



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 899 OF 2011**

**IN THE MATTER OF THE ESTATE OF CALEB OLUCHINA OPUKA (DECEASED)**

**RULING**

1. On 20<sup>th</sup> December 2019, I delivered a ruling herein where I dismissed an objection, dated 17<sup>th</sup> August 2017, and directed that a pending summons for confirmation of grant be set down for hearing, and that Jane Opuka be at liberty to file an affidavit of protest, limited to issues relating to distribution of assets. Further directions were given on 30<sup>th</sup> September 2020, for disposal of the summons by way of written submissions.

2. The summons for confirmation of grant is dated 15<sup>th</sup> September 2016. In the affidavit sworn in support of the application, the deceased is said to have died possessed of Isukha/Lubao/ xxxx and xxxx, and South Kabras/Shamberere/xxxx. The survivors of the deceased are not listed in the affidavit. The property is proposed to be distributed to Amina Sagina Abdalla, Filisi Owendi Ombima and Shirleyne Ongachi Opuka; so that Isukha/Lubao/ xxxx is devolved upon Amina Sagina Abdalla, Isukha/Lubao/xxxx is devolved upon Filisi Owendi Ombima, and Isukha/Lubao/ xxxx upon Shirleyne Ongachi Opuka. The summons is at the instance of Filisi Owendi Ombima, and I shall refer to her hereafter as the administratrix.

3. An objection to the summons for confirmation of grant was lodged herein, by Jane Opuka, on 18<sup>th</sup> August 2017, dated 17<sup>th</sup> August 2017, under section 68 of the Law of Succession Act, Cap 160, Laws of Kenya. The objection attracted a reply by way of an affidavit sworn on 3<sup>rd</sup> October 2017. It is the said objection that I dismissed by the ruling that I delivered on 20<sup>th</sup> December 2019, and it is, therefore, not available for consideration for the purpose of determination of the summons for confirmation of grant.

4. The proper response to the summons for confirmation of grant is an affidavit of protest, sworn on 3<sup>rd</sup> January 2020, by Jane Opuka. I shall refer to her hereafter as the protestor. She is a daughter of the deceased, and a stepdaughter of the administratrix. Her case is that the administratrix married the deceased 7 years after the demise of her mother, the first wife of the deceased, Grace Awinja Opuka. The administratrix and the deceased did not have children. She was said to have come into the marriage with a daughter, Doris Mandela, who was not a biological child of the deceased. Doris Mandela passed on, and was survived by a daughter known as Shirleyne Ongachi Opuka. She avers that she and her siblings had been visiting their mother's matrimonial home, which stands on Isukha/Lubao/xxxx, which they were taking care of until the administratrix restricted their access. According to her the administratrix and her granddaughter live in a shop-cum-residential house, on the same land, that the deceased had built for the administratrix. The deceased and Grace Awinja Opuka had 6 children, being the late John Wickliff Ambuso, Jane Opuka, Ruth Mildred Mabya, the late Charles Opuka, Rose Opuka and Edith Apisi. She avers that the deceased died possessed of the assets listed in the summons for confirmation, which he had acquired during the time he was a civil servant and when Grace Awinja Opuka ran a business at Kisumu town, and before the deceased married the administratrix. She avers that prior to his death the deceased had made a gift of 0.80 hectare out of Isukha/Lubao/xxxx to his daughters, Ruth Mildred Mabya, Edith Apisi, Jane Opuka and Rose Opuka, but he later sold the property, and the daughters were not given proceeds of the said sale. She also avers that Isukha/Lubao/ xxxx was also gifted to the late John Wickliff Ambuso, who died in 2007, and was survived by a widow and children, being Phoebe Ongachi, the late Christine Amimo and Dennis Buluku. She avers that the remains the late John Wickliff Ambuso were interred close to his house on Isukha/Lubao/ xxxx, and she could not understand how the land was subsequently sold to Amina Sagina Abdalla. She asserts that Isukha/Lubao/ xxxx and xxxx are registered in the name of the deceased, and should be subject to administration. She avers that South Kabras/Shamberere/xxxx is also registered in the name of the deceased. She asserts her claim to Isukha/Lubao/xxxx on the basis that that was where she was born and raised, and also where her parents and brother were buried. She avers that the proposed distribution was designed to disinherit her. She asserts that the estate ought to be shared between the 2 houses of the deceased, of the late Grace Awinja and the administratrix, taking into account the number of children in each house. She proposes that Isukha/Lubao/xxxx and South Kabras/Shamberere/xxxx be shared out between the surviving widow/administratrix and the four daughters, being the protestor, Ruth Mildred Mabya, Rose Opuka and Edith Apisi, equally. She proposes that Isukha/Lubao/ xxxx be devolved upon Dennis Buluku, a surviving son of the late John Wickliff Ambuso. She avers that Shirleyne Ongachi Opuka was a granddaughter of the administratrix, and that she was not entitled to a share in the intestate estate of the deceased. Charles Opuka is said to have had died in India without survivors.

5. There is also another affidavit, said to be in support of the protest, sworn by Edith Apisi, on 3<sup>rd</sup> January 2020. She complains that the children of the deceased from the first house were not provided for in the summons for confirmation of grant. She avers that the deceased did not acquire any other property after the demise of the first wife and during his marriage to the administratrix. She avers that in 2003, the

deceased had orally mentioned that she would make a gift of Isukha/Lubao/xxxx to Ruth Mildred Mabya, Rose Opuka and herself, but he later changed his mind and sold it to Amina Sagina Abdalla. She avers that the gift was never transferred to them during his lifetime, and she suggested that the same could be reverted to the estate. She avers that the late John Wickliff Ambuso married in the 1980s, and was gifted with Isukha/Lubao/ xxxx, where he put up a home, and after his death, he was buried there. She affirms that Isukha/Lubao/ xxxx and xxxx, and South Kabras/Shamberere/xxxx, were registered in the name of the deceased. She expresses dissatisfaction with the distribution proposed in the application.

6. Attached to those affidavits are copies of a certificate of marriage between the deceased and the administratrix, dated 7<sup>th</sup> December 2002; a certificate of death in respect of Grace Awinja Opuka, dated 22<sup>nd</sup> July 2011, certificates of official searches in respect of Isukha/Lubao/xxxx and South Kabras/Shamberere/xxxx, and a sale agreement in respect of Isukha/Lubao/xxxx between the deceased and Amina Sagina Abdalla, dated 24<sup>th</sup> July 2007.

7. There is a reply to the affidavit of protest, sworn on 12<sup>th</sup> September 2020, by Amina Sagina Abdalla. She avers to have had bought both Isukha/Lubao/ xxxx and xxxx from the deceased, on 30<sup>th</sup> October 2008 and 24<sup>th</sup> July 2007, respectively. He died before he could effect transfer to her name of Isukha/Lubao/ xxxx to her name, but having transferred Isukha/Lubao/xxxx to her name. she avers that the protestors and the other daughters of the deceased authorized their father to sell the land to her, and signed the sale agreements. She asserts that since Isukha/Lubao/xxxx is registered in her name, and she holds a title deed to it, it does not form part of the estate of the deceased. On the entitlement of Dennis Buluku, she states that his mother had sued the deceased over Isukha/Lubao/ xxxx, and the deceased stated in those proceedings that having sold that land, it was no longer available to the family, and he had acquired another parcel of land for the family of his late son. The land bought is identified as South Kabras/Shamberere/xxxx registered in the joint names of the administratrix, Phoebe Ongachi and Dennis Buluku. Although the affidavit in support was meant to be supported by annexures, none were attached to the copy filed in court.

