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In re Estate of Raphael Charles Makokha (Deceased) (Succession Cause 106 of 2014) [2024] KEHC 12277 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12277 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 106 OF 2014

WM MUSYOKA, J

OCTOBER 15, 2024

IN THE MATTER OF THE ESTATE OF RAPHAEL CHARLES MAKOKHA (DECEASED)

RULING

1. This case relates to the estate of the late Raphael Charles Makokha, who died on 30th April 2013, according to certificate of death number 151439 of 15th May 2013. There is a letter from the Chief of Mjini Sub-Location, dated 18th May 2013. It is partially torn, but the gist of it is to disclose to the court the survivors of the deceased, who are said to be 1 widow, 1 divorced wife, 1 son and 3 daughters, namely Zilpah Chepkemoi Bett, Pauline Mary Makokha, Thomas Makokha, Ashleen Makokha, Sheiler Makokha and Salome Makokha, respectively. Details of the assets are given, but the portion is partially cut off, so I cannot make out all the assets listed. There is also a portion saying something about Zilpah Chepkemoi Bett, which has also been partially torn off, and I cannot make sense of what it was meant to convey.
2. Representation, to the intestate estate, was sought by Zilpah Chepkemoi Bett, vide a petition that she filed herein on 24th March 2014, in her capacity as widow of the deceased. 5 individuals are mentioned in the petition, as survivors of the deceased, being Zilpah Chepkemoi Bett, Thomas Makokha, Asheline Appleton, Sheila Makokha and Salome Alea. The deceased is said to have had died possessed of Bukhayo/Mundika/9772 and 10024, Nairobi LR 2/241 and KAC 542W. Mathews Tornado Okech, Mareline Egesa, Gedion Syengo Mulonzya and Jarel Nyongesa are listed as liabilities. Letters of administration intestate were made to Zilpah Chepkemoi Bett, on 8th July 2014, and a grant of even date was issued.
3. Pauline Mary Makokha filed a summons for revocation of grant, on 5th September 2014, dated 4th September 2014, principally seeking revocation of grant, amongst other prayers. The principal complaint was that the applicant was a widow of the deceased, with whom she had had 4 children, and that she had not been consulted, neither had she consented to the petition by Zilpah Chepkemoi Bett, despite having written to her, asking for cooperation, towards filing a joint application. She pointed at fraud and misrepresentation. That application was compromised, by consent of the parties, on 1st October 2014, in terms that a joint appointment of administratrices be made of Pauline Mary



