In re Estate of Cheng'oli Chikamayi (Deceased) (Succession Cause 412 of 1998) [2023] KEHC 18059 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18059 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 412 OF 1998

WM MUSYOKA, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF CHENG'OLI CHIKAMAYI (DECEASED)

RULING

1. On 29th October 2021, I delivered a judgment herein, on a summons for revocation of grant, where I exercised discretion not to revoke the grant, even though there was sufficient cause for it, on account of non-involvement of the applicant in that application, Zablon Injendi. Instead, I set aside the orders that had been made on 27th April 1999, distributing the estate, and directed that a fresh application for confirmation of grant be filed, which should involve Zablon Injendi.

2. There was compliance, for the administratrix, Fronica Namukuyia Chegoli, filed an application for confirmation of grant. It is dated 20th April 2022. I shall refer to Fronica Namukuyia Chegoli as the applicant. In the affidavit, that she swore on 20th April 2022, she expresses that the deceased was survived by 4 children, all sons, described as Rasto Cheng'oli, James Cheng'oli Namasaka, Kilo Mbasu Cheng'oli and Paul Moi Cheng'oli. She has listed herself and Raphael Mukangai as dependants. The deceased is said to have died possessed of 1 asset, N. Kabras/Malava/1671. It is proposed to be distributed unevenly between herself, 3 of the sons, and 3 other individuals, so that she, the applicant and Kilo Mbasu Cheng'oli jointly gets 2.5 acres, Rasto Cheng'oli 3 acres and Paul Moi Cheng'oli 3 acres. The 3 other individuals given shares are Raphael Mukangai 2 acres, Robbinson Makokha Cheng'oli 1 acre and Anna Nanjala 3 acres. James Cheng'oli Namasaka is not allocated a share. There is a consent in Form 37, filed under Rule 40(8) of the *Probate and Administration Rules*, signed by Rasto Cheng'oli, James Cheng'oli Namasaka, Anna Nanjala Weswa, Paul Moi Cheng'oli and Robbinson Makokha Cheng'oli.

3. Rather than file an affidavit of protest, as required by Rule 40(6) of the *Probate and Administration Rules*, and as directed on 27th April 2022, Zablon Injendi filed his own summons for confirmation of grant, dated 5th July 2022. He is not one of the administrators of the estate, and, therefore, his summons was not properly on record, as section 71(1) of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 40(1) of the *Probate and Administration Rules*, envisage that a summons for confirmation of grant can only be filed by the holder of a grant of representation. The same ought to have been

struck out, but I opted to treat it as a protest to the proposals in the application, dated 21st April 2022, given that Zablon Injendi was a layman, acting for himself in these proceedings. Consequently, I shall hereafter refer to Zablon Injendi as the protestor.

4. In his protest, he avers that the deceased was his father, and the proprietor of N. Kabras/Malava/1671. He identifies the applicant as his stepmother, who he accuses of initiating these succession proceedings without involving him, and without filing a Chief's letter as required. He avers that the Malava Land Disputes Tribunal had awarded each of the survivors and beneficiaries of the estate their respective shares. He avers that the applicant took the share that was meant for him, having been gifted to him by the deceased, and gave it to strangers. He has attached copies of Malava Land Disputes Tribunal proceedings, conducted in 1999, where he was awarded 2.0 acres out of the land in dispute.

5. The proceedings were canvassed orally, as per the directions of 27th April 2022. The oral hearing was conducted on 18th October 2022.

