayo/Buyofu/427, Matayo Obayo Murwayi was given Bukhayo/Buyofu/428 and Lukas Nyongesa Murwayi was given Bukhayo/Buyofu/429. He asserted that Bukhayo/Buyofu/430 remained for distribution amongst the 7 younger sons of the deceased. He stated that the 7 had sat as a family and agreed on the distribution of Bukhayo/Buyofu/430. He explained that Stephen Ouma bought land elsewhere, and took a loan with his Bukhayo/Buyofu/427, as collateral, and the same was foreclosed, after he failed to pay the loan. He said that the land he bought had complications, and they were forced to accommodate him on Bukhayo/Buyofu/430. He said that Stephen Ouma transferred Bukhayo/Buyofu/427 to Jethro Mudi Enoda in 1992, and a title deed was issued. He asserted that Stephen Ouma was not entitled to a share in Bukhayo/Buyofu/430. He attached a copy of a green card for Bukhayo/Buyofu/427, showing that it was registered in the name of Stephen Ouma Murwai, in 1971, and was transferred to Jetero Mudi Enonda, by charge, in 1992.

5. There was another reply, by Onyango Murwayi, dated 27th March 2019. He averred that he was not consulted by the administrator before he got representation, and that his consent was not obtained. He supported the application by Stephen Ouma. He expressed surprise to the subdivisions done by the administrator following confirmation of the grant. He said that the administrator had allocated him Bukhayo/Buyofu/3578, which measured 5 acres, yet the portion he was entitled to was 6 acres. He supported the claim that Onyango Murwayi and Murwayi Wesonga Joseph had sold a portion of the estate land to John Makokha Makanda. He supported the prayer that the land be restored to the estate, to facilitate re-distribution.

6. The revocation application was placed before Kiarie J on 28th September 2020, and was allowed, upon admission by the administrator that Stephen Ouma was a son of the deceased. The administrator was directed to file an amended application for confirmation of grant. The essence of the orders of 28th September 2020, from my understanding, was that the grant was revoked, and the administrator reappointed, jointly with Stephen Ouma as co-administrator. The confirmation orders were vacated, and the administrators were to file for confirmation of their grant, involving those who had been left out. A fresh grant was issued on 10th June 2021, in the joint names of the administrator and Stephen Ouma. The affidavit in support of the petition was amended to introduce the 3 sons who had been omitted, and so was the affidavit sworn in support of the confirmation application. Stephen Ouma later passed on, and was substituted by his son, Robert Wema Ouma. Simon Otieno Murwayi also passed on, and was substituted by his son, Rodgers Otieno Murwayi.

7. The administrator, Rodgers Otieno Murwayi, the substitute, filed the summons for confirmation of grant, as directed, dated 26th May 2021, filed herein on 2nd June 2021. He identifies the survivors of the deceased as the individuals listed in the Chief's letter of 23rd August 2014, save that Juma Murwayi

Awuor is said to have had since died, and is replaced with Justus Okello Juma, his son. Simon Otieno Murwayi is also said to have died, and is substituted with his son, Rodgers Otieno Murwayi. Selina Barasa Opondo is listed in the place of the late Francis Opondo Murwayi. Stephen Ouma Murwayi, Matayo Obayo Murwayi and Lukas Nyongesa Murwayi are added as sons. The estate land is proposed for distribution between the 7 sons, and Stephen Ouma Murwayi. Matayo Obayo Murwayi and Lukas Nyongesa Murwayi are not allocated any share. The 2 alleged creditors/purchasers are catered for. The distribution proposed is uneven. I shall refer to Rodgers Otieno Murwayi, for the purposes of the confirmation application, as the applicant.

8. Robert Wema Ouma has filed an affidavit of protest, sworn on 14th July 2023, and I shall refer to him hereafter as the protestor. He does not agree with the proposals made in the confirmation application. He objects the inclusion of the buyers/creditors, as he says that they never bought the land from the deceased, but from the late Simon Otieno Murwayi. He proposes that the administrator of the estate of the late Simon Otieno Murwayi refunds the purchase price money to the 2 creditors. He asserts that the sale transactions between the late Simon Otieno Murwayi and the 2 creditors amounted to intermeddling with the estate of a dead person. He further avers that the sale by Onyango Murwayi, the late Otieno and Murwayi Wesonga to John Makanda Makokha was another incidence of intermeddling with the estate. He avers that he bought back the property from the alleged buyer, hence he was the one entitled to the 3.5 acres in question. He proposes an uneven or unequal distribution between 10 individuals, whose relationship with the deceased is not disclosed, so that Robert Wema Ouma gets 2.6 hectares, Rodgers Otieno Murwayi 1.31 hectares, Lucas Nyongesa Murwayi 0.25 hectare, Joseph Wesonga Murwayi 1.19 hectares, Onyango Murwayi 2.25 hectares, Alfred Awuor Ochieng 0.26 hectare, Justus Okello Juma 2.41 hectares, Josephat Okwero Murwayi 1.98 hectares, Selina Barasa Opondo 2.98 hectares and Kennedy Sakwa Balongo 1.80 hectares.