- Makokha and Zilpah Chepkemoy Bett, and rents collected from estate assets be deposited in a joint estate account.
4. Pauline Mary Makokha filed a summons for confirmation of grant, dated 24th March 2021. She identified the survivors of the deceased to be herself and her 4 children, being Tom Makokha, Ashelin Nekesa Makokha, Sheila Makokha and Salome Patricia Namukuru. The assets were listed as LR No. 2/241 Nairobi Gitanga Road, Bukhayo/Mundika/9772 and 10024, and KAC 542W. Distribution was proposed as follows: LR No. 2/241 Nairobi Gitanga Road to Pauline Mary Makokha at 50%, with the remaining 50% being shared equally between Tom Makokha, Ashelin Nekesa Makokha, Sheila Makokha and Salome Patricia Namukuru; Bukhayo/Mundika/9772 to Pauline Mary Makokha, Zilpah Chepkemoy Bett, Tom Makokha, Ashelin Nekesa Makokha, Sheila Makokha and Salome Patricia Namukuru, in equal shares; Bukhayo/Mundika/10024 to Pauline Mary Makokha during life interest, and thereafter to Tom Makokha, Ashelin Nekesa Makokha, Sheila Makokha and Salome Patricia Namukuru, in equal shares; and KAC 542W to Zilpah Chepkemoy Bett, absolutely. There are a number of documents attached, but the copies in the file are so faint that I am unable to make sense of what they are about.
 5. There are consents, to the distribution proposed, in the application, dated 24th March 2021, executed by Tom Makokha, Asheline Makokha, Pauline Mary Makokha and Sheila Patricia Bennett, on divers dates.
 6. There is an affidavit on record, sworn by Mathews Tornado Okech, on 29th March 2021. I am unable to tell whether it replies to the confirmation application, or an earlier application, but its contents are relevant. The deponent avers to have had bought 6 plots out of Bukhayo/Mundika/10024, from the deceased, who died before title in them was conveyed to him. He states that part of the sale proceeds was paid to the deceased, and part to Zilpah Chepkemoy Bett. He avers to have had extensively developed the plots.
 7. Zilpah Chepkemoy Bett swore an affidavit of protest, on 6th April 2021. She avers to be the only widow of the deceased, and mentions that there were divorce proceedings between the deceased and Pauline Mary Makokha. She avers that all the children of the marriage were adults, having their own property, and who should inherit from their mothers. She states that she had lived with the deceased for 12 years prior to his death, and that, as a result, she intimately and accurately knew the extent of the estate, and the wishes of the deceased with respect to it. She accuses Pauline Mary Makokha of having had abandoned the deceased during his lifetime, and, therefore, of knowing very little about the estate. She states that there was a de facto dissolution of the marriage between the deceased and Pauline Mary Makokha, given that the deceased had petitioned for divorce in Busia HCDC No. 2 of 2010, to which Pauline Mary Makokha had filed a cross-petition, in which she did not seek maintenance, nor any share in the assets of the deceased, which she is now claiming.
 8. She discloses that the deceased had sold a portion of Bukhayo/Mundika/10024, to Mathews Tornado Okech, and part of the proceedings of sale was plied towards medical expenses for the deceased. She asserts that Bukhayo/Mundika/9772 was acquired solely by the deceased, and that was where she and the deceased lived prior to his death, and she claims it as her property. She asserts that all the landed assets were acquired by the deceased, inclusive of 2 assets that he bought for Pauline Mary Makokha, being the house at Umoja and Bukhayo/Mundika/1316, which should be considered as her entitlements from the estate. She submits that Pauline Mary Makokha had not contributed to the acquisition of the assets, on account of the time she lived away from the deceased, but she expresses no objection to the 3 children, that Pauline Mary Makokha had with the deceased, getting their share of the estate. She proposes that House No. F89-Umoja be devolved upon Pauline Mary Makokha, absolutely; Bukhayo/Mundika/1316 upon Pauline Mary Makokha, absolutely; Bukhayo/



- Mundika/9772 upon Zilpah Chepkemoi Bett, absolutely; Bukhayo/Mundika/10024 upon Zilpah Chepkemoi Bett, absolutely; LR No. 2/241 Nairobi Gitanga Road upon Pauline Mary Makokha and Zilpah Chepkemoi Bett, equally; and KAC 542W upon Zilpah Chepkemoi Bett, absolutely.
9. She has attached to that affidavit a number of documents. There is a certificate of death, in respect of the deceased, dated 15th May 2013. There is a copy of typed court proceedings, in Busia HCDC No. 2 of 2011. There is a sale agreement, in respect of sale of 6 plots out of Bukhayo/Mundika/10024, and an acknowledgement of receipt of the sale price moneys, both dated 27th February 2013, executed by the deceased, Zilpah Chepkemoi Bett and Mathews Tornado Okech, and witnesses. There is a sale agreement, in respect of House No. 89 Umoja Estate, to Pauline Mary Makokha, dated 16th August 1985. There is a title deed for Bukhayo/Mundika/1316, dated 2nd June 1993, registered in the name of Pauline Mary Makokha.
 10. That application was canvassed by way of written submissions, following directions that were given on 28th October 2021. The court, Karanjah J, delivered a ruling on 28th March 2022, dismissing the application, dated 24th March 2021, for being premature.
 11. Another ruling was delivered on 12th October 2022, by Karanjah J, not based on any formal application, but oral submissions that the court took that day, where Mathews Tornado Okech was discharged from the proceedings, on grounds that there was no dispute that he had bought part of Bukhayo/Mundika/10024. The grant was partially confirmed, with respect to that portion purchased by Mathews Tornado Okech, and a certificate of confirmation of grant was duly issued to him, dated 12th October 2022.
 12. Zilpah Chepkemoi Bett then filed a summons for confirmation of grant, dated 18th March 2023. She identifies the survivors of the deceased as 2 widows and 4 children, being herself and her co-administratrix, and Tom Makokha, Ashelin Nekesa Makokha, Sheila Makokha and Salome Patricia Namukuru. She proposes distribution of House No. 89 Umoja Estate, Bukhayo/Mundika/1316, Bukhayo/Mundika/9772, Bukhayo/Mundika/10024, LR No. 2/241 Nairobi Gitanga Road and KAC 542W. She proposes distribution as follows: House No. 89 Umoja Estate to Pauline Mary Makokha and the children, jointly; Bukhayo/Mundika/1316 to Pauline Mary Makokha and the children, jointly; Bukhayo/Mundika/9772 to Zilpah Chepkemoi Bett, absolutely; Bukhayo/Mundika/10024 to Pauline Mary Makokha 0.03 HA (the graveyard and where the wooden house stands) and to Zilpah Chepkemoi Bett 0.23HA (where her permanent house stands); LR No. 2/241 Nairobi Gitanga Road to Pauline Mary Makokha and Zilpah Chepkemoi Bett, equally; and KAC 542W to Thomas Bruno Nyongesa. She has attached a consent on distribution, signed only by herself. I shall refer to Zilpah Chepkemoi Bett, hereafter, as the applicant.
 13. The applicant later swore a further affidavit, on 27th June 2023, to state that she had established that LR No. 2/241 Nairobi Gitanga Road did not form part of the estate of the deceased, as it was registered in the name of a Hesbon Omondi, and that she had discovered that the deceased had died testate, having made a will, which had since been traced. She avers that the estate be distributed as per the terms of the said will. She has attached a certificate of postal search for LR No. 2/241 Nairobi Gitanga Road, dated 19th June 2023, which indicates the owner of that property as Hesbon Omondi. There is also copy of a last will and testament of Raphael Charles Makokha, dated 16th May 2012.
 14. Pauline Mary Makokha swore an affidavit, on 19th May 2023. She asserts to be a widow of the deceased, having married him on 29th December 1963, at St. Monica Catholic Church, Mundika, and that they had 4 children, namely Tom Makokha alias Thomas Bruno Nyongesa, Asheline Nekesa Makokha, Sheila Makokha and Salome Patricia Namukuru alias Salome Bennett. She states that the estate should be distributed in terms of the proposals that she had made in her application, dated 24th March 2021,



