



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 356 OF 2015

IN THE MATTER OF THE ESTATE OF JOSEPH MAPESA NAKUKU (DECEASED)

JUDGMENT

1. On 15th August 2019 I delivered a ruling herein, where I revoked a previous grant, set aside confirmation orders and cancelled certificate of confirmation of grant, annulled transactions carried out on the basis of the said confirmation orders, appointed new administrators and directed them to file for confirmation of their grant.
2. In compliance with the directions of 15th August 2019, that the new administrators file a summons for confirmation of their grant, Hezron Kaunda Mapesa did file such a summons, dated 28th November 2019, filed herein on even date. I shall refer to Hezron Kaunda Mapesa as the applicant. He lists 21 individuals as the survivors of the deceased. Out of the 21, 5 are identified as sons, the rest are not. The sons are said to be Abisai Mapesa, Elifasi Amachaba Mukanambo, Japheth Moi, Moses Juma and Isaya Odongo. Those whose relationship with the deceased is not defined are Christine Vakhoya, Leunidah Machani Manyasah, Wilfroda Nyakoa Mapesa, Winfred Ayieko Achesa, Hezron Kaunda Mapesa, Jesca Nyakoa, Hellen Ayuma Nyongesa, Bernard Khasakhalia, Baslita Kharoya, Mary Atemba, Lucy Mapesa, Penina Marenya, Protus Luseno, Dora Nasenya, Emelita Sukuta Soita and Salome Murunga Indeche. The deceased is said to have died possessed of 2 parcels of land being Butsotso/Ingotse/556 and 1110.
3. There is no proposal on distribution in the affidavit sworn in support of the application, instead the distribution same is carried in a consent on distribution, filed simultaneously with the summons. The consent purports to distribute the estate amongst 4 houses of the deceased, yet the affidavit does not refer to any houses of the deceased, and it makes no mention of who makes up the alleged 4 houses of the deceased. The consent is also signed by 8 out of the 21 individuals purported in the affidavit to have had survived the deceased. Those who are purported to have executed the consent are Abisai Mapesa, Elifasi Amachaba Mukanambo, Hezron Kaunda Mapesa, Jesca Nyakoa, Dora Nasenya, Emelita Skuta Soita, Erinola Makwali Nyapola (purchaser) and Bernard Khasakhalia. Butsotso/Ingotse/556 is shared out equally between the 1st, 2nd and 4th houses of the deceased. The 1st house is allocated 4.6 acres, to be shared equally between Abisai Mapesa, Elifasi Amachaba Mukanambo, Moses Juma and Isaya Odongo. The following individuals, who appear to be from that house, are allocated nothing, that is to say, the late Christine Vakhoya, Leunidah Machani Manyasah, Wilbroda Nyakoa Mapesa and Winfred Ayieko Achesa. The 2nd house is also allocated 4.6 acres, which is given wholly to Hezron Kaunda Mapesa. Jesca Nyakoa and Hellen Ayuma Nyongesa, who appear to be from that house, get nothing. The 4th house is also allocated 4.6 acres, which is devolved wholly upon Bernard Khasakhalia. The late Baslita Haroya, the late Mary Atemba, Lucy Mapesa and Penina Marenya, who appear to be from that house get nothing.
4. The summons for confirmation of grant elicited an affidavit of protest, from Protus Luseno Mapesa, sworn on 3rd February 2020, and filed herein on even date. I shall refer to Protus Luseno Mapesa as the protestor. He avers that the deceased had 4 wives, being Rael Barasa, Agneta Khalakwa, Rebeca Mungoni and Berneta Khatondi. He further avers that the deceased had 24 children with the 4 wives. The children of Rael Barasa are the late Charles Okutoyi, Adriano Imbiakha, Michael Kanambo, the late Christine Vakhoya, Wilbroda Nyakoa, Wilfreda Ayieko and Leonida Magoni. The children of Agneta Khalakwa are Hellen Ayuma, Veronica and Hezron Kaunda. The children from the house of Rebeca Mungoni are the late Baslita Khavoya, Lucy Mapesa, Belina Opare, Bernard Khasakala, the late Julius Musungu and the late Mary Atemba. The children of Berneta Khatondi are the late John Machoni, the late Peter Amalemba, Dora Nasenya, Imelda Sakuta, Portus Luseno, the late Dwen Bulimo, the late David Okore and Salome Murunga. He avers that the deceased died possessed of 2 parcels of land, being Butsotso/Ingotse/556 and 1110. He further avers that the 2 parcels had been subdivided amongst the houses, to each wife and her children. He states that the deceased had bought a parcel of land, whose details are not disclosed, which had not yet been transferred to his name as at the date of his death. He further avers that Butsotso/Ingotse/556 as shared out between the houses of Agneta, Berneta and Rael, with Berneta getting a larger share because her house had not benefited from previous distributions. He avers that that sharing of Butsotso/Ingotse/556 happened in 1997, and the families had been living on the allocations that were made to them then. He mentions that there were sons who benefited from *inter vivos* transfers to their names, being Adriano Imbiakha of Butsotso/Indangalasia/416 and 417, Charles Okutoyi of Butsotso/Ingotse/552 and Bernard Khasakala of Butsotso/Indangalasia/415. He explains that Butsotso/Indangalasia/415 was subdivided into Butsotso/Indangalasia/4733 and 4734, to facilitate payment of compensation to Wilfrida Ayieko, that Bernard Khasakala had wronged.
5. The protestor has attached several documents to his affidavit. There is an official search certificate for Butsotso/Ingotse/556, which indicates that that property was registered in the name of the deceased on 7th October 1968. The certificate of official search for Butsotso/Ingotse/1110, dated 25th July 2016, does not indicate its proprietor, but it shows that it was a subdivision of Butsotso/Ingotse/569. It was subdivided in 2004 into Butsotso/Ingotse/2468, 2469 and 2470, which were registered in favour of Bernard M. Khasakhala Mapesa,