9. The applicant replied to the protest, vide his affidavit of 25th September 2023. He asserts that the deceased had already distributed Bukhayo/Buyofu/430 amongst the 7 sons, being Simon, Onyango, Joseph, Josephat, Henry, Francis and Juma, and their shares were demarcated and apportioned on the ground, and there were existing boundaries. He said that the deceased had 4 wives and 10 sons. He identified the assets that were owned by the deceased as Bukhayo/Buyofu/427, 428, 429 and 430. He says that the deceased gifted some of the assets to his elder sons, before he died. Stephen Ouma was given Bukhayo/Buyofu/427, Matayo Murwayi was given Bukhayo/Buyofu/428 and Lukas Bukhayo/Buyofu/429, with Bukhayo/Buyofu/430 being left for the remaining sons. He asserts that gifts to Stephen, Matayo and Lukas were made before land adjudication, hence the parcels were demarcated, adjudicated and registered in their names, and title deeds were issued. He proposes equal distribution amongst the remaining 7 sons. He says that Stephen had sold his Bukhayo/Buyofu/427 to Jethro, after which he forcefully took possession of a portion of Bukhayo/Buyofu/430. He says that the family had sat, and agreed to allocate the family of Stephen a portion of Bukhayo/Buyofu/430, being the portion that Stephen occupied. He avers that Kennedy Balongo Sakwa bought land from Simon, while Noeline Nakhabi Makoba bought land from Joseph. He says that the rest of the beneficiaries did not dispose of their respective portions, and that should explain the uneven distribution that he was proposing. He avers that Lukas and Matayo were satisfied with their inter vivos gifts, hence they were making no claims on the estate.

10. The application was canvassed by way of viva voce evidence, based on directions that were given on 18th July 2023.

11. The oral hearings commenced on 24th October 2023. The protestor, Robert Wema Ouma, was the first to go. He adopted his affidavit in protest and his supplementary affidavit. He urged the court to distribute the estate as per his proposals. He said that he proposed to get a larger share, as he was to

get what was due to his father, as well as the portion that he bought back from Makanda. He opposed Noeline Nakhabi Makoba getting a share, saying that she did not buy the land from the deceased. He, however, said he did not oppose Kennedy Balongo Sakwa getting his share. He said he did not know the names of the 4 wives of the deceased, but he named the 10 sons as Stephen Ouma Murwayi, Jonathan Opondo, Lucas Nyongesa, Matayo Opondo, Simon Otieno, Joseph Wesonga, Onyango Murwayi, Albert Juma, Henry Nyagwa and Josephat Otieno. John Makokha Makanda followed. He adopted his witness statement. He testified that he had bought 3.5 acres out of Bukhayo/Buyofu/430 from Simon, Onyango Murwayi and Wesonga, sometime in 2003 and 2004, and that in 2015 he returned the land to Robert Wema, by way of selling the land, 3.5 acres, to him. Martin Ouma Marinda testified next. He was a village elder, who was party to the sale transaction involving Makanda, Simon, Onyango Murwayi and Wesonga.

12. The applicant, Rodgers Otieno Marwayi, then followed. He adopted his affidavits in support of the application. He stated that the deceased had 10 sons, and that he died after he had given 3 of his sons lands. He named the 3 sons as Stephen Murwayi, Mathew Obonyo and Lucas Nyongesa. He said that Stephen Murwayi was given Bukhayo/Buyofu/427, Mathew Obonyo Bukhayo/Buyofu/428 and Lucas Nyongesa Bukhayo/Buyofu/429. He stated that the deceased retained Bukhayo/Buyofu/430, whose acreage he put at 19 hectares, which he said was intended for the remaining 7 sons, who he named as Michael Onyango, Simon Otieno, Juma Murwayi, Jonathan Murwayi, Joseph Wesonga, Henry Nyagwa and Josephat Okwero. He stated that the 7 sons sat and agreed on how to distribute Bukhayo/Buyofu/430, and identified one of them, Simon Otieno, to petition for representation. He said that Simon Otieno got letters of administration, his grant was confirmed and transmission of Bukhayo/Buyofu/430 happened to the 7 sons, and they got title deeds, but then Stephen, who had already gotten his share during the lifetime of the deceased, had the grant revoked. The 7 sons then approached the Advocate for Stephen, and agreed to allocate to Stephen a portion out of Bukhayo/Buyofu/430. He urged the court to go by the earlier distribution by the court, which had been agreed upon by the 7 sons entitled to Bukhayo/Buyofu/430. He said that he had no document evidencing that Balongo had bought land from Simon Otieno. He stated that Noeline Nakhabi Makoba bought the land in 2013, while the deceased died in 1980, and the instant cause was initiated in 2015. He stated that he was not aware that it was wrong to sell estate assets before a grant was made, and that he did not know the status of an asset without a grant. He asserted that Balongo did not buy the land from the deceased. He also stated that he did not know that the protestor had bought back the land that had been sold to John Makanda. He explained that Justus Okello Juma was getting a slightly larger share than the rest of the beneficiaries, as he never purported to sell his inheritance; but that Joseph Wesonga was getting a slightly lesser share as he had purportedly sold his share of the inheritance. He said that he was not aware that the land should have been shared equally. He said that Bukhayo/Buyofu/430 was still in the name of the deceased, and that Onyango, Simon Otieno Murwayi and Joseph Wesonga Murwayi had purported to sell a portion of it to John Makanda. He asserted that that transaction was not valid.

13. Josephat Okwero Murwayi followed. He stated that the deceased had 6 daughters and 11 sons. He explained that 1 son died young, and that the deceased had gifted land inter vivos to 3 of the older sons, being Matayo Murwayi, Lucas Nyongesa and Stephen Ouma, with each being shown their share of the land, and issued with title deeds. He explained that the remaining land was meant for the 7 younger sons. The land that remained was said to be Bukhayo/Buyofu/430. He stated that the said 7 sons sat, agreed on distribution, and picked Simon Otieno to petition for representation. Succession was done, and each of the 7 sons got title deeds. He explained that it was after that that Stephen came forward to complain, leading to revocation of the grant made to Simon. He explained further that Stephen then forced himself into Bukhayo/Buyofu/430, and the 7 sons decided to compromise the

matter by allocating to him a portion out of Bukhayo/Buyofu/430. He stated that it was wrong for the protestor to have bought back the land allegedly sold to john Makanda, without consulting the family. He asserted that he never sold any portion of Bukhayo/Buyofu/430 to anyone. He stated that he was contented with what was allocated to him. He said that the Balongos were not family members, but had bought land from Simon Otieno Murwayi, a son of the deceased. He said that there was nothing wrong with what Simon Otieno Murwayi did. He said that Stephen had been gifted with Bukhayo/Buyofu/427 by the deceased. He further stated that the family gave a portion of Bukhayo/Buyofu/430 to Stephen, and that his family resided there. He was opposed to the protestor getting a larger share of the estate. He said that he was not involved in the alleged salvage of the portion sold to John Makanda.