- and she has attached a copy of the affidavit and the consents filed in that application. She asserts that the Umoja Estate property was never part of the estate of the deceased. She further avers that the Gitanga Road, Nairobi, property was still in the name of the deceased. As the reply is ideally the affidavit of protest envisaged in Rule 40(6) of the Probate and Administration Rules, I shall treat it as an affidavit of protest, and I shall hereafter refer to Pauline Mary Makokha as the protestor.
15. She has attached, to her affidavit, a number of documents. The first is the application, dated 24th March 2021, together with the affidavit supporting it, and the consents executed in accordance with Rule 40(8) of the Probate and Administration Rules, in Form 37. Most of the other annexures are so faint that I am unable to make out their contents.
 16. The protestor then filed a summons, dated 7th December 2023, apparently provoked by the disclosure by the applicant, that the Nairobi Gitanga Road property had been sold to Hesbon Omondi. The application seeks the stay of the confirmation proceedings, the joinder of Hesbon Omondi to these proceedings and the cancellation of entry No. 20, made on 26th August 2016, in the register for LR No. 2/241 Nairobi Gitanga Road, and that the Directorate of Criminal Investigations be directed to carry out investigations on how that entry was made. It is averred that the said property was in the name of the deceased, as at the date of his death, in 2013, and that the transfer happened 3 years after, in 2016. It is averred that this court, in these proceedings, had not allowed that transfer prior to the grant herein being confirmed. It is argued that an official search done on 16th May 2016 pointed to that asset still being in the name of the deceased. It is further argued that the applicant had been collecting rent from that property up to February 2016, which suggested that it was still estate property up to that date.
 17. A number of documents are attached. There is an extract from the register indicating a conveyance to Hesbon Omondi, sometime in 2009. A certificate of official search for the property, dated 4th December 2023, indicates that it is registered in the name of Hesbon Omondi. Another certificate of official search, dated 19th May 2016, shows that the property was in the name of the deceased as at that date.
 18. The applicant filed a response to that application, by way of an affidavit, sworn on 15th February 2024. She asserts that Hesbon Omondi was the proprietor of that property, and, for that reason, it could not form part of the estate. She states that she established that fact during the currency of the succession proceedings, adding that whatever interest the deceased had, before his death, was transferred by him before his death to Hesbon Omondi. She further avers that she included that asset in the distribution schedule by error.
 19. Hesbon Omondi swore an affidavit in reply, on 4th February 2024. He avers that he purchased the property from the deceased in 2009, and an appropriate conveyance was drawn. He states that the property was charged to lenders, and that he worked with the deceased to discharge the same in 2012. He asserts that the property was never registered in the name of the deceased, and the certificate of official search, placed before the court, was, therefore, not authentic. The discharge of charge or indenture happened in 2015, after which the conveyance instrument of 2009, was registered in 2016. He states that upon a grant being obtained in these proceedings, the applicant had served his tenant with it, with directions to pay rent to her, which prompted the tenant to terminate tenancy, and he was forced to get the applicant to refund the rents she had collected from the tenant. He asserts that he has been paying rates to the relevant government agencies. He asserts further that the property was not part of the estate being distributed. He has attached copies of vouchers/receipts for rates payment to the Nairobi City County government. There is a certificate of official search, dated 16th December 2023, depicting him as proprietor.
 20. The initial directions, regarding disposal of the confirmation application, was that the same would be disposed of by viva voce evidence. There were delays, for whenever the matter came up for hearing