Kanoti Makale Mutuli and Erastus Apeniko Aseka. The title for Butsotso/Ingotse/1110 was closed thereafter. The certificate of official search for Butsotso/Indangalasia/416 shows that it was registered in the name of Adriano Imbiakha Mapesa on 13th August 1970. The certificate of official search for Butsotso/Indangalasia/417 shows that it was subdivided into Butsotso/Indangalasia/4733 and 4734, on 12th November 2007, and the title was closed. The certificate of official search for Butsotso/Ingotse/552 was registered in the name of Okutoyi Mapesa on 7th October 1970. The certificate of official search for Butsotso/Indangalasia/415 was registered in the name of Vincent Wanga Nandukule on 8th May 2018, but these details do not appear to be accurate, for the event of 8th May 2018 appears to be a transfer of number 2828 Kakamega. It would appear that Butsotso/Indangalasia/415 may have been subdivided, and no longer exists as such.

6. I usually do not narrate the contents of witness statements, because these are documents that are not on oath, and whose contents are intended to be breathed life into at an oral hearing. They are not meant to consumption by the court, but are supposed to disclose the testimony that the witnesses intended to be called are expected to give, so that the other parties are not taken by surprise. No directions were ever taken for filing of witness statements in this case. No witness statements were necessary, given that the principal actors had already filed affidavits, and what should have done, should any of them have felt the need to respond to any affidavits, was to file a further or supplementary affidavits. I have read through the witness statements filed herein, and it is clear to me that they are not witness statements in the proper sense, but responses to the affidavits filed by the other sides. Parties ought to distinguish between the purpose and import of affidavits and that of witness statements. A witness statement ought not be filed to respond to averments made in an affidavit. I shall narrate the same, that notwithstanding, as I would like to dispose of this matter once and for all.

7. I am more interested in the witness statement by the applicant, as it appears to be a response to the affidavit in protest. He gives details of the family of the deceased, which he ought to have given in his affidavit in support of the application. He confirms that the deceased had the 4 wives mentioned in the protest, and had 24 children with them, and that he owned the assets mentioned in the protest, being Butsotso/Ingotse/552, 556 and 1110, and Butsotso/Indangalasia/416 and 417. He also concedes that after land adjudication Butsotso/Ingotse/552 was registered directly in the name of Charles Okutoyi Mapesa; and Butsotso/Indangalasia/416 and 417 were registered in the name of Adriano Imbiakha Mapesa. He states that Butsotso/Indangalasia/417 was subsequently subdivided into Butsotso/Indangalasia/4733 and 4734. Charles Okutoyi Mapesa and Adriano Imbiakha Mapesa got 4 acres each from these *inter vivos* transfers or registrations. He concedes too that the deceased died before he had distributed Butsotso/Ingotse/556 and 1110. According to him, the rest of the family occupied the 2 parcels of land as follows: Butsotso/Ingotse/556 (14 acres), the families of Agneta, Berneta and Rael; and Butsotso/Ingotse/1110 (4 acres), the family of Rebecca Mungoni. He avers that the deceased had not purchased any other property prior to his death which was not within their knowledge.