8. The administratrix filed a further affidavit, sworn on 30<sup>th</sup> September 2020. She avers that Charles Opuka died young, without a wife or children; while John Wickliff Ambuso was survived by two children, the late Christine Amimo and Dennis Buluku. She states that before the deceased died, he had bought land for John Wickliff Ambuso's widow, Phoebe Ongachi and his son, Denis Buluku. The same was South Kabras/Shamberere/xxxx, which was hived off South Kabras/Shamberere/xxx, and registered in the names of the daughter-in-law and grandchild of the deceased. She avers that the daughters of the deceased had been given land *inter vivos*, which they sold to Amina Sagina Abdalla. She asserts that the daughters are not entitled to Isukha/Lubao/xxxx, since the same comprised of her matrimonial home. On Shirleyne Ongachi Opuka, she states that she was raised by the deceased since birth.

9. The documents attached to the affidavit of the administratrix include a copy of a handwritten sale agreement, in Kiswahili, between the deceased and Amina Sagina Abdallah, dated 24<sup>th</sup> July 2007, in respect of sale of Isukha/Lubao/xxxx. The agreement was signed by the deceased, Amina Sagina Abdalla, Edith Apisi, Abubakr Manyoa and Shaban O. Dianga. There is clause in the agreement which reads: "*Shamba linalouzwa ni la wasichana. Wasichana wa Mzee Opuka.*" The other document is an application to file appeal against a decision of the Land Disputes Tribunal, filed by the deceased, to challenge a decision that had awarded Isukha/Lubao/ xxxx to Phoebe Ongachi Omuhindi and her son. The other documents are the proceedings of the Tribunal in Land Claim No. 006 of B2009, where the Tribunal directed Phoebe Ongachi Omuhindi and her son to move out Isukha/Lubao/xxxx, as it had been sold to Amina Sagina Abdallah, and to move to Isukha/Lubao/ xxxx, and directed the deceased to surrender and transfer the title to that property to the two.

10. The protestor swore a further affidavit, on 10<sup>th</sup> November 2020. She avers that the deceased was a monogamist, who married another wife after her mother died, which resulted in the deceased having two households. She states that the matrimonial home for her mother, the late wife of the deceased, was on Isukha/Lubao/xxxx, to which they, as her children, are entitled. She states that their mother's house was being maintained by her sisters, because that was where her parents and her brother were buried. She asserts that the administratrix could not exercise life interest over property that ought to devolve to the children other than her own. She avers that there was no evidence that property was given to her and her sisters *inter vivos*. She says that she did not sign the sale agreement dated 24<sup>th</sup> July 2007, which purported to dispose of Isukha/Lubao/xxxx. She also avers that there was no evidence that Shirleyne Ongachi Opuka, granddaughter of the administratrix, was being maintained by the deceased during his lifetime. She contests the decision in Land Case No. 006 of 2009, which had awarded Isukha/Lubao/ xxxx to Phoebe Ongachi Omuhindi and her son, arguing that the said parcel of land had been sold to Amina Sagina Abdallah in 2008, and that the deceased could not order its transfer within four days before his death, and submits that it was not true that the deceased fell ill after that decision and was unable to have the property transferred to Amina Sagina Abdallah. She avers that the decisions of the Tribunal rendered the sale transaction dated 30<sup>th</sup> October 2008 on Isukha/Lubao/ xxxx null and void, by virtue of the decision that the said land be transferred to Phoebe Ongachi Omuhindi and her son. She avers that none of the family members had witnessed the sale of Isukha Lubao/ xxxx to Amina Sagina Abdallah. She asserts that Isukha/Lubao/ xxxx be given to Dennis Buluku, the grandson of the deceased.

11. The directions made on 30<sup>th</sup> September 2020, for disposal of the summons for confirmation of grant by way of written submissions, have been complied with, for both sides have filed detailed written submissions.

12. The protestor filed her written submissions first, on 30<sup>th</sup> November 2020, dated 27<sup>th</sup> November 2020. In those submissions she identifies the survivors of the deceased to be the surviving widow, who is also the administratrix; the protestor, who is also a daughter of the deceased, 3 other daughters of the deceased, being Ruth Mabya, Edith Apisi and Rose Opuka; and a daughter-in-law, the mother of the grandson known as Dennis Buluku. The deceased is said to have had died possessed of three parcels of land, being Isukha/Lubao/ xxxx and xxxx, and South Kabras/Shamberere/xxxx. She submits that the daughters of the deceased, and the grandson, had been excluded from benefit in the mode of distribution proposed; that Shirleyne Ongachi Opuka, a granddaughter of the administratrix is not an heir or dependant of the deceased; and Amina Sagina Abdalla is wrongly listed as a beneficiary. She submits to the extent that the deceased had two wives during his lifetime, section 40 of the Law of Succession Act applied, and she cites the decision in *In Re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR (Musyoka J), to support her case. She further submits that she and the other daughters of the deceased were left out of benefit, and that no gift *inter vivos* was ever made to them and cites *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 20(1), paragraph 67, and *In re Estate of the late Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), to support her case. The other argument that she makes is that she and her sisters were entitled to Isukha/Lubao/xxxx on account of it being their late mother's matrimonial home. Next

she submits on the status of Shirleyne Ongachi Opuka, arguing that she is not a child of the deceased, as she had come into the family with her mother, Doris Mandela, a daughter of the administratrix, when the administratrix married the deceased. It is argued that she was not dependent on the deceased, for she was raised by her own mother. She cites *In the Matter of the Estate of John Kitili & another vs. Muloka Kitili & another* [2017] eKLR (Nyamweya J) and *In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (Musyoka J), to support her case. The protestor argues that Isukha/Lubao/ xxxx was never sold to Amina Sagina Abdallah, for it had been gifted to the late son of the deceased in 1980, where he set up a home, lived with his family and was buried. She further submits that the sale agreement of 30<sup>th</sup> October 2008 was a trick orchestrated by the deceased and Amina Sagina Abdallah to have Phoebe Ongachi Omuhindi evicted from Isukha/Lubao/ xxxx after her husband died. She submits that the deceased never bought South Kabras/Chesero/xxxx for the late of the deceased, to compensate his family for the loss of Isukha/Lubao/ xxxx. She further argues that the decision of the Tribunal in Land Case No. 006 of B2009 rendered the sale agreement of 30<sup>th</sup> October 2008 a nullity, to the extent that it directed the deceased to transfer Isukha/Lubao/ xxxx to the names of Phoebe Ongachi Omuhindi and her son. She submits that South Kabras/Chesero/xxxx, purportedly bought for the late son of the deceased, was not part of the succession dispute, since the property was not registered in the name of the deceased, and that there was no evidence that the same was bought by the deceased, and given to the late son of the deceased. She concludes by submitting that the purported sale of Isukha/Lubao/ xxxx was done in bad faith, and was designed to evict Phoebe Ongachi Omuhindi and her son.