adjournments would be occasioned, hence those directions were modified, at the insistence of some of the parties, to require disposal by way of written submissions. The application, dated 7th December 2023, was filed, during the period when written submissions were due on the earlier application. That was followed by further directions that both applications be disposed of simultaneously, by way of written submissions. Both sides did file written submissions, which I have read, and noted the arguments made.

21. The deceased died a polygamist, in 2013, after the *Law of Succession Act* had come into force in 1981. A polygamist because he had 2 wives, as at the date of his death. The applicant has claimed that there was a de facto divorce, for the deceased and the protestor had not lived together for a long time, and there were pending divorce proceedings, where both sides were for dissolution of their union, for there was a counterclaim. I am not familiar with the concept of a de facto divorce, and the applicant has not placed before me judicial precedents on it, if, indeed, such a concept exists. To the very best of my knowledge, a civil marriage can only be dissolved through a judicial process, and that dissolution is evidenced by a decree absolute. The divorce proceedings, that the applicant is citing, were pending as at the date of the death of the deceased. No hearings were ever conducted, and, so, the issue of dissolution of that union would not arise. The divorce proceedings abated upon the demise of the deceased, before dissolution of the marriage could be pronounced by the court. The consequence was that the protestor was still married to the deceased, as at the date of his death, and upon his death, she became his widow. She is entitled to inherit from his estate.
22. The issue, as to whether he died testate or intestate, is cloudy. When the applicant sought representation to his estate, for she was the one who initiated these succession proceedings, she claimed that he died intestate, and sought a grant of letters of administration intestate, and that was the grant that the court made to her. When the protestor sought revocation of that grant, the parties compromised, and a joint grant of letters of administration intestate was made and issued. The issue of the existence of a will did not arise until after it became clear to the applicant that the court was keen on the matter going to distribution. It was then that the applicant claimed that she had discovered a will, which she proceeded to place before the court, and to invite the court to confirm the joint grant, by sharing out the estate as per the terms of the will.
23. Did the deceased die testate? It would be upon the party claiming that there was a testacy to establish that fact. That party initially commenced these proceedings in intestacy. It was her who produced the will. She did not disclose the circumstances under which she came to establish the existence of the will, to explain why the same was not availed earlier. There is a possibility that the will is being thrown into the mix at this stage, to sabotage these proceedings. I so say because upon discovery of a will, the party discovering it ought to move the court to terminate the proceedings based on intestacy, to pave way for initiation of fresh proceedings founded on the will. Proceedings founded on a will differ from those in intestacy. The pleadings filed differ, and so does the grant made, for it is a grant of probate, rather than of letters of administration intestate, that would issue. A will cannot be produced in the midstream of intestate proceedings, and then those proceedings are automatically converted into probate or testate proceedings.
24. Confirmation is not just about distribution of assets, it is also about confirmation of administrators and executors. Section 71(2)(a) of the *Law of Succession Act*, Cap 160, Laws of Kenya, envisages that the court considers whether the grant was properly made to the personal representative, whether that personal representative had administered the estate in accordance with the law, and whether he would continue to administer the estate in accordance with the law upon being confirmed. Section 71(2)(b) of the Act envisages that, where the court finds that the grant was not properly made, or the personal representative had not administered the estate in accordance with the law, or the personal representative