14. Selina Barasa Opondo testified next. She adopted her witness statement. She was a daughter-in-law of the deceased, having been married into the family in 1978, to the late Johnathan Opondo Murwayi. By then the deceased was alive. She found that 3 of the sons had already been given land, and they had title deeds. She named them as Matayo Obonyo Murwayi, Lucas Nyongesa Murwayi and Stephen Ouma Murwayi. She explained that the entire family comprised of 10 sons, but only 3 of them had been given land inter vivos, leaving out the 7, who then became entitled to the remaining land. She testified that the 7 sons, some represented by their families, sat and agreed on succession, which was done, transmission conducted, and title deeds issued. It was after that that Stephen Ouma came to court to have the grant revoked and the distribution reversed. She asserted that Stephen Ouma had sold the land that comprised the inter vivos gift made to him by the deceased.

15. At the end of the oral hearings, the parties filed written submissions, which I have read through, and noted the arguments made.

16. The applicant has identified 5 issues for determination: about inclusion of all the beneficiaries of the estate, the inter vivos distribution alleged, the entitlement of Stephen Ouma to a share in Bukhayo/Buyofu/430 of the estate, the inclusion of 2 of the alleged purchasers, and compliance of the laws of succession in the proposed distribution. Section 38 of the *Law of Succession Act*, Cap 160, Laws of Kenya, which provides for equal distribution, is cited in support. Copies of several decisions of the courts are attached to the written submissions, although not cited in the body of the written submissions. They are Raphael Nzioka Kilonzo vs. Anastacia Ngina Kilonzo [2014] eKLR (Mutende, J), Alphonse Muthama Ngauki vs. Tabitha Ndungwa Kilonzo & another [2015] eKLR (Mutende, J), Selina Tipango vs. Emily Wambui Ishmael & 8 others [2016] eKLR (Nyakundi, J), In re Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR (Mativo, J) and Mary Wambui Kimani & another vs. Martha Wanjiru Paul [2016] eKLR (Karanjah, J).

17. The protestor identifies 3 issues for determination: what constitutes the assets of the estate, who the beneficiaries of the estate are, and how the estate is to be distributed amongst the beneficiaries. Section 3(1) of the *Law of Succession Act* is cited, on the definition of free property of the estate.

18. What I am called upon to determine is a summons for confirmation of grant. Confirmation of grant is about distribution of the estate. It is the most critical or essential part of administration of estates. Succession causes are initiated for the sole purpose of having the property of dead persons distributed, and once distribution is done, the administration of the estate effectively ends, or is deemed to have been completed. See In re Estate of Reuben Musonye Kugu (Deceased) [2021] KEHC 9747 (KLR) (Musyoka, J). Distribution is so important that where proceedings relating to it are properly handled, the parties risk remaining in court for a long time, litigating over the aspects of the administration that had not been properly handled, possibly in proceedings initiated by individuals, who should have been involved in the process, but who had been left out. See In the Matter of the Estate of Ephrahim Brian Kavai (Deceased), Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported). The administrators must, therefore, get it right, and to get it right, they must do the

right thing, in terms of ascertaining the assets to be distributed, the persons entitled to benefit from the distribution, and the terms of the distribution. In testate succession, the assets are either disclosed in the will, or the executors have to trace them, and get them into the estate. The beneficiaries are named in the will, but the executors still have to be faithful to constitutional dictates, on such matters as non-discrimination, of those left out or inadequately provided for. See Articles 2(4) and 27 of *the Constitution* and In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of Stanley Mugambi M'Muketha (Deceased) [2019] eKLR (Gikonyo, J) and Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). Distribution is set out in the will. In intestate succession, it is the duty of the administrators to ascertain the assets of the estate, to trace the assets, to gather and collect them, and to bring them into the estate. Ascertainment of assets includes the exercise of ascertaining debts and liabilities of the estate. The persons beneficially entitled in the intestate estate are set out in the law, the *Law of Succession Act*, at Part V, sections 35 to 41, where the Act applies. Distribution in intestacy is also dictated by the *Law of Succession Act*, at sections 35 to 41, where the Act applies. Where the applicable law is customary law, the relevant customary law would guide on who the persons beneficially entitled are, and how the estate is to be distributed or shared out amongst them.

19. The proviso to section 71(2) of the *Law of Succession Act*, as read together with Rule 40(4) of the Probate and Administration Rules, requires that no grant in intestacy is to be confirmed "... until the court is satisfied as to the respective identities and shares of all the persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares." The language in Rule 40(4) is to the effect that "... the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined." So, at confirmation, it is about demonstrating that the beneficiaries have been ascertained and identified, both family members and creditors; that their shares have also been ascertained and determined. See In the Matter of the Estate of Ephrahim Brian Kavai (Deceased), Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported) and In Re Njoroge Mbote [2002] eKLR (Khamoni, J). "Shares" are about the assets. Before shares are ascertained, one has to ascertain the assets upon which those shares are to be determined. "Shares" are also about distribution. The share is what the beneficiary gets in the distribution. Confirmation is, therefore, about 3 critical things: the assets and liabilities, the beneficiaries and the distribution.