13. The written submissions by the administratrix were filed on 15<sup>th</sup> March 2021, and are of even date. She identifies the survivors of the deceased to be herself, as widow; 4 daughters, being Jane Opuka, Ruth Mildred Mabilia, Rose Opuka and Edith Apisi; a grandson, Dennis Buluku; and a step-granddaughter, Shirleyne Ongachi Opuka. She identifies the assets that the deceased died possessed of to include Isukha/Lubao/ xxxx, xxxx and xxxx, South Kabras/Chesero/xxxx and South Kabras/Shamberere/xxxx. She submits that Phoebe Ongachi Omuhindi and her son were not entitled to a share in the estate as the deceased had bought South Kabras/Chesero/xxxx for them, which was registered in the name of the deceased in trust for Phoebe Ongachi Omuhindi and her son. She also points at the proceedings in Land Case No. 006 of B2009 as providing a background to what she is stating. She avers that section 52 of the Law of Succession Act, Cap 160, Laws of Kenya, applies to the matter. Regarding Isukha/Lubao/xxxx, she avers that the same had been subject to a gift *inter vivos* to the daughters, who subsequently sold it to Amina Sagina Abdallah. She states that the deceased made an application for consent of the land control board to have the property transferred to the daughters as a gift, which transfer was approved, a transfer form was prepared, which was signed by all the daughters including the protestor, and stamp duty was assessed. She asserts that Isukha/Lubao/ xxxx was sold to Amina Sagina Abdallah, and she has pointed at the proceedings of the Tribunal as evidence. She asserts further that Isukha/Lubao/xxxx was her matrimonial home. On Shirleyne Ongachi Opuka, she submits that she is a step-granddaughter of the deceased, by dint of being the daughter of a stepdaughter of the deceased. She asserts that the said child was born during the lifetime of the deceased, and was maintained by him.

14. What is before me is a summons for confirmation of grant. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which provides as follows:

““Confirmation of Grants

71. Confirmation of grants

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

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

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

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

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

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

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

14. The principal purpose of confirmation is distribution of the assets. The proviso to section 71(2) requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate, and properly identified the shares due to them. The proviso is clear that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules, at Rule 40(4), which governs applications for confirmation of grant, as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of

*all persons entitled to the estate have been ascertained and determined.”*

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? As at the date the summons for confirmation of grant, dated 15<sup>th</sup> September 2016, was being mounted there was no compliance. In the affidavit sworn in support of the application, the administratrix did not identify the survivors of the deceased that he had ascertained for the purposes of confirmation. She did not, therefore, comply with the proviso to section 71(2) and Rule 40(4). Rule 40(8), which reinforces the other two provisions, by requiring that the persons ascertained sign a Form 37, which is a consent on distribution, was also not complied with. I say so because in both the affidavit and the consent in Form 37, the administratrix only listed herself, Amina Sagina Abdallah and Shirleyne Ongachi Opuka as beneficiaries, and, therefore, they were persons that she had ascertained as beneficially entitled to a share in the estate. From the filings in response to the application, it has come out that the deceased had 4 surviving daughters who were not disclosed in that application. He also had a grandson from one of his late sons, Dennis Buluku, who was not disclosed. One would wonder why they were left out at confirmation, given that the administratrix had listed them in Form 38, filed simultaneously with the petition, and in the petition itself. Having listed them in the petition as survivors of the deceased, it behooved the administratrix to explain, in her summons for confirmation of grant, why they should not be provided for out of the estate. The individuals left out of the confirmation application had been ascertained as survivors of the deceased as at the time representation was sought, and their omission at confirmation was, no doubt, glaring, hence the need to explain it. They were also listed in the letter from the Chief of Kambiri Location. It is curious that the administratrix only identifies and recognizes them as survivors and heirs after the protest to her proposals was raised.

16. So who are the rightful survivors of the deceased? It is common ground that the administratrix was the wife that the deceased, married after his first wife died. It is also common ground that the said first wife had 4 daughters, all whom are alive. She also had two sons. One died young, without survivors. The other died and left one child, Denis Buluku. So far as those are concerned there is no dispute. The dispute centres on only one person, Shirleyne Ongachi Opuka. The administratrix argues that she survived the deceased, as she was a child of her daughter, whom she had brought into her marriage with the deceased. She also argues that the grand daughter was born during her marriage with the deceased, and was dependent on the deceased. The protestor argues that granddaughter did not survive the deceased given that she was not his biological child nor grandchild, and was never dependent on the deceased.

17. I have seen a copy of a certificate of the marriage between the administratrix and the deceased, and noted that the marriage was celebrated on 7<sup>th</sup> December 2002, at the Amalemba Church of God. By then the first wife of the deceased had passed on, on 3<sup>rd</sup> February 1994. At the time of celebration of the said marriage, the deceased was 65 years old, and the administratrix 55. There is also a certificate of death for Doris Madera, the daughter of the deceased, who died on 2<sup>nd</sup> April 2008, at the age of 28 years. Her daughter, Shirleyne Ongachi was born on 28<sup>th</sup> March 1994. That would mean that as at the time the administratrix was marrying the deceased on 7<sup>th</sup> February 2002, her daughter, Doris Madera, was about 22 years old, as her age at the point of her death, on 2<sup>nd</sup> April 2008, is given as 28 years. She was not a minor then, and, therefore, the question of her being informally adopted by the deceased does not arise, for adoption is of minor children, human beings who are yet to attain the age of 18. Consequently, Shirleyne Ongachi could not have become a granddaughter of the deceased on account of the deceased having adopted her mother, Doris Madera, upon getting married to the administratrix. Doris Madera could not also claim to have become a child of the deceased by virtue of section 3(2) of the Law of Succession Act, as that provision, again applies only to minors, being individuals who are yet to celebrate their 18<sup>th</sup> birthday.

18. Could Shirleyne Ongachi have acquired a status with the deceased in her own right, by dint of how she might have related with the deceased prior to his death? I note that in these proceedings, Shirleyne Ongachi uses the name Opuka as her surname. That could suggest that she had adopted the name of the deceased, which could be indicative of the fact that she had been absorbed into the family of the deceased. I, however, note that when her mother died on 2<sup>nd</sup> April 2008, the death certificate issued did not bear the name of Opuka, for she was identified merely as Doris Madera. It is in the certificate of birth for her daughter, Shirleyne Ongachi, that she is identified as Doris Madera Opuka. Yet the said certificate of birth was obtained after her death. She died on 2<sup>nd</sup> April 2008, and the certificate of death was issued on 29<sup>th</sup> March 2010. It would mean, therefore, that, going by her death certificate, she had not adopted the Opuka name, after all, she was already an adult when the administratrix married the deceased, and she probably had already registered for her national identity card. The court takes judicial notice of the fact that certificates of death are issued against national identity cards, and the names borne in the certificates of death tally with those in the national identity card. It would appear that the Opuka name was being added to her name after her death, in order to lend credence to the argument that the deceased had adopted her child.

19. There was back and forth as to whether the deceased raised or maintained the said Shirleyne Ongachi. I have noted that the certificate of death for her mother indicates that she died on 2<sup>nd</sup> April 2008 at Buyangu, the same place that Shirleyne Ongachi was born on 28<sup>th</sup> March 1994. The mother died when she was 14 years of age. None of the parties have led evidence as to where she lived for those 14 years, whether at Buyangu or at Lubao. None of the parties led evidence as to who was staying with her prior to her mother's death. What is clear, though, is that she lived with the administratrix after her mother's death. Either way, she was child of tender years when her mother lived at Buyangu, and it may be presumed that she lived with her there. As to whether the deceased ever took her in as his child or grandchild, there is no evidence. Whether one has taken another in as their child is matter of evidence that the administratrix ought to have placed before the court, for it to evaluate whether or not to conclude that the deceased had taken her in as his child or grandchild in terms of section 3(2) of the Law of Succession Act. I am not persuaded that I have before me evidence that convinces me that the deceased herein had taken in the said child as his, whether as such or as a grandchild.

