



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Christopher Peti Okiya (Deceased) (Succession Cause
177A of 2011) [2023] KEHC 18057 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 177A OF 2011
WM MUSYOKA, J
JUNE 2, 2023**

RULING

1. What is for determination is a summons for confirmation of grant, dated 6th August 2015. It is brought at the instance of Julius Ambasu Petty. I shall refer to him as the applicant. He avers that the deceased died in 1986, and was survived by the applicant and James Malika Obeti. Fredrick Shisia Otieno, Shikwata Community Group and Wycliffe Akwabi Oronje are listed as dependants. He is said to have died possessed of Marama/Inaya/572. It is proposed that Marama/Inaya/572 be distributed as follows: Julius Ambasu Petty 0.5 HA, Fredrik Shiswa Otieno 0.1 HA, Wycliffe Akwabi Oronje 0.42 HA, Jared Malika Obeti 0.03 HA and Shikwata Community Group 0.07 HA. The application was filed contemporaneously with a Form 37, under Rule 40(8) of the Probate and Administration Rules.
2. An affidavit of protest was filed herein, on 2nd November 2015, by Fredrick Simbi Malika, sworn on even date. I shall refer to him as the protestor. He is a grandchild of the deceased, being a son of his son, the late Jared Nalika Obeti, who died on 14th August 2015. He describes Wycliffe Akwabi Oronje as a stranger to the estate, who is not entitled to benefit from it, as the sale agreement that he was relying on was a forgery. He states that his father had sold a portion of the land to Maranatha Faith Assembly. He describes the Shikwata Community Group as a stranger. He proposes distribution as follows: Julius Ambasu Petty 0.5 HA, Fredrick Simbi Malika 0.45 HA and Maranatha Faith Assembly 0.1 HA. He avers that Rose Achote Barasa is entitled to life interest in the portion meant for Fredrick Simbi Malika.
3. The applicant filed a further affidavit, sworn on 26th February 2016. He avers that his brother, Jared Nalika Obeti, had died, on 14th August 2015, before distribution of his estate. He explains that the late Jared had 2 wives, Beatrice Kharoya Malika and the late Rose Achote Barasa, and children, Truphosa Kuboka, Fredrick Simbi Malika and Julia Amimo.
4. The protestor swore another affidavit, on 14th October 2016, indicating that the deceased had died intestate, and his estate comprised of Marama/Inaya/572, measuring 5.18 HA.
5. The applicant filed another affidavit, on 8th December 2019, sworn on undisclosed date, in support of his application. It revises the distribution proposed earlier, so that he now proposes that Julius Ambasu Petty 0.5 HA, Fredrick Shisia Otieno 0.1 HA, Wycliffe Akwabi Oronje 0.34 HA, Jared Malika