20. Distribution is about assets or property, for where there is nothing to distribute, the issue of confirming the grant would not arise. In fact, even initiating a succession cause would be needless, for there would be nothing to administer, with a view of eventually distributing it. The question then would be whether the administrators herein have ascertained, identified and determined the assets that make up the estate. There is a general consensus on the assets that make up the estate. There is only 1 asset for distribution, being Bukhayo/Buyofu/430. That is the only asset demonstrably registered in the name of the deceased.

21. Assets and liabilities go together. What is available for distribution is what remains of the estate after the debts and liabilities have been settled. It is the net intestate estate that should be up for distribution to the beneficiaries. See sections 35(1)(b)(5), 36(1), 38, 39, 40, 41 and 83(d)(f) of the *Law of Succession Act*. Section 2 defines "net estate" as "... the estate of a deceased person after payment of ... debts and liabilities ..." and "net intestate estate" as "... the estate of the deceased person in respect of which he died intestate after payment of ... debts, liabilities..." Payment of debts and liabilities takes priority over distribution of the estate. Distribution of the assets of the estate should not precede settlement of the debts and liabilities of the estate. In section 83, ascertainment and payment of debts and liabilities comes under paragraph (d), while distribution of the estate follows at paragraph (f). Section 83(f) reads "... to distribute ... all assets remaining after payment of expenses and debts ..." The debts and liabilities

should be settled first, followed by distribution of the surplus or the net intestate estate amongst the persons beneficially entitled.

22. In this case, the administrators have mentioned the names of 3 individuals as creditors of the estate. 2 were named in the petition, by the applicant, and they also are mentioned in the letter from the Assistant Chief, that is to say Kennedy Balongo Sakwa and Noeline Nakhabi Makoba. They were allocated shares in the estate, in the distribution that was subsequently reversed on 8th September 2020. The other, John Makokha Makanda, was brought into the matrix by the late father of the protestor, through his summons for revocation of grant, dated 16th July 2018.

23. Are there any such debts and liabilities? I doubt it. Although Kennedy Balongo Sakwa and Noeline Nakhabi Makoba are mentioned in the liabilities column, in the affidavit sworn on 6th January 2015, in support of the petition, no document has been placed on record, to support their claims against the estate. What emerged, from the affidavits and oral testimony, is that Kennedy Balongo Sakwa and Noeline Nakhabi Makoba purportedly bought portions of Bukhayo/Buyofu/430, after the demise of the deceased from some of the sons. That must have happened before 6th January 2015, when the affidavit in support of the petition was sworn. There is not much evidence on when those transactions happened, and who were involved, although the applicant testified that Kennedy Balongo Sakwa bought from Simon, while Noeline Nakhabi Makoba bought from Joseph. The picture relating to John Makokha Makanda is a lot clearer. He purportedly bought a portion of Bukhayo/Buyofu/430 from Simon, Onyango Murwayi and Wesonga, sometime in 2003 and 2004. There is also evidence that the protestor purportedly entered into a sale agreement with the said John Makokha Makanda, in what he purported was a salvage of the property, to get it back into the estate. What is very clear, from the material on record, is that the deceased never entered into any sale transactions with Kennedy Balongo Sakwa, Noeline Nakhabi Makoba and John Makokha Makanda, to dispose of portions of Bukhayo/Buyofu/430 to them, and that he died before he could transfer the said portions to them. The effect of it would be that the estate is not indebted to Kennedy Balongo Sakwa, Noeline Nakhabi Makoba and John Makokha Makanda, for, at the date of his death, the deceased was not indebted to them.

24. The law on this is that the estate of an intestate, like the deceased herein, vests in his personal representative, that is the administrator of the estate, upon the appointment of the administrator a such. That is the purport of sections 79 and 80(2) of the *Law of Succession Act*. The office of an administrator becomes effective from the date of the appointment, and it is on that date that the assets of the intestate get vested in him as such. See Roy Parcels Services Limited vs. Esther W. Ngure [2010] eKLR (Okwengu, J) and Public Trustee (suing as the administrator of he estate of Gideon Mganga Mwandembe) vs. Pius M. Katambo [2017] eKLR (A. Omollo, J). The date of the making of the grant in intestacy would be the effective date from which the administrator can exercise the powers of a personal representative, that are set out in section 82 of the *Law of Succession Act*. It is only after that vesting that an administrator can sue or be sued over estate assets, can enter into valid contracts over estate assets, among other things. Regarding sale of land, section 82(b)(ii) of the *Law of Succession Act* provides that no immovable assets of the estate of an intestate should be sold before the grant is confirmed. See Anna Mutindi vs. Bernard Wambua Muia [2016] eKLR (Nyamweya, J), In re Estate of M'Ikome M'Matiri (Deceased) [2019] eKLR (Gikonyo, J), In re Estate of Mbiyu Koinange (Deceased) [2020] eKLR (Muchelule, J) and Albert Kithinji Njagi vs. Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/Interested Parties) [2020] eKLR (Njuguna, J). The effect of these provisions is to clothe the administrator with powers over estate assets akin to those of an owner, to do such things, to or with the assets, as the owner himself would have done, subject to the limitations set out in the law. This power over the assets is limited or confined only to the personal representative, so that any other person, be it a spouse or child of the deceased, or a creditor of the estate, would have no authority to handle the assets of the estate. See Benson Mutuma Muriungi vs. CEO Kenya Police Sacco

& another [2016] eKLR (Gikonyo, J) and In re Estate of Francis Kimani Muchiri (Deceased) [2018] eKLR (Musyoka, J). That is underlined by section 45 of the *Law of Succession Act*, which criminalises acts by individuals or entities over estate assets, when such individuals or entities have no grant of representation. See Christine Kajuju Mwenda vs. Gervasio M'Rukunga [2006] eKLR (Lenaola, J) and Jane Wairimu Mathenge vs. Joseph Wachira Mathenge & 3 others [2016] eKLR (Ngaah, J).