6. The applicant was the first on the stand. She explained that she was the widow of the deceased, who had 5 wives, who she named as Chirande, Chasi, Alesa, Fronika and Nekesa. Chirande had 3 children, Muyekho, Ndombi and Nasoko/Nasong'o. Nasoko/Nasong'o was said to be alive, while the other 2 were said to have had died, and were survived by widows and children. She did not indicate the total number of children that Chasi had, save that she said that 2 of her children were still alive, Watora and Naliaka. She mentioned that the protestor was the other child. She explained that the rest died young. Alesa did not have children. Fronika was said to have had 3 children, 1 died and 2 were alive, being Rasto and Moi. Kilo died. Nekesa was said to have had children, several of who died, leaving 1 alive, known as Kundu, also known as Robbinson Makokha Cheng'oli. She did not give the names of those who died, but said that they had not been survived by widows nor children. She said that the deceased had inherited the wife of his brother who had died. She gave her name as Solome. The deceased and Solome begat the late James Cheng'oli Namasaka, whose wife was said to be Anna Nanjala Weswa.

7. She stated that the deceased had a farm and a shop. All the 5 wives were accommodated on that farm, and all the children lived there. Later some of the children sold portions of the land, bought land elsewhere and moved out. She stated that the protestor was 1 of them, he sold his land to Indangasi, and moved to Kitale. Kundu was the other. He sold his land to the late Raphael Mukangayi, and moved out to Nandi. She stated that the rest of the children, including Nasoko/ Nasong'o, Rasto, Moi, and the families of the late Muyekho and the late Ndombi, were also said to be in occupation of the land. Indangasi and the family of the late Raphael Mukangayi were also said to be in occupation.

8. During cross-examination, by the protestor, she stated that the deceased had shared out his land to his 6 sons, and had given them title deeds. Among those given title deeds were Muyekho, Ndombi, Injendi and Nasoko/Nasong'o, being sons of the senior wives. She testified that the younger sons were not given title deeds, nor numbers. The remains of the deceased were interred on the portion meant for Moi, where her house also stands. She testified that the protestor was given 8 acres by the deceased, and he sold portions of the land, leaving 2 acres. When cross-examined by Robbinson Cheng'oli, she stated that he and others had been given 3 acres, which he then sold, but she could not tell whether he sold 2 acres, nor that he was left with 1 acre. When cross-examined by Paul Moi, she said that he had been given 2 acres, and a number by the deceased.

9. The protestor testified next. On the composition of the family, his testimony mirrored that of the applicant. He stated that Nasong'o was alive, and had been settled by the deceased, and given a title deed, and was, therefore, not entitled to a share in the estate. Ndombi was dead, but had been survived by a family, which was not entitled to a share, as the deceased had settled him. He said that Muyekho had 2 wives. He had been settled by the deceased, and given a title deed, and, therefore, his family

was not entitled to a share on the land. He stated that 4 members of his mother's family were alive, 4 daughters and himself. He asserted that he was not given a title deed. He said that he was allocated 2 acres by the deceased, but when he came back from Kitale, he found that the applicant had encroached on that land. He said that it was not him who sold land to Indangasi, but the deceased, who also gave Indangasi a title deed. He said that the applicant had 3 sons and 4 or 5 daughters. He said the applicant gave Moi and Kilo the land that was supposed to be his. He said that the fifth wife, Nekesa, had 6 children out of which 4 were alive, being Kundu and 3 daughters. He stated that Kundu sold his land to Raphael Wanjala, and moved out, while his 3 sisters got married. He asserted that the remaining land was 14 acres, and should be shared out amongst 6 individuals, himself 2 acres, Rasto 3 acres, Kundu 2½ acres, Moi 2 acres, Kilo 2 acres and Namasaka 2½ acres. He said that he was not given his share, when Ndombi, Nasong'o and Muyekho were given land, and title deeds. He said that the younger sons were given 2 acres each, by elders, after the deceased died, except for Rasto who got 3 acres. He stated that Paul Moi was shown 2 acres, where he was to live with his mother, the applicant.