- was not going to administer the estate in accordance with the law upon being confirmed, the grant would not be confirmed to that personal representative, and another grant would be made to someone else, and confirmed it on the spot, which effectively would amount to a revocation of the earlier grant held by the person seeking confirmation. See *In re Estate of Andashe Munyeti (Deceased)* [2020] eKLR (Musyoka J).
25. In the instant case, the grant in question was made to Pauline Mary Makokha and Zilpah Chepkemio Bett. That is the grant I am invited to confirm. The will, that the applicant invites me to consider, and on whose terms, she proposes that I distribute the estate, purports to appoint Humphrey Mbanda Musa as its executor. That is the person who should have sought a grant of probate of the said will. See *Mumbua Musyoki & 6 others vs. Mbenya Musyoki* [2016] eKLR (Nyamweya, J) and *In re Estate of Dorcas Omena Binayo (Deceased)* [2021] eKLR (Musyoka, J). I can only confirm distribution of the estate as per the will, on the basis of a grant of probate made to the said Humphrey Mbanda Musa. Of course, there is a window open for him to renounce probate, whereupon other individuals could petition for letters of administration with written will annexed. See *In re estate of Theresia Nundu Mwau (Deceased)* [2017] eKLR (Nyamweya, J), *In re Estate of M'Muremera Iria Muguna (Deceased)* [2018] eKLR (Gikonyo, J) and *In re Estate of George Barbour (Deceased)* [2021] eKLR (Onyiego, J). I would confirm distribution as per the will if such a grant was in place. As it is, there is no grant of probate of written will before me, nor of letters of administration with written will annexed. There is simply no basis whatsoever for me, in an application for confirmation of a grant of letters of administration intestate, to confirm distribution of an estate as per the written will of the deceased.
26. So what should I do? Should I postpone determination of the application, to allow the applicant decide on the steps that she should take in the circumstances? There is room to do that, given by section 71(2)(d) of the [Law of Succession Act](#). See *Alex Waweru Kibura & 2 others vs. Teresiah Nyokabi Njuguna* [2019] eKLR (Maina, J) and *In re Estate of Alfayo Ambalwa Musungu (Deceased)* [2020] eKLR (Musyoka, J). Upon discovering the alleged will, if the applicant was serious about it, she should have taken the steps that I have discussed above, at paragraph 23. She should have withdrawn the instant cause, to allow for the initiation of a fresh cause for grant of probate of the said will by the named executor, Humphrey Mbanda Musa, or, should Humphrey Mbanda Musa have passed on or renounced probate, any other person, who qualifies under sections 63, 64 and 65 of the [Law of Succession Act](#). The fact that that route was not taken, would suggest that the applicant has no faith in the alleged will. Secondly, the applicant has not sought to prove that that will is valid. That could only be properly done through a cause initiated to probate or prove that will. However, in the confirmation proceedings herein, the applicant could still lead evidence, to establish, prima facie, the authenticity of the said will, in order to convince the court not to proceed with the confirmation process, but to terminate these proceedings, and direct the parties to file a fresh cause in testacy.
27. Authenticity of a will can only be established through viva voce evidence, where the persons who were involved in the process of making and executing it are called to testify, such as the Advocate who drew it, and the witnesses who signed it as attesting witnesses. See *In Re Estate of GKK (Deceased)* [2013] eKLR (Lenaola, J), *Rahab Nyakangu Waithanji vs. Fredrick Thuku Waithanje* [2019] eKLR (Achode, J) and *In re Estate of Robert Otieno Guya (Deceased)* [2021] eKLR (F. Ochieng, J). Of course, under section 5(4) of the Act, the burden of proving that a will is not valid lies with the person challenging the validity. See *In Re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR (Githinji, J) and *In re Estate of Samuel Ndiga Maina (Deceased)* [2019] eKLR (Ngaah, J). However, this case is unique. These are not proceedings to probate the will, but in intestacy. Anyone, introducing a will, within such intestacy proceedings, should bear the burden of establishing that that will is valid, and, therefore, worthy of the court abandoning the intestacy proceedings that it has been conducting. I shall, in the circumstances, deem the deceased to have died intestate.