25. For avoidance of doubt, sections 45(1)(2), 79, 80(2) and 82(b)(ii) of the *Law of Succession Act* state as follows:

> " 45(1) Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of the deceased person.
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> (2) Any person who contravenes the provisions of this section shall – (a) be guilty of an offence and liable to a fine ... or to a term of imprisonment not exceeding one year or to both such fine and imprisonment..."
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> "79 The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."
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> "80(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant."
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> "82 Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers – (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or part of the assets vested in them, as they think best: Provided that – (ii) no immovable property shall be sold before confirmation of the grant."

26. The deceased herein died in 1980. Representation herein was sought and obtained in 2015. The transactions in question happened after the deceased died, and before the estate was vested in anyone, least of all the individuals who were alleged to have sold the property. The effect of it was that the persons who purported to sell the property had no authority to sell the property of a dead person, as they had no grant of representation. The property did not vest in them, by virtue of section 79, and they had no power to sell it, by virtue of section 82(b)(ii). Their conduct run afoul of section 45(2)(i) of the Law of Succession, and was criminal in nature. A transaction tainted by criminality cannot possibly have any legality or validity. See In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J). The sellers had no proprietary rights over the property, which they could validly pass to the buyers, and the buyers, therefore, bought nothing. The buyers acquired no interest in Bukhayo/Buyofu/430, that could elevate them to the status of creditors of the estate. The alleged buyers, that is to say Kennedy Balongo Sakwa, Noeline Nakhabi Makoba and John Makokha Makanda, have no interest in the estate, and no claim against the estate. The said buyers can only look up to the persons who purported to sell the land to them, to sort them out, one way or the other. They can either wait for the property to be allocated to the alleged sellers or their estates, at confirmation, and to be transmitted thereafter to them, the alleged sellers, after which the alleged sellers or the administrators of their estates can cause the same to be subdivided, and the portions that they had allegedly sold transferred to the alleged buyers. The alternative would be to get the alleged sellers or the administrators of their estate to reimburse the moneys received as consideration for the purported sales. Kennedy Balongo Sakwa, Noeline Nakhabi Makoba and John Makokha Makanda have no remedy in these proceedings.

27. The protestor alleged that he had salvaged the portion allegedly bought by John Makokha Makanda. A reimbursement to a purported buyer, of moneys received on behalf of the estate, in respect of an invalid sale of estate property, would be a welcome move, to shield the estate from liability. Was there a salvage in this case? No, there was none. Firstly, the portion allegedly sold was never hived off or excised from Bukhayo/Buyofu/430, and transferred to the name of the alleged buyer. It remained and remains part of the property registered in the name of the deceased. It never left the estate, and so the issue of a salvage could not arise. Secondly, the alleged transaction was neither legal nor valid, for the reasons that I discussed in paragraph 26, foregoing, of this ruling. Representation to the estate had not been granted to anyone, for the impugned transaction happened on 18th May 2015, while the grant was made on 20th May 2015. The persons who transacted with John Makokha Makanda were not administrators of the estate at the time, and they could not possibly bind the estate. Thirdly, the alleged salvage was undertaken with an ulterior motive. I say so as the protestor herein is using the alleged salvage to claim a larger share at distribution, by asserting that since it was him who salvaged the said property, the same should be assigned to him. That would mean that the purported recovery of the alleged portion was not for the benefit of the estate, but that of the parties involved in the alleged salvage. I have read the agreement placed on record by the protestor. It is dated 18th May 2015. It was not made in the understanding that the cause herein, Busia HCSC No. 20 of 2015, was pending, but rather in anticipation that Stephen Ouma, the father of the purported sellers, the protestor herein and Bwibo Ouma Kenneth, was to file for representation to the estate, and at confirmation of the grant, that was supposedly to be made to him, Stephen Ouma, the names of the protestor and Bwibo Ouma Kenneth were to be inserted as buyers of the portion of Bukhayo/Buyofu/430 allegedly sold, hence the said portion would become theirs. The alleged salvage was a fraudulent scheme by the late Stephen Ouma, and his sons, the protestor herein and Bwibo Ouma Kenneth, to get themselves a larger share of Bukhayo/Buyofu/430 that they were not even legally entitled to through succession. It was a scheme to fleece the estate. In any event, the mere fact that a beneficiary salvaged an asset of the estate grants them no superior claim or entitlement to that asset. See Andrew Kithinji & another vs. Abiud D. Njeru [2017] eKLR (Muchemi, J). The only possible relief for a beneficiary who has expended his finances to salvage a property is to seek reimbursement from the estate. See In re Estate of Festo Lugadiru Abukira (Deceased) [2019] eKLR (Musyoka, J).

28. On whether the administrators have ascertained the persons beneficially entitled to a share in the estate, I note that there is a general consensus about the number of the sons of the deceased. The general understanding is that the deceased had 10 sons, whose names were ascertained as Juma Murwayi Awori, Joseph Wesonga Murwayi, the late Simon Otieno Murwayi, Josephat Okwero Murwayi, Onyango Murwayi, the late Francis Opondo Murwayi, Henry Nyakwa Murwayi, the late Stephen Ouma Murwayi, Matayo Obayo Murwayi and Lucas Nyongesa Murwayi. There was an eleventh son, who was said to have had died young, presumably without a spouse and children, but whose name has not been disclosed. It was not disclosed whether he pre-deceased the deceased or he died after the deceased. As he does not appear to have had a successor or successors, and the parties have opted to treat his interest in the estate to have been extinguished by his demise, I shall similarly treat it as so extinguished. So far so good. However, certain details were not disclosed in the filings, but they came to the fore at the oral hearing. It emerged that the deceased had 4 wives, and so his household comprised of 4 houses. He died a polygamist. It also emerged that the deceased had 6 daughters. The names of the daughters were not disclosed in the filings by the parties, nor at the oral hearing, but the fact of their existence was disclosed by Josephat Okwero Murwayi, when he testified.