20. Parties addressed me at length on the matter of the dependency of the said child. One side argued that she had been dependent on the deceased, while the other argued that she was not. Section 29 was relied on to make that point, and decisions, like *In the Matter of the Estate of John Kitili & another vs. Muloka Kitili & another* [2017] eKLR (Nyamweya J) and *In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (Musyoka J), were cited to support that submission. This argument is totally needless. Section 29 of the Law of Succession Act is of no application whatsoever to the set facts before me. The application that I am considering for determination is a summons for confirmation of grant mounted on section 71 of the Law of Succession Act, and not a summons for reasonable provision under section 26 of the Act. Section 26 is housed in Part III of the Act, where a party moves the court asking for reasonable provision where they complain that they had not been adequately provided for under the will of the deceased or upon intestacy. Section 29 is also housed in Part III, and it defines the individuals who qualify to bring applications under section 26. As stated above, the application before me is premised on section 71, and not section 26, there is, therefore, no reason for me to turn to section 29 in my assessment of the material before me. The only logical connection between the summons under section 26 and that under section 71 is section 30 of the Act. Once a grant has been

confirmed, a summons under section 26 would be untenable, and where there is a pending summons under section 26, the court ought not dispose of a summons under section 71, for that under section 26 ought to be disposed of first. In any event, both can be disposed of simultaneously. To conclude his, let me say that there is no application before me premised on section 26, and, therefore, there would no benefit in citing section 29 to me for the purpose of a summons under section 71. A person can only be pronounced to be a dependant, as per section 29, upon an application properly mounted under 26, bringing out the facts envisaged under section 28 of the Act. Otherwise dragging section 29 into matters which have nothing to do with section 26 of the Act, is to get the court engaged in a wild goose chase.

21. The long and short of it is that Shirleyne Ongachi has not been proved to be a survivor of the deceased, to be entitled to a share in his intestate estate. So, for the purposes of the application before me, the survivors of the deceased are his widow, the administratrix herein; his 4 daughters; and his grandson, Dennis Buluku.

22. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. Shares are about the property being distributed. Before I look at the shares ascertained, it would be critical to consider whether the property forming part of the estate was properly ascertained, before shares were allotted to the survivors and heirs.

23. The assets listed in the petition as making up the estate of the deceased are Isukha/Lubao/ xxxx and xxxx, and South Kabras/Shamberere/1462. In the confirmation application, the administratrix listed Isukha/Lubao/ xxxx and xxxx, and South Kabras/Shamberere/xxxx as the assets available for distribution. In her written submissions, she adds to that list Isukha/Lubao/xxxx, South Kabras/Shamberere/xxxx and South Kabras/Chesero/xxxx. According to the protestor, the assets available for distribution are Isukha/Lubao xxxx and xxxx, and South Kabras/Shamberere/xxxx. Clearly, therefore, there is no concurrence on what is available for distribution. I shall, therefore, have to consider the assets being mentioned to assess which of them is available for distribution as an asset in the name of the deceased and which one is not.

24. Let me start with Isukha/Lubao/xxxx. It is common ground that this is an asset of the estate. The administratrix claims it as her matrimonial home, while the protestor claims it as the matrimonial home of her late mother. There is a certificate of official search, dated 26<sup>th</sup> August 2016, relating to Isukha/Lubao/xxxx, which depicts the registered proprietor as the administratrix in her capacity as such. The other property which undisputedly estate property is South Kabras/Shamberere/xxxx, registered in the name of the deceased on 2<sup>nd</sup> November 2011, following subdivision from South Kabras/Shamberere/1462. All the other assets are highly contested.

25. The material before me indicates that the deceased had intended to gift Isukha/Lubao/xxxx to his 4 daughters, that is to say Jane Nyakoa Opuka, Ruth Mildred Mabya, Rose Opuka and Edith Apisi. There is evidence to that effect, from a bundle of documents on record. On 15<sup>th</sup> September 2004, he made an application to the Ileho Land Control Board for consent to transfer the whole of Isukha/Lubao/xxxx to the 4 daughters as a gift. There is an endorsement on the face of that application, indicating that the same had been approved on 20<sup>th</sup> September 2004, by the Board. There is a copy of a letter of consent, dated 20<sup>th</sup> September 2004, from the Ileho Land Control Board, indicating that the Board had given its consent to the proposed transfer. The deceased then executed a transfer form, on 4<sup>th</sup> November 2004, together with his 4 daughters, of transfer of land in Form RL 1. Valuation was done on 12<sup>th</sup> November 2004, at Kshs. 300, 000.00. Stamp duty and registration fees were assessed on 16<sup>th</sup> November 2004. What I cannot tell is whether stamp duty was ever paid, and whether the transfer of land form was ever presented for registration of the land in the names of the 4 daughters.

26. There are documents that show that the deceased entered into a sale agreement with Amina Sagina Abdallah, disposing of Isukha/Lubao/xxxx. The handwritten agreement is dated 24<sup>th</sup> July 2007. The seller was the deceased, while the buyer was Amina Sagina Abdallah. Both signed the agreement, witnessed by Abubakr Manyoa and Shaban O. Dianga, and drawn by Swalleh D. Abdallah. There is an endorsement, in the middle of the document, saying: “*Shamba linalouzwa ni la wasichana. Wasichana wa Mzee Opuka.*” The same can directly be translated to say: “Farm being sold is of the girls. The girls of Mr. Opuka.” That would loosely translate to saying that the land being sold belonged to daughters of the deceased herein. The names of 3 of the daughters, against their national identity card numbers, and their purported signatures, appear in the middle of the document, just above the names of the witnesses. The 3 are Edith Apisi, Ruth Mabya and Rose Opuka Ayieko. An endorsement at the end of the document indicates that the purchaser, Amina Sagina Abdallah, completed paying the purchase price on 27<sup>th</sup> September 2007. The purchaser swore and filed an affidavit herein, claiming that she had obtained a title deed to the property. She did not, however, attach a copy of the said title deed, or a certificate of official search of the subject property as evidence that the same was transferred to and registered in her name.

27. As it is, I have nothing before me, which signifies whether the property was ever transferred to the name of Amina Sagina Abdallah, or that of the 4 daughters of the deceased, or whether it was still in the name of the deceased as at the date of his death. If it is in the name of the deceased, then it would form part of his estate, and available for distribution. Whether it would, at distribution, be devolved upon the 4 daughters of the deceased or Amina Sagina Abdallah would be a moot point that this court cannot determine. One, because it has no jurisdiction to determine questions of ownership of property, by dint of Articles 162(2) and 165(5) of the Constitution. Two, the dispute over who would be entitled to that property would not be ideal for determination within the context of the confirmation application, and it would be ideal, by dint of Rule 41(3) of the Probate and Administration Rules, to have a separate suit initiated in another court for determination of the question of who, between the two claimants, would be entitled to it. If, however, the property is registered in the names of either the 4 daughters or Amina Sagina Abdallah it would not be an asset in the estate of the deceased, it would not be available for distribution, and it should not before the court. However, if it is registered in the name of the 4 daughters, or there is evidence that it was a gift *inter vivos* in their favour, then, under section 42 of the Law of Succession Act, it would be of interest to the court at confirmation, in terms of taking it into account, in order to achieve fairness in distribution of the estate. As it I cannot decide, one way or the other, to whom it belongs in absence of registration documents or a certificate of official search.