8. Some survivors attended court and orally expressed their views on the distribution proposed, that is to say Abisai Mapesa, Elifas Amachaba, Jesca Nyakoa, Imelita Sukuta, Dora Nasenya and Bernard Khasakala. They all supported the proposals made by the applicant.

9. As there was an affidavit of protest on record, the matter went for full hearing, where oral evidence was recorded. The hearing happened on 5th November 2020, with the protestor being the first to take to the witness stand. He stated that the only asset in dispute was Butsotso/Ingotse/556, which he said had been given to 3 of the deceased's wives, that is to say Rael Barasa, Agneta Akhakwa and Berneta Khatondi. He said that there were boundary marks on the ground. He stated that Berneta Khatondi had gotten a larger piece of land compared with the rest. He said that the portions given to Rael Barasa and Agneta Akhakwa were equal. He explained that the 2 had gotten land elsewhere through their sons, but the house of Berneta Khatondi had not benefited from such lifetime distribution. He said that the house of Rael Barasa had benefited through Charles Okutoyi, who was given Butsotso/Ingotse/ 552. Hezron was said to have had gotten 4 acres of the land belonging to Japheth Akhoya Mukoya, while Adriano Mukhoya got Butsotso/Indangalasia/416 and 417. Bernard Khasakhala got Butsotso/Indangalasia/ 415. He said that the deceased had 4 wives, being Rael Barasa, Agneta Akhakwa, Rebecca Mungondu and Berneta Khatondi. He proposed that the distribution of Butsotso/Ingotse/556 ought to be the way the deceased left it.

10. On cross-examination, he stated that the division of Butsotso/Ingotse/556, was not done in 1997, for the deceased died in 1988. He said that the deceased did not have 5 sons and 16 daughters. He asserted that the parcels in dispute were numbers Butsotso/Ingotse/556 and 1110. He stated that he did not support equal distribution. He also stated that he did not agree that Butsotso/Ingotse/556 be shared only between the 1st, 2nd and 4th houses, although he had no problem with Butsotso/Ingotse/1110 being given to the 3rd house. He also stated that the estate ought to be shared out as proposed by the sons in the 1st house. He said that he had no opposition to the proposals by the 2nd house, adding that he was from the 4th house. He stated that he did not support equal distribution of Butsotso/Ingotse/556. He said that Dora Nasenya, Emelita Asikuta Soita and Salome Murunga were his sisters, who were entitled to get a share in the estate, which he said was 1 acre. He asserted that he was entitled to 6 acres, and not 3.4 acres. He said that he did not recognize the sale of land to Arinori Makwayi.

11. At reexamination, he clarified that the subdivision of Butsotso/Ingotse/556 was done in 1979, and not in 1997. He stated that Butsotso/Ingotse/556 ought to be shared out between the houses, and thereafter each house should agree on distribution within the house. He stated that he had seen a buyer on the land, but asserted that he was not a member of the family. He said that he came onto the land after the deceased passed on. He said that he had no problem with his sisters getting their share.

12. Josephat Kombo Keya was the second witness on the protestor's side. He was a retired assistant chief for the Ingotse area. He stated that the land was subdivided in 1979. He said that no surveyor was involved in the process, and that they merely made estimates.

13. The applicant's case opened on 20th January 2021. The applicant took the stand. He stated that the deceased had 4 wives and 24 children. He stated that 11 of the children survived the deceased. He also said that the deceased had 2 pieces of land, being Butsotso/Ingotse/556 and 1110. He testified that the family sat to agree on distribution, but the protestor stayed away. He said that Butsotso/Ingotse/1110 was given to the 3rd house, of Rebecca Mung'oni, which measures 4.1 acres. He said that Butsotso/Ingotse/556 was 14 acres, and they had agreed that each house gets 4.6 acres. He said the 4th house had 4 children and 1 son, the protestor. The 3 were said to have been present at the meeting, and had agreed that their house take 4.6 acres. The 3 daughters were to take 1 acre between themselves, leaving 4.3 acres for their brother, the protestor, and $\frac{3}{4}$ acre was to go to a buyer. He stated that the 1st house had 5 children, who were all alive. He stated that they had all agreed on how the property was to be shared out. He said that he was not aware that the protestor was asking for 7 acres.