29. Should the fact of the polygamy and the existence of the daughters have been disclosed? Distribution of an intestate estate is based on the relationships of the deceased and his survivors, that is to say spouses, children, parents, siblings, and other relatives. There ought to be full disclosure of all the close relatives.

Indeed, that is commanded by section 51 of the *Law of Succession Act*. Section 51(1) provides that "an application for a grant of representation shall be made in such form as prescribed..." Section 51(2)(g) says: "an application shall include information as to – 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." Rule 7 of the Probate and Administration Rules sets out the procedures for applications for representation. Rule 7(1) echoes section 51(2)(g), and states: "... the application shall be by petition ... supported by an affidavit ... containing ... the following particulars – (e) in cases of total or partial intestacy – (i) the names, addresses, mental state and description of all surviving spouses and children of the deceased..."

30. The above provisions are specific with respect to disclosure of the family of the deceased. They are specific that the names and addresses of "all the surviving spouses" of the deceased are to be given or disclosed. These provisions are in mandatory terms. The fact that the deceased was a practising polygamist ought to have been disclosed at the outset, for there are specific rules in intestacy on how the estate of a polygamist is shared out. Where the substantive provisions of the *Law of Succession Act* apply, section 40 would be relevant, and the estate of the intestate would be distributed in the terms proposed in that provision, whose effect is equal distribution amongst the children. If customary law applies, invariably the estate would be shared out equally between the houses, which may not necessarily translate to equal distribution amongst the children. See Koinange and thirteen others vs. Koinange [1986] KLR 23 (Amin, J). It should be noted that the said provisions talk about disclosure of "children," and not "sons." That would then mean that the administrators herein did not properly ascertain the persons beneficially entitled to a share in the estate, for the daughters were not disclosed, and the children were not grouped according to the 4 houses of the deceased, to enable consideration of the distribution of the estate of a polygamist.

31. The non-disclosure of the daughters was perhaps tied up with the fact that the deceased died in 1980, prior to the coming into force of the *Law of Succession Act*. It may well be so. For a person who died before the *Law of Succession Act* came into force on 1st July 1981, the law to apply to the devolution of his estate, by dint of section 2(2) of the *Law of Succession Act*, would be the law or custom which applied at the time of the death. See Weru Gatere vs. John Wachira [2013] eKLR (Wakiaga, J). By dint of section 2(1), the *Law of Succession Act* applies the substantive provisions of the Act to estates of persons dying after 1st July 1981. See Rono vs. Rono & another [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA). The substantive provisions on disposal of an intestate estate are in Part V of the Act. The deceased herein, no doubt, died before the Act became operational, and the law applicable to the disposition of the estate herein should be customary law. However, under section 2(2) of the *Law of Succession Act*, whereas customary law should apply to this estate, the law on administration of the estate remains the *Law of Succession Act*. Part VII of the *Law of Succession Act* provides for administration of estates, and it applies to all estates, whether subject to the dispositive provisions of the Act, or Islamic law, or customary law. See In Re: Kiiru Muhia "A"[2002] eKLR (Rawal, J) and In re Estate of Kageto Gitome (Deceased) [2018] eKLR (Muigai, J). Section 2(2) says that "The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

32. It is a matter of common notoriety that the customary law of succession does not provide for daughters, and, therefore, daughters do not reckon under that system of law, and there may be a natural temptation not to consider involving them in a process where they do not count. See Duncan Gachiani Ngare vs. Joseck Gatangi and others Nairobi High Court Civil Case Number 1460 of 1977 (Muli, J) (unreported), Mbuthi vs. Mbuthi [1976] KLR 120 (Harris, J), Kanyi vs. Muthiora [1984] KLR 712 (Kneller, JA, Chesoni & Nyarangi, AJJA), Wambugi w/o Gatimu vs. Stephen Nyaga Kimani (1992) 2

KAR 292 (Hancox, CJ, Masime & Kwach, JJA), Mukindia Kimuru and another vs. Margaret Kanario [2000] eKLR (Gicheru, Shah & Owuor, JJA) and Phillicery Nduku Mumo vs. Nzuki Makau [2002] eKLR (Omolo, Tunoi & Bosire, JJA). However, where the administration of the estate of an intestate, who died before 1st July 1981, is being administered after that date, Part VII of the *Law of Succession Act* would apply to the administration of such an estate, by dint of section 2(2) of the said Act, as observed above. Section 51 of the *Law of Succession Act* is located in Part VII. It would mean that a person seeking to administer the estate of a person who died in 1980 has to comply with section 51(2)(g) of the *Law of Succession Act* and Rule 7(1)(e) of the Probate and Administration Rules, which require disclosure of "all the children of the deceased." It matters not that the daughters of the deceased may not, ultimately, benefit from the estate, when one applies the customary law of succession to the disposition of that estate, given that the death happened in 1980, but then section 51 requires that all the children, whether sons or daughters, male or female, must be disclosed, and the administrators have no option but to make that disclosure.

33. Are these non-disclosures critical? Are they of any consequence? That relating to the marital status of the deceased, as a polygamist, may not be so critical. Firstly, because the distribution model, based on the customary law of succession, with respect to the estate of a polygamous intestate, is unequal. It shares out the estate equally to the houses, regardless of the number of children in each house. See Koinange and thirteen others vs. Koinange [1986] KLR 23 (Amin, J). That would mean, a house with 1 child would be treated equally with a house with 10. The distribution would produce inequality, and would be unjust, and would be run afoul of Article 27 of *the Constitution*. Secondly, if Part V of the *Law of Succession Act* were to be applied herein, and it would appear that that is what the parties hereto have in mind, then the property would be shared out equally, amongst those sharing , which would promote justice and equality.