28. There were arguments as to whether the said property was a gift *inter vivos* in favour of the 4 daughters. All indications, based on the paperwork on record, point to such a gift. What amounts to a gift *inter vivos* was addressed in *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015], eKLR(Nyamweya J), where the court defined it as a gift between living persons. For such gift to be effective, it must be granted by deed or an instrument in writing, or by delivery, or by way of declaration of trust by the donor, or by way of resulting trust or presumption of gift of land by registered transfer, or by a declaration of trust in writing. For such gift to be valid it must be complete. It was said, in *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J), that properties which the deceased gave to beneficiaries during

lifetime no longer formed part of his estate, so long as they were given and settled for the beneficiaries. The court stated that there ought to be evidence that the gifts were granted by deed, payment or execution of a transfer. On the facts of that case, the court held that the deceased had not given his estate to his sons during his lifetime. The evidence on record showed that he had applied for subdivision of his land, but never transferred the land to the sons, and, although he had pointed out on the ground where each of the sons could occupy the land, the property remained in his name. The court concluded that the land was, therefore, not gifted to the sons, and it remained the free estate of the deceased, available for distribution in intestacy.

29. In *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J), the court found that there was sufficient proof of a gift *inter vivos*, where the deceased had given possession of a piece of land to another, and signed a transfer form in his favour, but died before the transfer was registered. In *In re Estate of Muchai Gachuika (Deceased)* [2019] eKLR (Gikonyo J), it was established that the deceased had registered three assets in the names of some of his sons during his lifetime, and it was held that those gifts were complete and the assets in question did not form part of the estate of the deceased. It was said, in *In re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR (Gikonyo J), that a person claiming that the deceased had made a gift *inter vivos* to them, but the titles were not deduced during his lifetime, should show such conduct of the donor which would give the intended donee the right to enforce the gift. On the facts of that case, the court found no evidence of gifts *inter vivos*, for there were no consents to transfer the property, duly signed by the deceased, or any evidence that the subdivision of the land by the deceased was intended to benefit the persons claiming. The court further found that none of the alleged beneficiaries had claimed to have had been put in possession of the subject property by the deceased, nor to build or built on the subject property.

30. See also *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR (Nyakundi J), *William M'Arimi M'tuambae vs. Rosemary Karamuta for estate of George Gatimi* [2017] eKLR (Gikonyo J), *In re Estate of Monicah Wambui Nguthiru (Deceased)* [2020] eKLR (Ongeri J), *In re Estate of Osoro Motari (Deceased)* [2020] eKLR (Ougo J), *In re Estate of M'Raiji Kithiano (Deceased)* [2017] eKLR (Gikonyo J), *Evans Onguso & 2 others vs. Peter Mbuga & 4 others* [2020] eKLR (JM Mutungi J), *Margaret Mumbi Kihuto vs. Peter Ngure Kihuto & another* [2017] eKLR (Onyiego J), *In re Matabo Sabora (Deceased)* [2019] eKLR (Mrima J), *Naomi Wanjiru Njoroge & 2 others vs. Winston Benson Thiru* [2018] eKLR (Muigai J) and *In re Estate of Japhet M'tuamwari M'ikandi (Deceased)* [2019] eKLR (Gikonyo J).

31. Let me leave the issue at that, lest I prejudice the position of the parties, should they be minded to bring separate proceedings, by taking advantage of Rule 41(3) of the Probate and Administration Rules, to determine the contest on the ownership of the said asset.

32. The other contested property is Isukha/Lubao/ xxxx. The certificate of official search on record, dated 5<sup>th</sup> April 2012, indicates that the same was registered in the name of the deceased on 2<sup>nd</sup> June 2004. It is claimed by Phoebe Ongachi Omuhindi and her son, Dennis Buluku. She claims that the deceased had given it to her late husband, Jones Wycliffe Ambuso. She points at documents that the deceased signed on 15<sup>th</sup> November 2003, in a dispute between him and his son, Jones Wycliffe Ambuso, where he gave to him a share of Isukha/Lubao/1217, on the side where his late mother and brother were buried, and where the family house was. The certificate of official search indicates that Isukha/Lubao/ xxxx was indeed a subdivision from Isukha/Lubao/1217. It is claimed that her late husband was also buried on this piece of land. Isukha/Lubao/ xxxx is also claimed by Amina Sagina Abdallah. She asserts that she bought it on 30<sup>th</sup> October 2008. There is a handwritten sale agreement, of even date, signed by the deceased and Amina Sagina Abdallah, and witnessed by the administratrix and Shaban Akida Oder. It is for disposal of the entire Isukha/Lubao/ xxxx, and it is indicated that the entire purchase price was paid.

33. That dispute spilled over to the Ileho Land Disputes Tribunal, in Land Case No. 006 of B2009, pitting the deceased and the widow of his late son. The Tribunal found that the deceased had given a portion of land, to be hived off Isukha/Lubao/1217, to his late son, boundaries were marked and planted, the son took possession, and put up structures and settled, and as at the date of hearing, his widow was still in occupation of the land. The deceased then sold a portion of the land that he had given to his son to Amina Sagina Abdallah, who planted sugarcane on it. The deceased told the Tribunal that he had bought land elsewhere to settle the family of his late son. In the end, the Tribunal ordered the widow of the late son to move out of Isukha/Lubao/xxxx into Isukha/Lubao/ xxxx, to own and occupy, and directed the deceased to surrender and transfer the title in Isukha/Lubao/ xxxx to the name of the widow of his late son and her son.

34. The deceased was unhappy with that outcome, and lodged an appeal with the Provincial Land Dispute Appeals Committee at Kakamega, being Case No. 108 of 2010. The appeal was allowed, on 16<sup>th</sup> June 2011, by the Provincial Appeals Committees, which directed the widow and her son to another parcel of land that the deceased had allegedly purchased at a place called Ikoli, Kambiri, being Kabras/Chesero/xxx, for them, since their current residential land had been sold and was not available. It was ruled that Isukha/Lubao/ xxxx belonged to the deceased, pending transfer to Amina Sagina Abdallah. The deceased was ordered to transfer the portion of Kabras/Chesero/xxx that he had bought from Solomon Maikuba Sambaka to the widow of his late son and her son. The decision of the Ileho Land Disputes Tribunal was revoked. To that extent it is not clear if Isukha/Lubao/ xxxx is an asset of the estate, available for distribution, given the orders of the Provincial Appeals Committee

35. The portion that the deceased bought out of Kabras/Chesero/xxx, is what became South Kabras/Chesero/xxxx. The administratrix argues that this land was bought for the widow of the late son of the deceased and her child, and was registered in their names, and to that extent, the same did not form part of the estate of the deceased, and the two were not entitled to a share in the rest of the assets of the estate. The document placed on record on the ownership of South Kabras/Chesero/xxxx is a title deed, dated 10<sup>th</sup> September 2013. It shows that the property was registered on 5<sup>th</sup> September 2013 in the names of Filisi Owendi Ombima, Phoebe Ongachi and Dennis Buluku. To the extent that the said property is not registered in the name of the deceased would mean that the same is not available for distribution as part of the estate of the deceased, but it should be something to take note of, by dint of section 42 of the Law of Succession Act, to ensure a fair and equitable distribution of the estate. Of concern, though, would be why the name of the administratrix appears in the title deed, when the Provincial Appeals Tribunal had, in Case No. 108 of 2010, ordered the deceased to transfer the property to Phoebe Ongachi and Dennis Buluku. I have noted that in all her affidavits, where she mentions South Kabras/Chesero/xxxx, as a property meant for Phoebe Ongachi and Dennis Buluku, the administratrix does not care to mention that she is also registered as proprietor of the said property.