10. Robbinson Makokha Cheng'oli testified next. He described himself as a son of the deceased. He stated that he was given 3 acres by the deceased, and that he sold 2 acres to Raphael Mukangayi, leaving 1 acre. He stated that Raphael Mukangayi was utilizing all 3 acres. He stated that Ndombi, Benson Muyekho and Nasong'o were all given title deeds, and were not claiming a share in the estate. He asserts that the rest of the sons did not get their due share, but the deceased had given them the shares. He asserted that the distribution should follow the allocation, by the deceased, on the ground. He said that the protestor had been given his share, of 8 acres, at the time when Ndombi, Benson Muyekho and Nasong'o got theirs. That was after the 4 older sons were given theirs, saying that the protestor was the last to be given, but he could not tell whether he got a title deed for the same. He stated that the portion given to the protestor was occupied by other persons, who he identified as Peter Chekeni, Indangasi and Josephat. He said that he did not know how those individuals got into the land. He denied selling 3 acres to Ruth Opwoya and her husband.

11. Anna Weswa followed. She was the widow of James Namasaka Cheng'oli. She expressed support for the case presented by the applicant.

12. Ruth Nechesa Opwoya testified next. She stated that she was not a member of the family, but had an interest in that estate, on account of having bought land from Robbinson and Rasto. She stated that Robbinson sold 3 acres to her husband, while Rasto sold 1 acre to her, and, therefore, her claim from the estate was 4 acres. She said that she lived within the estate, on the portion sold to her by Robbinson. She said her husband was the late Raphael Mukangayi.

13. Paul Moi Cheng'oli was the last to testify. He said that the deceased had shown the younger sons, 6 of them, land in 1992. Those present were said to be Rasto, Robbinson, Kundu, Namasaka, Moi and Kilo. The land was shared out amongst 3 houses or wives, that is the houses of Nekesa, Fronika and Afuwa. The house of Nekesa had 1 son, Fronika 3 and Afuwa 1. Rasto was given 3 acres, Robbinson 3 acres, Kilo 3 acres and Namasaka 3 acres, and himself 3 acres. The deceased died 3 months thereafter, before he gave them title deeds. The protestor showed up after that. He stated that the deceased had told him that he had given 8 acres to the protestor, but not a title deed. He sold 6 acres of the land, leaving 2, and disappeared. The deceased then transferred the land sold to the buyer on behalf of the protestor. He said that it was the last 5 sons who did not have title deeds. He said that he lived with the deceased and the applicant on the portion allocated to him, and that when the deceased died, his remains were interred on that portion. After the protestor came back, he demanded land, the larger family sat and gave him 2 acres out of the 3 given to the witness, leaving him with 1. The applicant was aggrieved and the matter went to the elders, and escalated to the Tribunal.

14. The parties did not submit.

15. Confirmation of grant is provided for under section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Confirmation is of 2 items: appointment of administrators and distribution of the estate. The provision states as follows:

> "71. Confirmation of grants
>
> (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
>
> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
>
> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
>
> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
>
> (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
>
> (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:
>
> Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares."

16. On appointment of administrators, the relevant provision is section 71(2)(a)(b). The court may confirm the administrator to continue with his duties as such, or it may revoke the grant made to such administrator, if he was not properly appointed, or, upon his appointment, he did not administer the estate in accordance with the law, or he would not administer the estate in accordance with the law upon his confirmation. Upon such revocation, the court may appoint another administrator, and confirm his grant straightaway.

17. The administratrix herein was appointed in 1999. The protestor had brought an application for revocation of her grant, but I, in my judgment of 29th October 2021, refrained from revoking that grant, although it merited revocation, for the administratrix had not disclosed, when she sought representation, that the protestor was a child of the deceased. The deceased died in 1993, and the cause was initiated in 1998, and I thought that revoking the grant, and appointing other administrators, would set the parties way back. However, the evidence that emerged from the oral hearing of the confirmation application, revealed that the administratrix had concealed a lot more than what came out during the hearing of the revocation application. It emerged that the deceased had 5 wives, not 2 as was implied at the hearing of the revocation application. He had children with 4 of the wives. The children that the administratrix disclosed at the time she sought representation, and at the initial confirmation hearing, were just her own. She did not disclose the children of her co-wives. The impression created, at the hearing of the revocation application, was that, other than her own children, the protestor was the only other child of the deceased. It transpired that the deceased had other sons, about 5 of them, apart from the protestor and the sons of the administratrix. Some of the sons, not disclosed, are still alive, and some have died, but left behind widows and children. He had daughters too, with the 4 wives, including with the administratrix. The administratrix did not disclose any of the daughters, including her own.