14. During cross-examination, he stated that the deceased died in 1988. He said that the deceased was left his mother on Butso/Ingotse/556. He said that Rebecca was left on Butso/Ingotse/1110, where she had been settled. He said that Butso/Ingotse/556 was occupied by 3 of the wives of the deceased. He said that there were no definite boundaries, but the occupants worked on specific portions without crossing over to portions occupied by the other family members. He said Butso/Ingotse/556 was not apportioned to the 3 houses, but the 3 were settled on the land, and built on it, separate compounds, 5 to 10 metres apart. He said that by the time he died, the deceased had settled some sons, and given them title deeds. He said that that happened in 1968, but the rest of the members of the family were not allocated any land, saying that only 2 were settled and given title deeds. He said his home was on Butso/Ingotse/556, which he put up after the deceased died. He said that he built on his father's side. He said that the 1st, 2nd and 4th wives were on Butso/Ingotse/556. He said that he was from the 2nd house, while the protestor was from the 4th house. He said that he was the only son in the 2nd house, while the 1st house had 3 sons, being Charles, Nika and Adriano. He testified that Charles and Adriano had been given land inter vivos, while Nika was not. In the 4th house, there was only one son, the protestor. The other son, Okore was said to have died in 1988, after the deceased. He said that the *inter vivos* distribution was not as per the sons in each house. He said that the 1st house was not utilizing 6 acres, but the 2nd house occupied 4 acres and the 3rd house 3 to 3½ acres.

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

16. What is before me is a summons for confirmation of grant. The deceased died on 22nd July 1988, after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation. His estate therefore fell for distribution in accordance with the intestate provisions of the said Act. 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.”

17. The principal purpose of confirmation of a grant 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.”

18. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? The applicant has not done a good job of making a full disclosure of the persons beneficially entitled to the estate of the deceased. In his supporting affidavit, he only identified 5 sons, and listed other individuals whose relationship with the deceased was not disclosed. However, the matter has been redeemed by the protestor, for in his written submissions he has given a full list of the survivors of the deceased, grouping them into the 4 houses from which they come. That position, the applicant has agreed with, in his written statement. For clarity sake, members of the household of the deceased are as set out in the affidavit of protest. The deceased had 4 wives. It has not been disclosed whether they are alive or dead. They were Rael Barasa, Agneta Khalakwa, Rebecca Mung'oni and Berneta Khatondi. They had 24 children between them. The children of Rael Barasa, the 1st house, were 6, that is to say the late Charles Okutoyi, Adriano Imbiakha, Michael Kanambo, the late Christine Vakhayo, Wilbroda Nyakoa, Wilfrida Ayieko Leonida Magoni. The children in the 2nd house, of Agneta Khalakwa, are 3, being Hellen Ayuma, Veronicah Nyakoa and Hezron Kaunda. The 3rd house had 6 children, being the late Baslita Khavoya, Lucy Mapesa, Belina Opere, Bernard Khasakhala, the late Julius Musungu and the late Mary Atemba. The 4th house had 8 children, being the late John Machoni, the late Peter Amalemba, Dora

19. I have noted that some of the children of the deceased are dead, but both the applicant and the protestor have not disclosed who survived them. It has also not been made clear in the application whether or not the wives of the deceased are surviving or not. Part V very clearly refers to surviving spouses, and in the application for confirmation, the applicant must clarify whether any of the spouses of the deceased survived the deceased or not. The proviso to section 71(2) expects that the applicant will have ascertained all these facts before mounting the application, and in that application there is a duty to disclose what has been ascertained. There is no clarity as to whether the deceased had sold any of the assets to anyone, even though there are said to be strangers on the land. Legitimate or genuine creditors of the estate ought to be ascertained and disclosed. It is not enough to have names of strangers thrown into the application, without disclosure as to how they related to the deceased, and evidence provided, if they be creditors or purchasers of property from the deceased, of the debt owed by the estate to them. I shall take it that the mandatory requirements of the law, as set out in the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules have not been substantially complied with.