36. The other aspect of the proviso to section 71(2) and Rule 40(4) is with regard to distribution: the court must be satisfied as to the distribution proposed, in terms of being satisfied that the shares of all the persons beneficially entitled had been ascertained. I have said elsewhere that the administratrix had not properly ascertained, in her application, all the persons beneficially entitled to a share in the estate. She had left out the daughters of the deceased, and the widow and son of the late sons of the deceased. It is in her replies to the application

and her written submissions that she acknowledges that the daughters, the daughter-in-law and the nephew of the deceased were indeed survivors of the deceased. She did not provide for them, for the reasons that emerge with her filings.

37. With respect to the daughters, she takes the position that the deceased had made an *inter vivos* gift to them, of Isukha/Lubao/xxxx, which, according to her the daughters sold. I have discussed the issue of Isukha/Lubao/xxxx above, and concluded that it had all the hallmarks of a gift *inter vivos* to the 4 daughters, and to that extent the administratrix would be right in saying that it was not available for distribution, and the daughters got their share, by dint of section 42 of the Act, and should not benefit again at confirmation. The daughters do not contest the fact that the said property was meant to be a lifetime gift to them by the deceased, but they argue that the deceased subsequently sold it, and they did not benefit from the sale proceeds. One of them proposes that the said property be reverted to the estate. Although Amina Sagina Abdallah, the purported buyer of Isukha/Lubao/xxxx, claims that the same is registered in her name, she has not attached copy of a title deed or a recent certificate of official search in respect of the said property to support her contention.

38. As stated above, there are indications that the deceased intended to make a gift of Isukha/Lubao/xxxx to his daughters, and did everything that needed to be done to perfect the gift, including executing a transfer instrument. However, the parties have overwhelmingly averred that the said property was sold by the deceased to another person, and there are suggestions, without evidence, that the said property is in the name of the other. If the said property was indeed transferred to the name of the other, instead of that of the 4 daughters, issues would arise as to whether the gift *inter vivos* was effective. The administratrix avers that it was the daughters who sold the land to Amina Sagina Abdallah. If that was the case, then they disposed of property that the deceased had effectively gifted to them during his lifetime. The daughters argue that they did not sell the property, and that it was the deceased who sold it, and that they did not even benefit from the sale proceeds. If the latter is the case, then it would appear, although the deceased intended to gift the property to the daughters, and had done everything possible to actualize that intention, the gift failed, for he did not carry his intention through, by causing the transfer instrument to be registered in the names of the 4 daughters, so as to facilitate transfer of the property and its registration in their names. He defeated that intention when he sold the property to Amina Sagina Abdallah, before the same had been transferred to their names. Again, all this could be speculative, for there is no proof yet, before me, that the said property had been transferred to the name of the alleged buyer.

39. But who sold the property to Amina Sagina Abdallah? The sale agreement in question was exhibited to the affidavits of both Edith Apisi and the administratrix. The sale agreement was undoubtedly between the deceased and Amina Sagina Abdallah. The opening clauses of the agreement state as follows:

“MAPATANO YA KUUZA NA KUNUNUA SHAMBA NO ISUKHA/LUBAO/xxxx. (0.80) HA.

BWANA: Caleb Opuka Oluchina wa kitambulisho no 10272177, P.O Box 68 Lubao.

Amekubali kumuuzia

Bi Amina Sagina Abdallah wa kitambulisho no. 6971987

Shamba no Ishukha/Lubao/xxxx (0.80) HA

Mzee Opuka amekubali kuuza shamba hili kwa Sh. Eflu mia tatu na sabini Yani (Sh. 370, 000/=)

Tarehe ya leo (24 – 7 - 007) atapokea sh. (Three – hundred thousand.) Eflu mia tatu (300, 000) Pekee.

Zimebaki Eflu Sabini (Sh 70, 000/=)

Muzaji Mzee Caleb Opuka Oluchina

Sighn. \_\_\_\_\_

Mununuzi Amina Sagina Abdallah

Sign \_\_\_\_\_”

40. The parties did not provide an English translation of the same. In my understanding, the same says as follows, in English:

“AGREEMENT FOR SALE AND PURCHASE OF FARM NO ISUKHA/LUBAO/xxxx. (0.80) HA.

MISTER: Caleb Opuka Oluchina of identity card no. 10272177, P.O Box 68 Lubao.

Has agreed to sell to

Mrs. Amina Sagina Abdallah of national identity card no. 6971987

Farm no Ishukha/Lubao/xxxx (0.80) HA

Mzee Opuka has agreed to sell the farm for shillings three hundred and seventy That is (Sh. 370, 000/=)

Today (24 – 7 - 007) he will receive sh. (Three – hundred thousand.) Three hundred thousand (300, 000) Only.

The balance is seventy thousand (Sh 70, 000/=)

Seller Mzee Caleb Opuka Oluchina

Sighn. \_\_\_\_\_

Buyer Amina Sagina Abdallah

Sign \_\_\_\_\_”

41. My understanding of the above is that the person selling the land was the deceased, and, therefore, the transaction was between the deceased and Amina Sagina Abdallah. That is what the agreement says in plain language. It is not disclosed, at this stage, whether the property had been transferred to the daughters, after they and the deceased had executed the transfer instrument dated 4<sup>th</sup> November 2004. The fact that the deceased purported to sell the land would suggest that the same was still in his name, for he could not purport to sell what did not belong to him. But then there is this curious clause in the agreement, reading as follows:

*“Shamba linalouzwa ni la wasichana.*

*Wasichana wa Mzee Opuka*

(1) Edith Apisi id. 11472073

Sighn \_\_\_\_\_

(2) Ruth Mabya I.D. 14496178

Sighn. \_\_\_\_\_

(3) Rose Opuka Ayieko Id 9733598”

42. The Kiswahili portion above literally states that the land being sold belonged to the daughters, who then appended their signatures, at a portion in the middle of the document. Several issues arise from the above. Does it mean that, as at 24<sup>th</sup> July 2007, the property had been transferred to the names of the daughters, or was the agreement referring to the daughters as owners of the land merely on account of the transfer instrument that they had signed on 4<sup>th</sup> November 2004? Did they sign the agreement as sellers of the property? If they did not sign as sellers, were their signatures meant to signify their consent to the property being sold by the deceased? Was the deceased selling the property on their behalf? It may be difficult for me to give accurate answers to the questions above, without information as to the ownership status of the property currently, in terms of whether it is registered in the name of Amina Sagina Abdallah or the names of the 4 daughters. If it were in the names of the 4 daughters, as at the date of the sale, then it would suggest that the deceased was selling property that did not belong to him, and he needed the authority of its 4 owners before transacting. In this case, only 3 of the daughters signed on the agreement, the protestor did not. That would suggest that a sale which did not involve all 4 owners would not have been valid. It would not appear that the 3 daughters signed the agreement as sellers, for if that was the case, the transaction would have been stated to have been between them and Amina Sagina Abdallah. They do not appear to have signed on the agreement to give consent to their father to sell the land, for the agreement does not say so. They do not appear to have signed as witnesses either because their names do not appear in the clause where the witnesses appended their signatures. I cannot make any definitive conclusions about this affair until proof of the current status of ownership is availed. I cannot say for sure, at this stage, whether or not the daughters of the deceased are entitled to a share in the estate before that evidence is tabled. If the property is registered in the names of the daughters, it would mean that the lifetime gift materialized, and they probably would not be entitled to more from the estate. If it is registered in the name of Amina Sagina Abdallah, it would mean that the gift did not mature, for the deceased could not have been managed to transfer the property to the name for the buyer, if the property was not registered in his name, without involving the 4 daughters, in which case the 4 daughters would then have a strong case, for asserting a right to share in the rest of the assets.