34. The non-disclosure of daughters could have more far reaching consequences. The estate herein is being placed before me for distribution after a new Constitution has been promulgated. Under the old constitutional order, *the Constitution* allowed application of laws that were discriminatory, on grounds gender, among others. Section 82 of the old Constitution of Kenya dealt with discrimination. Section 82(1) outlawed any law which was discriminatory in itself or in effect. However, the subsequent subsections provided exceptions to the generality of section 82(1). Section 82(4), for example, provided that section 82(1) was not to apply to personal law matters, which included "devolution of property on death." That then meant that, for estates of intestates, dying before 1st July 1981, daughters of a deceased person could not have recourse to *the Constitution* for protection against discrimination, for such discrimination was sanctioned under section 82(4). See Mukindia Kimuru and another vs. Margaret Kanario [2000] eKLR (Gicheru, Shah & Owuor, JJA), Chelang'a vs. Juma [2002] 1 KLR 339 [2002] eKLR (Etyang, J) and Aisha Brek vs. Aisha Mohamed Nzawa & another [2020] eKLR (N. Mwangi, J).

35. That position no longer obtains. The promulgation of the new Constitution of Kenya in 2010 has completely changed the matrix. Article 27 of *the Constitution* outlaws discrimination based on gender and marital status. See Joseph Achichi Aburili vs. George Ochola Aburili [2017] eKLR (Majanja, J), In re Estate of Elijah Kuria (Deceased) [2018] eKLR (Nyakundi, J) and Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). The new Constitution commands that men and women be treated equally in all spheres of life, including in matters relating to succession. Article 27 is to be read together with Article 2(4) of the same Constitution, to effect that any act done in contravention of any of the provisions of *the Constitution* would be invalid. See In the Matter of the Estate of Mariga Njuguna (Deceased) [2013] eKLR (Musyoka, J) and In re Estate of Seth Namiba Ashuma (Deceased) [2020] eKLR (Musyoka, J). All are equal in the eyes of the law. When it comes to succession, by dint of *the Constitution* of Kenya,

2010, there is no man nor woman, no son nor daughter, no male nor female, no married nor single person. All are equal before the law, and all are to be treated equally. No distinctions are made.

36. Articles 2(4) and 27 of *the Constitution* state as follows:

"2. Supremacy of this Constitution

(1) ...

(2) ...

(3) ...

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) ...

"

"27.

Equality and freedom from discrimination

(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) ...

(7) ...

(8) ..."

37. I cannot conclude discussion on this matter without reverting to Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal No. 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA), which I should consider together with In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of Stanley Mugambi M'Muketha (Deceased) [2019] eKLR (Gikonyo, J). These decisions turned on Articles 2(4) and 27 of *the Constitution*. The courts were emphatic, that anything done or omitted, which contravenes the constitutional principles on gender equality and non-discrimination, would be void and invalid. In Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal No. 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA), the deceased had made a will, in exercise of his freedom of testation, as donated by section 5 of the *Law of Succession Act*, in which he devolved his estate to his sons, to the exclusion of his daughters. The High

Court found and held that he was within his rights, as he had the freedom to will away his property as he wished. The Court of Appeal found and held that that will was valid, for it was made in proper form, by a person who had testamentary capacity. However, on the exercise of freedom of testation, it was held that the same was used in a discriminatory manner, which contravened Article 27 of *the Constitution*, and, in keeping faith with Article 2(4) of *the Constitution*, the court declared the will void and invalid. Why? Whereas the will was valid in all other respects, it contravened the equality and non-discrimination principles stated in *the Constitution*, and that act rendered it void and invalid. Never mind that the will in question was made prior to the promulgation of the new Constitution of Kenya in 2010, and under the old Constitution, which allowed such discrimination under customary law. Before final orders are made in this matter, there may be need to have the daughters on board, for them to be heard on the matter, to obviate consequences in future, along the lines of Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal No. 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA), should the said daughters, or their offspring, embark on such a course.

38. Having disposed of the matters of assets and liabilities, and beneficiaries, let me advert to distribution. The deceased was survived by 10 sons or their successors, if we go by the list of beneficiaries placed on record by the administrators. The deceased died before the Act came into force, and, therefore, customary law should apply to the devolution. The parties did not address me on the applicable customary law, and proceeded with the matter as if Part V of the *Law of Succession Act* applied. There is room for departure from what the law prescribes, and parties may agree on a mode of distribution, outside of what is set out in the law. That would be the case where the parties herein may, by agreement, choose to abandon the application of customary law, and choose to bring themselves under the umbrella of the *Law of Succession Act*. The law on this is Justus Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another [2015] eKLR (Visram, Koome & Otieno-Odek, JJA), where it was said that an intestate estate could not be distributed otherwise than by the parties agreeing amongst themselves, and filing a consent; or by the court following the applicable law on intestate distribution, in the absence of such a consent. It was stated that where the parties were in total agreement, and have recorded a consent on the mode of distribution, the court would have no choice but to adopt the consent. Where there is no consensus, the court imposes the applicable law of succession. Similar sentiments were expressed in In re Estate of Juma Shiro (Deceased) [2016] eKLR (Mwita, J), to effect that where the beneficiaries had not agreed on the mode of distribution, the court would resort to the applicable law to resolve the issue. See also Joseph Achichi Aburili vs. George Ochola Aburili [2017] eKLR (Majanja, J). Is there consensus in this case on distribution? There is no consensus. There are 2 rival modes of distribution proposed, one for equal distribution, the other proposing an unequal mode. There is also no unanimity on who should benefit from the estate. In such a scenario, there would be no discretion, but to strictly apply the applicable law, which, in this case, has not been ascertained.