18. The process of applying for confirmation of grant is governed by section 51 of the *Law of Succession Act* and Part III, of the *Probate and Administration Rules*, regardless of whether the deceased died before or after the Act came into force. The deceased died intestate, and section 51(2)(g) and Rule 7(1)(e), in Part III, of the *Probate and Administration Rules* apply. The 2 provisions set out the individuals that the person applying for representation should disclose. Both provisions are in mandatory terms. The disclosure should be of all the survivors of the deceased set out therein.

19. Section 51(2)(g) states:

> " 51. Application for grant
>
> (1) ...
>
> (2) An application shall include information as to -
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) ...
>
> (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
>
> (h) ...
>
> (i) ..."

20. The failure to disclose all the 5 houses of the deceased, made the proceedings to obtain the grant defective. I am more persuaded now, than when I handled the revocation application, that the administratrix herein should not be allowed to act alone, and should work in association with representatives from the other houses of the deceased, to ensure fairness and parity. That would be the only democratic way of handling the matter.

21. Was there justification for the non-disclosure? The applicant appeared to be of the persuasion that the deceased had distributed his property amongst his children from the other houses, and the remaining property was only available for her house. It could be that inter vivos, or lifetime, distribution had happened, but that is no justification for leaving anyone out. The estate herein is of the late Cheng'oli Chikamayi. Section 51 and Rule 7 require that all his children be disclosed, and if any of them are dead, their children ought to be disclosed. These are mandatory requirements. So, everyone who survived the deceased, as listed in section 51 and Rule 7, must be disclosed, whether or not they are going to get shares in the estate. The issue of who gets a share and who does not qualify to get a share are issues to be dealt with at confirmation of grant, and not when the grant is being applied for. Non-disclosure of survivors is criminalized under section 52 of the *Law of Succession Act*. Non-disclosure is a false statement, which tells a lie about who the survivors of the deceased are. The administratrix was a spouse of the deceased, she surely knew who the other spouses of the deceased were, and their children. The failure to disclose them must have been willful and reckless. It is an offence for which the administratrix could be prosecuted, and, if convicted, serve jail term for it or pay a fine. It is that serious. It is a fertile ground for revocation of a grant.

22. Section 52 of the *Law of Succession Act* says:

> " 52. Wilful and reckless statements in application for grant
>
> Any person who, in an application for representation, wilfully or recklessly makes a statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment."

23. I am particularly concerned about the nondisclosure of the daughters. From the oral narratives, the deceased had more daughters than sons, yet none of them were disclosed. The deceased herein died in 1993, after the *Law of Succession Act* had come into force on 1st July 1981. The *Law of Succession Act* is gender neutral. It ousted the application of customary law, by dint of section 2(1)(2). Reference to children in the Act means both male and female, sons and daughters, married and unmarried. All must be provided for. For those who are dead, section 41 applies, their children must be disclosed. The fact that they died did not extinguish their right to inherit, for their share should devolve to their children, by dint of section 41. See *Martin Munguti Mwonga v Damaris Katumbi Mutuku* [2016] eKLR (Thande, J) and *In re Lenah Wanjiku Gathuri (Deceased)* [2021] eKLR (Odero, J).

24. Section 2(1)(2) of the *Law of Succession Act* provides:

> " 2. Application of Act
>
> (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) 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."