43. The other consideration is with respect to Phoebe Ongachi and Dennis Buluku. The case by the administratrix is that these two also benefited from a lifetime gift from the deceased, being of South Kabras/Chesero/xxxx. She claims it is registered in their names. She appears to rely largely on the decision of the Provincial Appeals Committee, in Case No. 108 of 2010, which had ordered the deceased to give the parcel of land he had bought out of South Kabras/Chesero/xxx, which, upon being hived off, became South Kabras/Chesero/xxxx, to the two. The title deed in respect of South Kabras/Chesero/xxxx was issued on 10<sup>th</sup> September 2013, after the deceased had died in 2011. It is not clear whether it was the deceased who initiated its transfer or whether it was the administratrix. The registration happened after this cause had been initiated, and the administratrix appointed as such on 7<sup>th</sup> February 2012. I raise this because the administratrix appears in the registration with Phoebe Ongachi and Dennis Buluku as a co-owner of that property, and there is no indication that she is registered as such as an administratrix. It means that she co-owns the property equally with the two. That position is inconsistent with what she has been saying all through, that the deceased had settled Phoebe Ongachi and Dennis Buluku on South Kabras/Chesero/xxxx, without suggesting that she also had an interest in the property. She has not pleaded that the deceased allocated to her a portion in that land, and she has not sought to explain how her name came to be in the title document, given the decision of the Provincial Appeals Committee, in Case No. 108 of 2010, did not direct that she be given a portion of that land. If she genuinely believes that South Kabras/Chesero/xxxx was given to Phoebe Ongachi and Dennis Buluku by the Provincial Appeals Committee, in Case No. 108 of 2010, in line with the wishes of the deceased, and that the two should not, as a result share in the rest of the assets, then she should relinquish her alleged share in Kabras/Chesero/xxxx, before the court embarks on the distribution of the rest of the assets, as, it would appear, her name should not be in that title deed in the first place. It

may not be fair to the other parties for the administratrix to benefit from both Isukha/Lubao/xxxx and South Kabras/Chesero/xxxx. Even as I say these things, I am mindful of the fact that the parties have not placed before me any evidence that the decision of the Provincial Appeals Committee, in Case No. 108 of 2010, of 16<sup>th</sup> June 2011, was ever adopted by any court of law, as was required by the law creating that Committee, that is to say the Land Disputes Tribunals Act, Cap 303A, Laws of Kenya, now repealed. The force or effect of the said award, without the same having been adopted by a court of law, as an order of the court, is doubtful.

44. What about the share proposed for Shirleyne Ongachi? I have made a specific finding, here above, that she was not a child nor grandchild of the deceased. There is no evidence that the deceased ever adopted her, whether formally or informally, either way. She has not obtained a declaration, under section 26 of the Law of Succession Act, to the effect that she was a dependant of the deceased under section 29, and no court has made any provision for her, under section 26, in the manner of section 27, on the basis of the criteria set out in section 28. The application before me is not at all grounded on section 26 of the Act, to enable me make any reasonable provision for her out of the intestate estate of the deceased. Consequently, there cannot be any basis in law for her to be allotted a share in the intestate estate of the deceased herein.

45. On Amina Sagina Abdallah, the administratrix has allocated to her two assets: Isukha/Lubao/xxxx, which she allegedly bought from the deceased or the daughters of the deceased; and Isukha/Lubao/xxxx, which she also allegedly bought from the deceased. I have discussed Isukha/Lubao/xxxx extensively above, particularly with regard to the tussle between Amina Sagina Abdallah and the daughters of the deceased. I have concluded that as at this stage I have no material which points to the current ownership status of the said property. No ownership document was placed before me with respect to the summons for confirmation of the grant, and I have not stumbled on any such document in my very extensive and thorough perusal of the papers in the file before me. I cannot, therefore, tell, between Amina Sagina Abdallah and the 4 daughters of the deceased, who is entitled to it.

46. Regarding Isukha/Lubao/xxxx, Amina Sagina Abdallah and the administratrix claim that it was Amina Sagina Abdallah who was entitled to it, the same having been sold to her by the deceased. That is contested by the first house, who argue that the same had been gifted to the late son of the deceased, and the same ought not to be devolved to the widow and son of the late son of the deceased. Amina Sagina Abdallah relies on the proceedings in the Provincial Appeals Committee, in Case No. 108 of 2010, and in particular the decision of 16<sup>th</sup> June 2011 of the Appeals Committee, to assert that the two had been relocated to Kabras/Chesero/xxxx, so as to leave her as the person solely entitled to Isukha/Lubao/xxxx, and the deceased was to remain the registered owner of Isukha/Lubao/xxxx pending transfer to Amina Sagina Abdallah. The only challenge I have with the decision in the Provincial Appeals Committee Case No. 108 of 2010 of 16<sup>th</sup> June 2011, is that there is no evidence that it was ever made an order of the court, and, therefore, making its force and effectiveness questionable. I am alive to the fact that section 8(8) of the Land Disputes Tribunals Act makes an award of the Provincial Appeals Committee final, but such award or decision can only have a force of law from its adoption by a court as an order of the court, otherwise it would be unenforceable. Giving recognition to such an award, before it is adopted or made a decision of the court, is to ascribe to it a force of law, which it does not have. The administratrix, or Amina Sagina Abdallah, or both of them, should wrestle with that, and regularize it before I can go on to distribute that asset. Since the sale is contested by the daughters, the daughters could also take advantage of Rule 41(3) of the Probate and Administration Rules, to have the validity of that sale addressed in separate proceedings, limited to consideration of that sole issue, although I doubt whether that would be feasible, in view of the proceedings in the Ileho Land Disputes Tribunal Land Case No. 006 of B2009 and Provincial Appeals Committee Case No. 108 of 2010.

47. The last issue relates to the two uncontested assets, Isukha/Lubao/xxxx and South Kabras/Shamberere/xxxx. I will start by considering Isukha/Lubao/xxxx, which is contested by both the administratrix and the protestor. The administratrix asserts that she is the person entitled to Isukha/Lubao/xxxx exclusively given that it was matrimonial property as it comprised her matrimonial home. The daughters argue that Isukha/Lubao/xxxx was the matrimonial home for their mother, and the land where they were born and raised, and where their father, mother and brother were buried. The protestor says that the administratrix had a home on a shop-cum residential house on the same land. They propose that since the deceased had two houses, the said property be shared out between the two houses in terms of section 40 of the Law of Succession Act.