- Obeti 0.03 HA and Shikwata Community Group 0.07 HA. This revision was informed by a surveyor's report, dated 24th July 2019, filed herein on 16th August 2019, which indicated that Marama/Inaya/572 measured 1.04 HA. He also filed a consent in Form 37, under Rule 40(8), executed by 4 of the 5 beneficiaries listed in the affidavit as such.
6. The protestor filed another affidavit on 25th January 2022, sworn on even date. He avers to be a son of the late Jared Nalika Peti. He states that the applicant had left out Emily Ayuma, a widow, and 2 daughters, Emily Shisia and Frida Omwaka. He states that they were left out of the distribution proposed. He expresses dissatisfaction with the 0.01 HA allocated to him, as he was claiming his father's entitlement, and once he got title deed, he would give his 2 sisters their share. He says that the applicant had allocated himself 0.5 HA compared with the 0.01 HA he has allocated to the estate of the late Jared Nalika Peti. He claims that the deceased had shared out his land equally, during his lifetime. He dismisses Wycliffe Akwabi Oronje as a stranger. He accuses the applicant of focusing on giving the land to buyers, rather than to the survivors of the deceased.
 7. Fredrick Shisia Otieno filed an affidavit on 17th May 2022, which he had sworn on 13th May 2022, in response to the affidavit of the protestor of 25th January 2022. He avers that he bought a portion of the estate property from the deceased, for Kshs. 80, 000.00, measuring 50 feet by 28 metres. The transaction happened on 17th March 2005, when the purchase price was paid, and an agreement signed. The deceased died before he could transfer the property to him. He asserts that he has lived on the subject land since then. He accuses the protestor of encroaching upon and interfering with his portion. He would like the court to grant him what he bought from the deceased. He has attached a handwritten sale agreement between the father of the protestor and F. Shisia, dated 16th March 2015. There is also an acknowledgement, of payment, note dated 5th January 2006.
 8. Another affidavit is by Wycliffe Akwabi Oronje, sworn on 13th May 2022, and filed on 17th May 2022. He says that he also bought land from Jared Malika Obeti, on 11th May 2013. The portion sold measured 1 acre, and was sold for Kshs. 380, 000.00. He states that the seller died before he could transfer the portion to him. He says that the protestor was not happy with what his father did, hence the claim that he did not buy a portion of the estate land. He asserts that he lawfully bought a portion of Marama/Inaya/572. He has attached a copy of a sale agreement, dated 13th May 2013, between himself and Jared Nalika Obeti, disposing of 1.04 acres, for Kshs. 380, 000.00.
 9. There is another affidavit by Joseph Omulama, sworn on 13th May 2022, and filed herein on 19th May 2022. He speaks on behalf of Shikwata Community Group, which, he claims, had also bought land from the father of the protestor in 2009. He explains that the church had already put up a structure on the land, hence the father of the protestor asked them to pay him for the portion the building occupied. They paid Kshs. 160, 000.00, and entered into a sale agreement with him. He avers that the church has been occupying the land uninterrupted ever since. He avers that the father of the protestor died before he could transfer the land to them. He has attached a copy of a handwritten document, dated 16th March 2015, as evidence of the alleged sale.
 10. The proceedings were canvassed orally, as per the directions given on 27th April 2022.
 11. On 8th November 2021, Fredrick Shiswa, Wycliffe Akwabi and Javan Onume stated that they had no objection to the proposals made in the application, dated 6th August 2015. It was disclosed that the deceased had 2 daughters, Frida Omwaka Betty and Mary Shisia Betty.
 12. Fredrick Shisia Otieno took to the witness stand on 29th May 2022. He stated that he bought a portion of the estate land. Joseph Omulama Ndavi also testified. He said that the Shikwata Community Group bought land for the church. He stated that they began to use the land in 2000, 2002 they put up a semi-



permanent structure, and 2009 a permanent structure. Wycliffe Akwabi Oronje testified on 20th April 2022. He stated that he also bought land from the deceased.

13. The protestor testified next. he stated that the deceased was his grandfather, who had 4 children, 2 sons and 2 daughters, Julius Ambasu Petty, the late Jared Nalika Obed, Frida Omwaka and Mary Shisia. He said that his grandmother, Emily Ayuma, was also alive, but was not brought into the matter. He objects to the portion allocated to his father, Jared Nalika Obed, saying it was not equivalent to what the applicant had allocated himself. He asserted that all 4 children and the widow of the deceased ought to have been considered. He contested the sales of land to Wycliffe, but indicated that he did not object to the claims by Julius, Fredrick Shisia and Shikwata Community. He said that the deceased had shared out the estate equally between his 2 sons, although he also conceded that he had no evidence of that. He said that his father was alive when the confirmation application was filed, but he did not protest, as he was not aware of the proposals.
14. Emily Ayuma followed. She was a widow of the deceased. She said that she had 4 children, Julius, Shisia, Frida and the late Jared. She said that the 2 sons were on the land, while the daughters were dead. She asserted that she had prior right to administration, and wanted to administer the estate, to distribute it among those entitled. She said she was aware of the space occupied by the church, and that is the space that the church should get. She said that she lived on Marama/Inaya/572. She said that she was unaware that the late Jared had sold land to persons other than the church.
15. The parties did not submit.
16. 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.”