25. Section 41 provides:

> " 41. Property devolving upon child to be held in trust
>
> Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

26. Tied up with what I have discussed above is the obligation under the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules*, to ascertain the persons beneficially entitled to a share in the estate of the deceased, and the shares due to them. The administrator should ascertain both the sons and the daughters of the deceased, and where dead, ascertain the individuals who survive them. The court has a duty to be satisfied that everyone has been ascertained. I am not satisfied that all the persons beneficially entitled, in this case, were ascertained and provided for, for the applicant did not disclose all the daughters of the deceased in her papers or filings, and for those that have since died, she has not ascertained and disclosed those who survived them. Full disclosure is what the law requires, and there is no shortcut. In *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)*, Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), it was stated that confirmation orders made where the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules* have not been complied with would be illegal. See also *In Re Njoroge Mbote* [2002] eKLR (Khamoni, J), *In re Estate of Gaitho Kimani (Deceased)* [2021] eKLR (Meoli, J) and *In Re Estate of Samson Amasini Adeya (Deceased)* [2022] KEHC 14839 (KLR)(Musyoka, J).

27. The proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules* state as follows:

> " Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares."
>
> "Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined"

28. Of more importance are the consequences that flow from that kind of treatment of daughters. The failure to properly ascertain the daughters of the deceased, or their successors and survivors, would render whatever orders that the court makes on distribution a nullity. The *Constitution* of Kenya, 2010, at Article 27, has outlawed discrimination based on gender, and declared that men and women are to

be treated equally in all spheres of life. Article 27 should be read together with Article 2(4). Article 2(4) declares any law, including customary law, which is inconsistent with the *Constitution*, null and void, to the extent of the inconsistency. A differential treatment of women, who include daughters, is inconsistent with Article 27 of the *Constitution*, and if it is done on the basis of customary law, it should be understood that such customary law is null and void. In any event, customary law is not even of application here, in view of section 2(1)(2) of the *Law of Succession Act*.

29. The second part of Article 2(4) is equally relevant. It states that any act done by any person, which contravenes or violates the *Constitution*, is a nullity. Discriminating against daughters of the deceased, merely because they are women, or because they are married, contravenes or violates Article 27 of the *Constitution*, and to that extent, and by virtue of Article 2(4), the said act is a nullity. In this case, the petition herein and the summons that I am determining, did not list any of the daughters of the deceased, as survivors of the deceased, yet the *Law of Succession Act* applies, and commands their disclosure. That act of filing papers in court, which discriminate against women, is an act which contravenes the *Constitution*, and the papers filed are nullities. Conducting proceedings based on such nullity will produce an order which will itself be a nullity. Consequently, as the petition and the summons herein are not constitutionally compliant, they are nullities. See *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 v Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).

30. The relevant portions of Articles 2 and 27 of the *Constitution* state as follows:

> " 2. Supremacy of this Constitution
>
> (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
>
> (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) ..."

31. So, what should be done? The nullity ought to be struck out. That sounds too drastic, but it is what one should get for contravening the *Constitution*. However, the applicant can still salvage the situation, by filing papers that comply with what the *Constitution* and the *Law of Succession Act* require. Let her file a further affidavit, where she should disclose the full family of the deceased. The number of wives that the deceased had married. The children that he had with such wives, whether the children are male or female, or sons or daughters, married or unmarried. Disclose all those male and female children of the deceased who have died, and disclose the individuals who have survived them. I believe that way the applicant will have brought her application within the requirements of the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules*, and Article 27 of the *Constitution*, to obviate striking out of the proceedings, under Article 2(4) of the *Constitution*.