39. I was told that the deceased had made some lifetime distribution or made gifts inter vivos to the first 3 older sons, Matayo Obonyo Murwayi, Lucas Nyongesa Murwayi and Stephen Ouma Murwayi. It was alleged that the deceased had given these 3 their own parcels of land, prior to his death, and prior to land adjudication and registration being done. When land adjudication was eventually done, these parcels of land were registered in the names of the 3, and they were issued with title deeds. The parcel given to Stephen Ouma Murwayi was registered as Bukhayo/Buyofu/427, that for Mathew alias Matayo Obonyo Murwayi was registered as Bukhayo/Buyofu/428, while Bukhayo/Buyofu/429 was registered to Lucas Nyongesa Murwayi. The deceased retained the portion which was registered as Bukhayo/Buyofu/430, and which was meant to be shared out amongst the 7 younger sons, who had not benefitted from that inter vivos gifting. The protestor, and his father before him, protested that reasoning. He asserted that his family was entitled to a portion in Bukhayo/Buyofu/430, for that was

where they lived. The applicant, and his witnesses, countered that the family of the protestor only moved back to Bukhayo/Buyofu/430, after Bukhayo/Buyofu/427 was foreclosed and sold to a third party.

40. Lifetime gifting is about the deceased making a gift of a property, and actualizing it. For movables, it is parting with possession and ownership of the subject matter of the gift. For property which is subject to registration, such as motor-vehicles and land, it is about obtaining transfers, registration and documents of title. That would be the classic gift inter vivos. See In re Estate of Gedion Manthi Nzioka (Deceased) [2015] eKLR (Nyamweya, J). It would be a case of the property owner obtaining the necessary consents, signing the necessary transfers, having the same registered, the title documents obtained and handed over to the beneficiary. Such a gift would cease to be estate property. See In re Estate of Muchai Gachuika (Deceased) [2019] eKLR (Gikonyo, J) and Lucia Karimi Mwamba vs. Chomba Mwamba [2020] eKLR (Gitari, J). Anything short of that would not suffice for a lifetime gift. Being shown a piece of land to settle on, or to farm, or to cultivate, or to use one way or other, without more, is not a gift inter vivos. There has to be transfer of ownership. However, in some cases, the gift may be deemed or deduced, where the owner takes preliminary steps towards actualizing it, but dies before completion of the gifting. See In re Estate of Nyachieo Osindi (Deceased) [2019] eKLR (Ougo, J). Such would be the case where, perhaps, only the final step, such as registration of transfer, was remaining.

41. Were gifts inter vivos or lifetime gifts made in this case? No concrete evidence was presented, to effect that the deceased transferred land to the 3, or that the lands registered in their favour was land originally belonging to the deceased. The green cards on record point to the 3 holding first registrations. What I find curious is that the 4 parcels of land in question were all in close proximity, being Bukhayo/Buyofu/427, 428, 429 and 430. They were also all registered on the same date. It would suggest that they all came from the same source, and there is, therefore, credence to the narrative that they belonged to a larger piece of land, belonging to the deceased, and that it was he who gave out the 3 portions to his sons, and the same were adjudicated and registered in the names of the said 3 sons. I note that Matayo Obonyo Murwayi and Lucas Nyongesa Murwayi, or their successors, did not show any interest in these proceedings, suggesting that they were satisfied with their inter vivos gifts. It could also be the case that the parties hereto did not notify them of these proceedings, nor involve them, save for amending documents to include their names. The position of Stephen Ouma is, however, different. The green card placed on record shows that his land was foreclosed and sold to a third party. There is, therefore, credence to the argument that it was after that that he forced his way back to Bukhayo/Buyofu/430. That should be considered alongside the fraudulent scheme, which he conceived with John Makokha Makanda, the protestor and Bwibo Ouma Kenneth, which I have discussed above, to get themselves a larger piece of Bukhayo/Buyofu/430, when it is quite clear that they were not even entitled to an inch of it. The 7 siblings, who were entitled to Bukhayo/Buyofu/430, have been magnanimous. There were inter vivos gifts, and they ought to be taken into account, in keeping with section 42 of the *Law of Succession Act*.

42. As indicated above, certain things need to be addressed before I can make final orders in the matter. The cause ought to be brought into full compliance with Article 27 of *the Constitution*, section 51(2)(g) of the *Law of Succession Act* and Rule 7(1)(e) of the Probate and Administration Rules, by bringing on board all the children of the deceased. The children not brought on board are the daughters. They must be involved in this process. Their voices must be heard on the proposed distribution. Consequently, I hereby postpone determination of the application herein, for confirmation of grant, by virtue of section 71(2)(d) of the *Law of Succession Act*. The administrators shall file affidavits disclosing the names and addresses of the 6 daughters of the deceased, and if the daughters have since died, the names and addresses of their children. I shall allocate a date, when I shall confirm compliance with these directions,

and when the said daughters, or their successors, shall be availed to state their position, for avoidance of any doubt. I shall also require that Matayo Obonyo Murwayi and Lucas Nyongesa Murwayi, or their successors, be availed to state their position, for avoidance of any doubt. I shall thereafter allocate a date for the final ruling on distribution. Each party shall bear their own costs. If any party is aggrieved, I hereby grant leave, of 30 days, for filing an appeal, at the Court of Appeal, against the findings and orders made above. It is so ordered.

RULING DATED AND SIGNED AT BUSIA AND DELIVERED BY EMAIL ON THIS 2ND DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Luchivya instructed by Marisio Luchivya & Company, Advocates for the applicant.

Mr. Shihemi, instructed by Maloba & Company, Advocates for the protestor.