20. 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 are allotted to the survivors and heirs. 6 assets have been disclosed as belonging to the deceased. that is to say Butsotso/Ingotse/552, 556 and 1110 and Butsotso/Indangalasia/415, 416 and 417. There is common ground that Butsotso/Indangalasia/416 and 417 and Butsotso/Ingotse/552, although initially belonging to the deceased, were adjudicated and registered in the names of some of the sons. Butsotso/Ingotse/552 was registered in the name of Charles Okutoyi Mapesa and Butsotso/Indangalasia/416 and 417 in the name of Adriano Imbiakha Mapesa. The protestor claims that Butsotso/Indangalasia/415 was also estate property, which was adjudicated and registered in the name of Bernard Khasakhala, a position which the applicant does not appear to agree with. There is no clarity whether Butsotso/Indangalasia/415 was estate property that was registered in the name of Bernard Khasakhala or not. There is also no clarity whether it was ever registered in his name in the first place, given that the certificate of official search indicates it to be registered in the name of Vincent Wanga Nandukule.

14. It would appear that the applicant did not consider the fact that the deceased had made *inter vivos* gifts seriously, for he neither disclosed the fact of the gifts nor of the persons who benefited nor the assets distributed or gifted. The law requires, at section 42 of the Law of Succession Act, that such gifts, and others, be taken into account at intestate distribution. The court in *In re Estate of Marete Mbui alias M'Marete M'Mbui alias Justus Marete (Deceased)* [2017] eKLR (Gikonyo J), rationalized that provision, when it said that the same serves two purposes: one, to obviate double benefit to some of the beneficiaries, and, two, to attain equity in the sharing of the estate. Section 71, of course, makes no reference to section 42, but Part V of the Law of Succession Act, for section 42 is in Part V, in the event of intestacy, must be read and applied with section 71 of the Law of Succession Act. As the two sets of provisions must be read and applied together, it follows that an administrator applying for distribution in intestacy, where the deceased had given out some of the assets to his children during his lifetime, must, to facilitate compliance with section 42, make disclosures in his application, of such *inter vivos* gifts, for the court will have no way of knowing that such *inter vivos* gifts were made unless there is a disclosure.

15. Section 42 of the Law of Succession Act, says as follows:

“42. *Previous benefits to be brought into account*

Where—

(a) *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

(b) *property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”*

16. 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. The applicant has proposed distribution of the estate to the sons of the deceased, who had not benefitted from *inter vivos* gifts. The distribution is limited to the sons only, yet the deceased had daughters, indeed there were and are more daughters than sons. The surviving daughters have not been allocated any share in the estate, yet they have not filed any documents to renounce or waive their rights in shares in their father's estate. The survivors of the sons and daughters of the deceased who are dead have not been disclosed, have not been allocated anything in the estate, to take the share that would have devolved to their mothers, by dint of section 41, and have not waived or renounced their interest in the estate. I have also stated above, that it has not been disclosed, whether the wives of the deceased survived the deceased or not, and whether they are alive as at the date when I am writing this ruling. Consequently, the proviso to section 71(2) of the Act and Rule 40(4), with respect to ascertainment of shares of those persons ascertained as survivors of the deceased, have not been complied with.

17. The matter of these disclosures is important, because the deceased died after the Law of Succession Act had come into force. Distribution of his estate must be, therefore, in strict compliance with Part V of the Law of Succession Act. Part V is specific; distribution is to the survivors. It talks of entitlement of surviving spouses and children, who are given priority over everyone else. See sections 35, 36, 37 and 38 of the Law of Succession Act, *In re Estate of Joshua Orwa Ojode (Deceased)* [2014] eKLR (Musyoka J) and *In re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR (Musyoka J). A surviving spouse is entitled to a life interest, which terminates upon their death or their remarriage, if female. If surviving spouses exist, they cannot be ignored, their right to inheritance overrides that of the surviving children. Surviving children take next after the surviving spouses. They do not have a direct right, so long as there is a surviving spouse, by virtue of section 35(1)(2), and they only get directly where there is no surviving spouse, by virtue of sections 35(5) and 38 of the Law of Succession Act. Where a child of the deceased is dead, but survived by a child of their own, then the right of such dead child to

inheritance is not extinguished, instead it ought to accrue to any surviving child of such child, who is in fact a grandchild of the deceased. that is the purport of section 39 and 41 of the Law of Succession Act. So, if the applicant is obliged to ascertain the persons who survive the deceased, he must as well ascertain those who survived any of the dead children of the deceased. Survivorship is not limited to spouses and children, it extends to grandchildren, where any of the children of the deceased are themselves dead. More importantly, succession is not limited to the survivorship of the children. It does not mean that once a child of the deceased dies, their right is extinguished. That is not the law. The right of a child of the deceased who survives the deceased and dies before distribution is not extinguished. Where such child had children of their own, then such children would take what is due to him from the estate by virtue of section 41. Where he or she has no children, then his or her share goes to his or her estate, to be distributed in terms of section 39, to either his or her parents, if they survived him, or, if not, to his or her siblings. If such child predeceases his or her parent, the right to succession would be extinguished if he or she was not survived by offspring of their own, since their lineage would have come to an end, but there would be no extinction where the dead child had offspring, grandchildren of the deceased, who would then take what would be due to him or her, by dint of section 41. The importance of disclosure of everyone entitled to a share in the estate cannot be gainsaid.