32. Regarding the sale by Robbinson Makokha Cheng'oli of a portion of the estate asset, I shall take the hard position. The land in question did not belong to Robbinson Makokha Cheng'oli. It was estate property. It had not been distributed, whether inter vivos or in succession proceedings. Robbinson Makokha Cheng'oli held no title to it. He was not the administrator of the estate at the time he carried out the transaction. He did not have leave of court to sell. He had no authority to sell land belonging to a dead person. He had nothing to sell to whoever he allegedly sold it to, and the alleged buyer bought nothing from him. The property, in that asset, did not pass, and could not pass, to the buyer. The alleged sale was a nullity, and it amounted to intermeddling, under section 45 of the *Law of Succession Act*. Intermeddling is a criminal offence, and a transaction tainted with criminality cannot be basis for any form of legality or validity. See *Benson Mutuma Muriungi v CEO Kenya Police Sacco & another* [2016] eKLR (Gikonyo, J), *Gladys Nkirote M'Itunga v Julius Majau M'Itunga & 3 others* [2016] eKLR (Gikonyo, J) and *In re Estate of Tsimango Akafwale (Deceased)* [2021] eKLR (Musyoka, J). The alleged buyer did not deal with the estate, and he or she is not a creditor of the estate. He or she should look up to whoever sold the land to them for recompense, either by way of refund of the price money, or otherwise wait for the grant to be confirmed, and the property distributed, so that, upon transmission of the share to the person who sold to them, they can claim from them, not the estate, what that person purported to sell to them. This applies not only to the transactions between Robbinson Makokha Cheng'oli and those who claim from him, but to all family members who purported to sell a portion of the estate property.

33. Section 45 provides:

"45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under 0this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of

imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) ..."

34. Both sides claimed that the deceased made what are known as inter vivos or life time distributions, that is that he distributed his property to his sons before he died. I have not seen any evidence of that. One aspect of it is the claim that he gave out his land to his first 5 sons and transferred it to their names, and that got them title deeds in their names. It was argued that those sons or their successors have no claim to the estate in those circumstances. If it is true that that is what happened, then those would be proper cases of inter vivos or lifetime distributions, and those who benefitted from the same would not be entitled. However, no concrete evidence was presented to support those assertions. No title deeds in the names of the said 5 sons were presented to evidence that. No copies of green cards for those titles were presented to indicate when those registrations were done, and whether the deceased had anything to do with them. No certificates of official searches of the titles were presented. Indeed, the title or registration numbers of the properties allegedly given to the said 5 sons were not presented or disclosed. 1 of the sons was said to be alive, Nasoko or Nasong'o. He was not presented to confirm whether or not he benefitted from the alleged inter vivos transactions, and that he has no claim to the property that has been placed before me for distribution. The other 4 sons are dead, but they were survived by widows and children, none of their widows or children were presented to make similar confirmations. He who alleges must prove. There is no material that shows that those sons benefitted from prior or previous distributions by the deceased, and a distribution of the property herein, excluding them, would expose them to a risk of being disinherited, unless evidence is presented, to establish that in fact those alleged inter vivos distributions happened in their favour.

35. The other claim was that the deceased had also settled the remaining 5 sons, the younger ones, who were not old enough, or probably not even born, at the time the alleged inter vivos distributions were being done in favour of their older brothers. No concrete evidence was presented to establish that the deceased distributed the land to the 5 younger sons, as alleged. No minutes of the proceedings, when and where that happened, were presented. No testimony, from any elder or government official present at that event, was given. The evidence that came out was mixed up. Although it was asserted that the deceased shared out the property, there was also talk about elders of the clan distributing the property after the deceased died.

36. The protestor placed before me proceedings and an award of the Land Disputes Tribunal in his favour. The court can only reckon a decision of the Land Disputes Tribunal where the same was subsequently adopted by the court as its order. It is the adoption of the award of the Tribunal by the court that carries weight. If the said award was not adopted by a court, then it is not worth the piece of paper on which it is written, and it behooves the protestor to do more, in terms of placing on record an order of the court adopting that award.

37. I believe I have said enough to show that the grant herein is not ripe for confirmation. The pending application should only be disposed of after there has been full compliance with the relevant provisions of the *Law of Succession Act* and the *Constitution*. The confirmation application is hereby postponed, under section 71(2)(d) of the *Law of Succession Act*. The parties shall have to file further affidavits to address all the issues that I have discussed hereabove. A date for mention for compliance shall be given at the delivery of this ruling, and the remaining business shall be handled by my successors at Kakamega. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Fronika Namukuyia Chegoli, the applicant/administratrix, in person.

Zablon Injendi Cheng'oli, the protestor, in person.