28. Production of a will, in the middle of intestate proceedings, on grounds that it had just been discovered, would not present a case of a will made under suspicious circumstances, but it would present a circumstance, nevertheless, that would itself raise suspicion. The deceased herein died in 2013, and these proceedings were initiated in 2014, yet the will is emerging in 2023, 10 years after the demise of the deceased. There would be reason to view the will with some level of suspicion, and there should be a burden, then, on the person seeking to rely on it, to clear that suspicion, by leading some evidence around the circumstances of its discovery, to explain why it could not be produced sooner. That issue arose in *In re Estate of Ignatius Ndirangu Kamau (Deceased)* [2020] eKLR (Wendoh, J), where there was an unexplained three-year delay, before a will was availed, after the demise of the deceased, and no appropriate reason was given to explain the delay. The court declined to admit it. The point is, there should be some explanation, why, if there was indeed a will in existence, at the date of death, it was not disclosed upon his demise, who had possession of it, and how the person, now seeking to rely on it, got to know that it existed. These issues should be addressed first, before the matter of its validity is adverted to, otherwise the court would be justified to conclude that, the introduction of the alleged will at this stage, is a vain attempt to scuttle the intestate proceedings, and thereby delay the conclusion of the cause.
29. As the deceased died intestate, after the *Law of Succession Act* had come into force, distribution of his estate should be in accordance with Part V of the Act. Section 40, in Part V, sets out how the estate of an intestate polygamist is to be shared out or distributed. It provides that the estate shall be divided into units, in accordance with the number of children that the deceased had, with any surviving widows being treated as additional units. Once a ratio of distribution is worked out, the estate is distributed according to that ratio. See *Kuria and another vs. Kuria* [2004] KLR (Musinga, J), *Rono vs. Rono & another* [2005] 1 EA 363 [2005] eKLR (Omolo, O’Kubasu & Waki, JJA) and *Munyole vs. Munyole* [2022] KECA 373 (KLR) (M’Inoti, Kiage & M Ngugi, JJA). Distribution of the estate should thereafter follow the provisions in sections 35 to 38 of the Act. See *In re Estate of Katama Nyaki (Deceased)* [2019] eKLR (Muchemi, J).
30. The deceased had 2 wives, Pauline Mary Makokha and Zilpah Chepkemoi Bett, the 1st and 2nd wives or widows, respectively. The 1st wife had 4 children, while the second had none. The 1st wife and her children constitute the 1st house of the deceased, while the 2nd wife constitutes the 2nd house. The 1st house, therefore, has 5 units, being the 1st widow and her 4 children; while the 2nd house comprises of the 2nd widow only, making it 1 unit. In total, the entire estate comprises of 6 units. The ratio of distribution works out to 5:1. The assets of the estate shall be shared out in that ratio of 5:1, so that the 1st house shall take 5/6 of all the assets, while the 2nd house shall take 1/6.
31. The 2nd widow says that she was married 12 years before the deceased died in 2013, meaning that the marriage happened around 2001; while the 1st widow was married in 1963. I note too that the 1st widow bore the deceased 4 children, while the 2nd widow had no children with the deceased.
32. The assets lined up for distribution are House No. 89 Umoja Estate, Bukhayo/Mundika/1316, Bukhayo/Mundika/9772, Bukhayo/Mundika/10024, LR No. 2/241 Nairobi Gitanga Road and motor vehicle registration mark and number KAC 542W. I have not seen registration documents in respect of House No. 89 Umoja Estate, but there is a sale agreement, dated 16th August 1983, which indicates Pauline Mary Makokha as the buyer, from one Michael Ndedda. Bukhayo/Mundika/1316 was registered in the name of the deceased on 2nd June 1983. Bukhayo/Mundika/9772 was registered in the name of the deceased on 28th January 2011, but an official search certificate, dated 3rd November 2015, indicates that it was registered in the name of Zilpah Chepkemoi Bett, on 15th July 2014. Bukhayo/Mundika/10024 is also registered in the name of Zilpah Chepkemoi Bett, going by the



certificate of official search, dated 3rd November 2015, effective from 15th July 2014, despite a restriction that Pauline Mary Makokha had filed on 13th May 2013. LR No. 2/241 Nairobi Gitanga Road has never been registered in the name of the deceased, and the material on record points to the deceased having sold his interest in it in 2009 to Hesbon Omondi. Motor vehicle registration mark and number KAC 542W was registered in the name of the deceased on 15th March 1993.