17. 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.
18. The administrator herein was appointed in 2014. He is a son of the deceased. It has emerged that the deceased had 4 children. In the petition and the letter from the Chief, dated 18th February 2011, the applicant only disclosed 2 children, the sons, the 2 daughters of the deceased or their successors were not disclosed, the applicant disclosed purchasers instead. It has emerged, from the confirmation proceedings, that the widow of the deceased was also alive. She was not disclosed in the Chief’s letter, the petition and the confirmation application. It was the protestor who brought out the fact that she was in fact alive. He then produced her in court, and she testified, where she asserted that she was the one entitled to administer the estate and distribute the assets.
19. The deceased died in 1986, after the Law of Succession Act had come into operation in 1981. His estate is, therefore, for distribution in accordance with that law. The process of applying for a grant of representation 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.
20. 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) ...”

21. The failure to disclose the surviving widow of the deceased, and his 2 daughters or their survivors, made the proceedings to obtain the grant defective. It also meant that the applicant concealed matter from the court, distorted facts and exercised fraud. Certainly, the grant was not obtained properly on that account, and applying section 71(2)(a), the applicant ought not be confirmed.
22. Section 51 and Rule 7 require that all surviving spouses and children of the deceased 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 administrator was a son of the deceased, he knew that his mother had survived the deceased, and he knew that the deceased had 2 daughters, his sisters, and if they are dead, their children. The failure to disclose them must have been willful and reckless. It is an offence for which the administrator 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.
23. 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.”
24. The widow of the deceased has prior right or entitlement to administration, over the children. That is what section 66 says. Under Rules 7(7) and 26 of the Probate and Administration Rules, any other persons, where there is a surviving spouse, applying for representation, must obtain the consent of the surviving spouse, or her renunciation of her right to apply, or issue citations to her to take out letters. The applicant did not do that here. He did not cause citations to issue to his mother, the surviving spouse, calling upon her to either renounce probate or to apply for representation. He did not obtain her consent to go ahead and petition, despite not having prior right. He did not get her to renounce her right. He did not file an affidavit either, under Rule 26, to explain why he had to apply for representation, despite the prior right of the surviving spouse. Rules 7(7) and 26 are in mandatory terms. All these reinforce the fact that the applicant obtained representation, in this cause, through a faulty or defective process.
25. The relevant portions of section 66 and Rules 7(7) and 26 state as follows:

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

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

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



- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

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

- (a) renounced his right generally to apply for a grant; or
- (b) consented in writing to the making of the grant to the applicant; or
- (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

26. Grants of letters of administration

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
- (3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

26. The courts have given interpretation to section 66, to effect that it gives widows priority to administration over the children. See *Kimari and another vs. Kimari* [1988] KLR 587 (Platt, JA, Gicheru & Kwach, AJJA) and *In re Estate of Aggrey Makanga Wamira (Deceased)*[2000] eKLR (Waki, J). In this case, although the surviving spouse had prior right to administration over the applicant, she was not even disclosed or notified of the proceedings. The applicant treated her as if she did not exist or even count.

27. I am concerned about the non-disclosure of the surviving spouse and the daughters. The deceased herein died in 1986, 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 vs. Damaris Katumbi Mutuku* [2016] eKLR (Thande, J) and *In re Lenah Wanjiku Gathuri (Deceased)* [2021] eKLR (Odero, J).



28. 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.”

29. 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.”

30. Connected to 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 widows, 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 properly ascertained and provided for, for the applicant did not disclose the surviving spouse and the daughters of the deceased in his papers or filings. Full disclosure is what the law requires, and there is no shortcut. In *In the Matter of the Estate of Ephrahim Brian Kawai (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).