48. On the matter of matrimonial rights, it should be clear that the Law of Succession Act does not make it a consideration in distribution of the assets of a departed spouse. All what a surviving spouse is entitled to, by virtue of sections 35, 36 and 39 of the Law of Succession Act, is a life interest in the net intestate estate. I do note, however, that the courts are increasingly taking such rights into account. That has nothing to do with succession, but the law relating to division of matrimonial property. Since it is a matter about matrimonial rights to property, it may be worthwhile to consider the provisions of the Matrimonial Property Act, No. 49 of 2013 which would be relevant. Section 6 of that Act defines matrimonial property as the matrimonial home or homes, household and effects in such matrimonial home or homes, and any other property, whether movable or immovable, jointly owned and acquired during subsistence of the marriage. Section 5 provides that property acquired or inherited before marriage does not form part of matrimonial property. Section 7 provides that ownership of matrimonial property vests in the parties to the marriage according to their contribution towards acquisition, and the property should be divided between them upon divorce or dissolution of marriage. Section 8 provides for rights in polygamous situations. Section 93 of the Land Registration Act, No. 3 of 2012, is also relevant. It provides that where a spouse obtains land for the co-ownership or use of both spouses, there arises a presumption that the spouses hold the property as joint tenants and the land registrar ought to register them as such. The Matrimonial Property Act does not carry any provisions on what should be done with matrimonial property upon the death of either spouse, nor how matrimonial property rights are to be reckoned in succession proceedings.

49. In the instant case, Isukha/Lubao/xxxx was a creation from a subdivision of Isukha/Lubao/1217, a property that was registered in the name of the deceased. A green card was not exhibited to provide a historical background to the property, but the proceedings in the Ileho Land Disputed Tribunal Land Case No. 006 of B2009 and Provincial Appeals Committee Case No. 108 of 2010 are useful guides. The deceased told the tribunals that he subdivided Isukha/Lubao/1217, on 15<sup>th</sup> January 2002, to create Isukha/Lubao/xxxx, among others. The administratrix married into the family on 7<sup>th</sup> December 2002. Clearly, the property Isukha/Lubao/xxxx was acquired by the deceased before the administratrix came into the picture as his spouse. She could not have contributed to its acquisition, she has not claimed to have made such contribution, and she did not provide any proof of such contribution. The same cannot be matrimonial property in the context of the Matrimonial Property Act, on grounds of acquisition. She appears to anchor her claim to matrimonial rights to the property on the basis of occupation, that the deceased married her and settled her on the land, by establishing for her a home on the land. However, according to the Matrimonial Property Act, the right to such property is predicted on, not occupation, but ownership and acquisition. The administratrix has

not claimed to have acquired such rights on account of ownership or acquisition, but merely on account of marriage and occupation. It would appear that marriage and occupation of the property owned by the other spouse, do not, *per se*, guarantee any matrimonial property rights. There has to be ownership or acquisition or both. The only other pathway is through improvement and development of such property, by the spouse asserting such rights, where they do not own or did not contribute to acquisition of the subject property, by dint of section 9 of the Matrimonial Property Act. The administratrix has not led any evidence pointing to joint ownership of the property with the deceased, or having contributed to its acquisition, or having improved or developed it. I doubt whether she can assert any matrimonial rights to the property, and I am persuaded that her interest is limited to the life interest allocated to surviving spouses in intestacy under the Law of Succession Act.

50. As stated above, the courts are increasingly considering matrimonial property rights in probate proceedings at distribution. See *Elizabeth Wanjiru Njonjo vs. Brian Mwituria* [2019] eKLR (Ouko, Nambuye and Warsame JJA), *In re Estate of Nyoro Julia Nguhi Wanjiru (Deceased)* [2019] eKLR (Achode J) and *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J). I believe that this has something to do with enactment of legislation providing for matrimonial rights over the matrimonial home and property, in such legislation as the Matrimonial Property Act and the Land Registration Act. *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR (Nyakundi J), the court, relying on the Matrimonial Property Act, held that the surviving spouse was entitled to the portion of the land where the matrimonial home stood, and devolved the same to her during life interest, and devolved the rest of the land to the children, to be shared equally. In *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Machelule J), the issue of was raised, but the court declined to entertain it, on grounds that the widows had not claimed matrimonial rights, and none had been proved.

51. With respect to the daughters, they assert entitlement to a share in Isukha/Lubao/xxxx on various grounds. One, they argue that that property was the matrimonial property of their mother or she had a matrimonial home on it. Either way, I do not think any rights accrued to them. Firstly, the Law of Succession Act does not assign any such rights. Secondly, the rights under the Matrimonial Property Act accrue only to the persons who are party to the marriage, the spouses, and not the children. The right would be extinguished once the spouse died without asserting it. Thirdly, even if they accrued to the children or survived the spouses, the children would need to obtain representation to the estate of the relevant parent before they can assert the right accruing to that departed parent. Two, they assert entitlement to Isukha/Lubao/xxxx on account of having been born and raised on the land, and on account of their parents and siblings being buried on the land. I am not aware of the provisions of law which grant inheritance rights to anyone on account of the above, and none have been pointed out to me. The factors mentioned only establish an emotional or sentimental attachment to the land, and do not provide a legal foundation for asserting any inheritance rights to such property. They can be considered by the court at distribution, but the court is not bound by them.

52. In the end, it is my finding, with respect to Isukha/Lubao/xxxx, that the same is estate property which should be available for distribution to the survivors of the deceased, subject to all the other issues that I have addressed in the body of this ruling. Whether the administratrix or the daughters are entitled to shares in this property will depend on whether the administratrix remains a co-proprietor of South Kabras/Chesero/xxxx, and for the daughters, on the proprietorship of Isukha/Lubao/xxxx according to the current registration status with the lands authorities, and also Isukha/Lubao/xxxx.

53. With regard to South Kabras/Shamberere/xxxx, there is no contest at all over this property. It was registered in the name of the deceased on 1<sup>st</sup> February 2011, being a subdivision from South Kabras/Shamberere/1462. The parties have not deposed much about the property, and there is no history of it in the documents lodged on record. Its distribution should, therefore, be to all entitled, subject to the sorting out of the issues relating to South Kabras/Chesero/xxxx and Isukha/Lubao/xxxx.

54. The orders I feel constrained to make, in the circumstances, are:

- (a) That, since the deceased left two households, both houses ought to be represented in the administration of the estate;**
- (b) That, as a consequence of (a), above, I do hereby appoint Jane Nyakoa Opuka, as administratrix, to co-administer the estate with Filisi Owendi Ombima, and a grant of letters of administration intestate shall issue to them;**
- (c) That I find that there are several issues that need sorting out, with regard to the assets, especially Isukha/Lubao/xxxx and xxxx, and South Kabras/Chesero/xxxx, and, therefore, I shall not distribute any of the assets of the estate, to allow the new administratrices to address all the issues that I have raised in the body of the ruling, concerning all the assets that have been disclosed before me, relevant to these proceedings, whether registered in the name of the deceased or not;**
- (d) That ascertainment of the persons beneficially entitled to a share in the estate of the deceased, whether as survivors or creditors, can only be properly done after the issues referred to in (c), above, are addressed;**
- (e) That the estate shall be distributed only after all these issues have been fully addressed, and, where necessary, regularized or perfected, and, therefore, the summons for confirmation, dated 15<sup>th</sup> September 2015, is hereby postponed;**
- (f) That new administratrices have leave to file further affidavits, whether jointly or severally, to depose on the outcome of whatever they will have done on the said issues;**
- (g) That the matter shall be mentioned, in the new term, for compliance;**
- (h) That each party shall bear their own costs; and**
- (i) That any party aggrieved by the orders made above or the decision reached in the body of the ruling, has leave of 28 days, to move the Court of Appeal, appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2<sup>nd</sup> DAY OF July 2021**

**W. MUSYOKA**

**JUDGE**