33. So, which of these assets is in the name of the deceased, and, therefore, available for distribution? I have found only 1 property registered in the name of the deceased, being the motor vehicle registration mark and number KAC 542W. The rest are in the names of other persons. House No. 89 Umoja Estate was acquired by the 1st widow in 1983, and that would make it her property. No evidence was led, to establish that she held it in trust for the deceased, or that it was registered in the name of the deceased, subsequent to that purchase transaction. Bukhayo/Mundika/1316 was registered in the name of the 1st widow in 1983. No evidence was adduced to demonstrate that that property was subsequently transferred to the name of the deceased. Again, that would mean that it is her property. Bukhayo/Mundika/9772 was registered in favour of the deceased in 2011, but was transferred to the 2nd widow in 2014. No evidence was led into the circumstances of that transfer, whether it was in transmission, or by way of gift from the deceased, or whether it was fraudulent. To the extent that no evidence of any kind was led to establish or challenge that registration, I shall deem it that that property belongs to her, until the contrary is established, for there is nothing on record to demonstrate that that registration was subsequently reversed. The same applies to Bukhayo/Mundika/10024, which is in the name of the 2nd widow since 2014. No effort was made to challenge that registration, and, so, I shall presume it to be her property, until the contrary is established. I have also not seen any proof that the registration has since been reversed. LR No. 2/241 Nairobi Gitanga Road is in the name of Hesbon Omondi. No proper challenge was mounted to his registration as such. The documentation on record supports my conclusions above on all these assets.
34. Let me say something about the hearing of a confirmation application. My understanding, of Rules 40(6)(8) and 41(1) of the Probate and Administration Rules, is that that application should be heard orally, viva voce. My usual practice is to take evidence from the parties on a confirmation application, unless the parties themselves prefer another mode. Viva voce evidence is the most effective way of bringing to the open all material relevant to determination of applications of this nature. Cross-examination is vital to digging up material that is not disclosed in the affidavits. It enables the unearthing of material hidden between the lines. See *In the Matter of Estate of Gerald Kuria Thiara Nakuru High Court Succession Cause Number 127 of 1995 (Lesiit, J)(unreported)*, *John Gitata Mwangi & 3 others vs. Jonathan Njuguna Mwangi & 4 others* [1999] eKLR (Akiwumi, Shah & Bosire, JJA) and *In re Estate of John Ngumba Njoroge (Deceased)* [2018] eKLR (J Ngugi, J). However, ever since the practice of written submissions gained currency in Kenya, parties have always opted for it, as the easy way out. Yes, it is easy. It enables a fairly faster disposal of matters. But, it often greatly disadvantages some parties. Written submissions should not apply to all cases. For some, it should be a complete no-go zone. Confirmation applications fall in that class. If these proceedings had been conducted viva voce, the gaps that I have discussed in paragraphs 32 and 33, hereabove, would have come out very clearly, in the course of the hearing. To me, written submissions are a lazy approach to litigation, and it is completely unhelpful, in complex cases such as this one. Indeed, they are a tool that a trial court should approach with circumspection, particularly where the norm is a formal hearing viva voce.
35. My predecessors in the matter, Kiarie and Karanjah JJ, had sensed that the parties needed to properly ascertain the assets of the estate before rushing to propose distribution. Ascertainment of assets is critical, to avoid the embarrassment of asking the court to distribute assets that do not belong to the