31. 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”

32. Of more importance are the consequences that flow from that kind of treatment of widows and daughters. The failure to properly ascertain the widows and daughters of the deceased, or their successors and survivors, would render whatever orders, 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 widows and 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*.
33. 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 widows and daughters of the deceased, merely because they are women, or because the daughters 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 and the surviving widow, 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 vs. Kimani & 3 others (Civil Appeal 36 of 2014)* [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).
34. 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) ...”

35. So, what should I do here? Ideally, the nullity ought to be struck out. That may sound draconian, but it is what one should get for contravening *the Constitution*. However, the situation has been salvaged by the protestor, who has filed papers that have made the necessary disclosures, that have brought the matter into compliance with what *the Constitution* and the *Law of Succession Act* require. As I now have a complete picture of who survived the deceased, in terms of spouses and children, or their successors or survivors, I am equipped to determine the confirmation application.

36. Regarding the sale by Jared Malika Obeti of a portion of the estate asset, I shall take the hard position. The land in question did not belong to Jared Malika Obeti. It was estate property. It had not been distributed, whether inter vivos or in succession proceedings. Jared Malika Obeti held no title to it. He was not the administrator of the estate at the time he carried out the transactions. 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 buyers. The alleged sales were nullities, and they 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 vs. CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J), Gladys Nkirote M’Itunga vs. Julius Majau M’Itunga & 3 others [2016] eKLR (Gikonyo, J) and In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J). The alleged buyers did not deal with the estate, and they are not creditors of the estate. They 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, and not from this estate.

37. 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 this 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) ...”

38. I need to point out that these proceedings relate to the estate of Christopher Petty Okiya, and not the estate of Jared Malika Obeti. The purchasers, who have been paraded in this case, bought no land from Christopher Petty Okiya. The material placed on record indicate that they purported to buy from Jared Malika Obeti. They have no claim against the estate of Christopher Petty Okiya. The estate of Christopher Petty Okiya does not owe them anything. Determining issues between them and the estate of Jared Malika Obeti would amount to conducting succession proceedings in the estate of Jared Malika Obeti within the estate of Christopher Petty Okiya, which is not acceptable. Let them wait for a succession cause to be mounted in the estate of Jared Malika Obeti, and pursue their claims there.
39. The deceased was survived by a spouse and children, and the estate falls, therefore, for distribution under section 35(1) of the *Law of Succession Act*. The estate shall devolve upon the widow, during lifetime, and thereafter to the 4 children of the deceased, upon determination of the life interest. Section 35(1) provides as follows:
- “35. Where intestate has left one surviving spouse and child or children
- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:
- Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”
40. The final orders are as follows:
- a. That I hereby revoke the grant made herein, on 14th May 2014, to Julius Ambasu Petty, and I appoint Emily Ayuma, Julius Ambasu Petty and Fredrick Simbi Malika administrators of the estate, and direct that letters of administration intestate be made to them;
- b. That I hereby confirm the grant that I have made in (a), above, so that Marama/Inaya/572 shall devolve upon Emily Ayuma, during life interest, and thereafter to Julius Ambasu Petty, Jared Malika Obeti, Mary Shisia and Frida Omwaka, in equal shares;
- c. That a certificate of confirmation of grant shall issue accordingly;
- d. That should any of the children of the deceased be dead, their share shall devolve upon their estate, to be distributed in proceedings mounted under their names;
- e. That Wycliffe Akwabi Oronje, Fredrick Shisia Otieno and Shikwata Community Group shall pursue their interests from the estate of Jared Malika Obeti;
- f. That each party shall bear their own costs; and
- g. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, appropriately.

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

WM MUSYOKA

JUDGE



Appearances

Julius Ambasu Petty, the applicant/administrator, in person.

Fredrick Simbi Malika, the protestor, in person.

Ms. Shibanda, instructed by VA Shibanda & Company, Advocates for Wycliffe Akwabi Oronje, Fredrick Shisia Otieno and Shikwata Community Group.