- estate; and the inconvenience of being turned away, at the lands office, while attempting to transmit property which the deceased did not own, or which did not vest in the administrators. Kiarie J addressed that issue in his ruling of 10th November 2019, when he directed the parties to compile a complete list of the assets of the estate. In the ruling of 24th February 2022, Karanjah J dismissed the first confirmation application, because it was premature, for the administrators were yet to properly identify or ascertain the assets of the estate, as they had failed to heed the direction, that Kiarie J was pointing them to, in the ruling of 10th November 2019. Apparently, the counsel from my predecessors was never taken, hence I am being asked to distribute assets that do not belong to the estate.
36. The protestor appears to entertain the notion that the probate court should order cancellation of transfers of property that she considers were irregular. The probate court may do so, but to a very limited extent. The best approach should be to initiate separate proceedings, in the spirit of Rule 41(3) of the Probate and Administration Rules, and a party need not wait for the court to cite Rule 41(3), in its ruling on a confirmation application, before taking the necessary action. See *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo, J) and *In re Estate of Eliud Kiarie Mutembei (Deceased)* [2019] eKLR (Achode, J). I say so with respect to the case of Hesbon Omondi. The issue around whether he properly and validly acquired LR No. 2/241 Nairobi Gitanga Road is not for determination in these proceedings. Whoever feels he did not acquire that property properly ought to challenge that in separate proceedings, at the land court, collect that asset, if at all it is an estate asset, bring it into the estate, and then propose it for distribution. See *Gichohi Mwangi vs. Simon Irungu Joshua* [2016] eKLR (Waweru, J), *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] (Musyoka, J), *In re Estate of Muthiani Mutule (Deceased)* [2017] eKLR (C Kariuki, J), *In re Estate of Alice Mumbua Mutua* [2017] eKLR (Musyoka, J), *Elizabeth Wanjiru Njonjo Rubia vs. Brian Mwaituria* [2019] eKLR (Ouko, Nambuye & Warsame, JJA,) and *Pacific Frontier Seas Ltd vs. Kyengo & another (Civil Appeal 32 of 2018)* [2022] KECA 396 (KLR) (M'Inoti, Mohammed & Kantai, JJA).
37. I do not think that it would be proper to pursue a criminal option, with respect to how Hesbon Omondi acquired ownership of LR No. 2/241 Nairobi Gitanga Road, before exhausting the options available through the civil process. Whether the right processes were followed, in getting registration of a property, is a matter best addressed in civil proceedings, and, should elements of criminality be exposed in the process, there would always be opportunity to pursue the criminal options thereafter, using the material gathered in the civil process as evidence. See *Jane Kanyi Kahara vs. Waweru Titi Michael* [2015] eKLR (Okong'o, J) and *In re Estate of Kenneth Njagi Josiah (Deceased)* [2021] eKLR (Njuguna, J).
38. I should say a little bit more about the assets that were registered in the name of the 2nd widow, in 2014, after the demise of the deceased. Such registration, on the face of it, would suggest intermeddling with the estate of a dead person, for it would appear that it was done after the deceased died, and before confirmation, for the grant made in 2014, to the 2nd widow alone, was never confirmed. However, there is the principle that, where the process of transfer had been initiated by the deceased, prior to his death, but was completed after his death, the deceased would be deemed as having intended to gift the said property to that beneficiary or person during lifetime, and the same ought to be treated as a gift that was made inter vivos. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya, J), *In re Estate of Phylis Muthoni M'Inoti (Deceased)* [2019] eKLR (Gikonyo, J), *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo, J) and *In re Estate of Kiplalang Kiplanduk* [2020] eKLR (HA Omondi, J).
39. It would then fall upon whoever claims that that was not a gift in that mould, to lead evidence to prove the contrary, particularly to establish that that process was, in fact, an act of intermeddling



with the estate of a dead person. Intermeddling has elements of criminality; hence the standard of proving it is on a scale higher than balance of probability. See *In re Estate of Kenneth Njagi Josiah (Deceased)* [2021] eKLR (Njuguna, J). Such is not for establishment in proceedings carried out through written submissions. It is only upon intermeddling being established that orders may be made for accountability and restoration of the property intermeddled with. See *In Re the Estate of David Wahinya Mathene (Deceased)* [2005] eKLR (Koome, J) and *In re Estate of Tsimango Akafwale (Deceased)* [2021] eKLR (Musyoka, J).

40. The final orders are as follows:

- a. That the administratrices have not ascertained the assets of the estate, except for motor vehicle registration mark and number KAC 542W, and that is the only asset that I shall distribute;
- b. That motor vehicle registration mark and number KAC 542W shall be sold, and the proceeds distributed equally between the 2 widows and the 4 children;
- c. That the certificate of confirmation of grant, issued on and dated 12th October 2022, shall be amended accordingly;
- d. That the administratrices are given 90 days, to properly ascertain the rest of the assets, compile the relevant documentation relating to them, and file relevant affidavits in court;
- e. That the parties, in compliance with (d), above, shall not file a fresh summons for confirmation of grant, for that dated 18th March 2023 has only been partially determined, but directions shall be taken, on a date to be appointed, on a hearing, *viva voce*, on the distribution of the rest of the assets, if need be, and on the matter of the alleged will;
- f. That this cause shall be mentioned on 26th February 2025, for compliance and further directions;
- g. That, for whatever it shall be worth, Hesbon Omondi, is hereby joined to these proceedings, but his intervention shall be limited to the aspect of the confirmation of LR No. 2/241 Nairobi Gitanga Road;
- h. That the interim order, for the preservation of LR No. 2/241 Nairobi Gitanga Road, shall remain in force, until other or further orders;
 - i. That each party shall bear its own costs; and
- j. That any party, aggrieved by these orders, has leave of 30 days, to file an appropriate appeal at the Court of Appeal.

41. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS *15TH DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Fwaya, instructed by Fwaya Masakhwe Were & Company, Advocates for the applicant.



Mrs. Oduor, instructed by Ochieng Onyango & Kibet, Advocates for the protestor.

Mr. Agutu, instructed by Agutu & Company, Advocates for Hesbon Omondi.