18. It is clear that the applicant proceeds on the notion that daughters are not entitled to inherit from or succeed their parents. That is a customary law notion. It is notorious and, therefore, I do not have to cite material that support it. However, the deceased herein died after the Law of Succession Act had come into force in 1981. The coming into force of the Law of Succession Act had the effect of ousting the application customary law to the intestate estates of Africans dying after 1st July 1981, by dint of section 2(1), unless the estate was exempt from Part V by virtue of sections 32 and 33, which allow application of African customary law. See *Rono vs. Rono and another* [2005] 1 EA 538 (Omolo, O'kubasu & Waki JJA), *In Re Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu J), *In the Matter of the Estate of Mwangi Giture (Deceased)* [2004] eKLR (Koome J), *In Re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita J), *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau J) and *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Machelule J). The exemption under sections 32 and 33, through Legal Notice No. 94 of 1981, was limited to property situated in pastoral districts, which did not include Kakamega, and, therefore, the estate herein was not affected. So, customary law does not apply here. Customary law sanctions discrimination founded on gender, the provisions of the Law of Succession Act do not, they envisages equality in treatment of both gender with respect to matters pertaining to succession. Furthermore, Article 27 of the Constitution, 2010, outlaws discrimination based on sex or gender. Kenya is also signatory to international legal instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which also outlaws all gender discrimination, and which is also part of Kenyan law by dint of Article 2(5) of the Constitution of Kenya, 2010. Overall, any proposed distribution that would discriminate against daughters of the deceased, or any other female survivor for that matter, cannot stand, in view of the above provisions. The applicant appears to live in the distant past.

19. Both the applicant also argues that the deceased had distributed his estate before his died. He had allegedly shared out the land amongst the houses, and that there were boundaries on the ground. That may well be so. I understand the applicant to be asserting an *inter vivos* arrangement. However, if that was what the deceased had intended, then he should have subdivided the land and caused title deeds to be issued upon the beneficiaries following registration. The alternative would be that he would have taken steps to have the transfers done, but died before he could finalize the same. The material on record shows no evidence that the deceased ever obtained consent of the relevant land control authorities to have the property subdivided in the manner alluded to, and there is no evidence that he ever executed any transfer documents to facilitate the same. Consequently, I do not find any material upon which I can hold that Butso/Ingotse/556 and 1110 had been settled *inter vivos* by the deceased. If that had been done, then the parties hereto would not have initiated this succession cause, for the deceased would have done, during his lifetime, what the parties are now asking this court to do. Secondly, in intestate succession proceedings, the role of the court is to distribute the estate of the intestate according to the intestate law, whether Part V or that under customary law it is not to endorse what the deceased intended, but did not carry out. What the deceased died before he had distributed, and which is still in his name, shall be distributed strictly in accordance with Part V of the Law of Succession Act, particularly taking into account sections 35, 38, 40, 41 and 42 of the Law of Succession Act. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J), and *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J).

20. The applicant has allocated $\frac{3}{4}$ acre of Butso/Ingotse/556 to a person he describes as purchaser, Arinoli Makwali Nyapola. The protestor does not acknowledge the sale, although he acknowledges that that person is in possession. The purchasers that can be reckoned by the court for succession purposes are those that acquired the interest from the deceased. Such can be treated as creditors of the estate. Creditors have a prior right, in the sense that their interests must be settled first, before the estate is distributed amongst the survivors. See sections 3 and 83(d)(f) of the Law of Succession Act. Persons who buy estate property from survivors acquire no interest in the estate and ought to wait for the estate to be distributed to the survivors at confirmation in order to get their share from those who sold the land to them. They are not creditors of the estate, but of those who sold the assets to them. See section 45 of the Law of Succession Act. The same case would apply to purchasers from administrators, who sell the land to them before the grant is confirmed. See section 82(b)(ii) of the Law of Succession Act. Such purchasers acquire no interest whatsoever in the estate, and section 93 of the Law of Succession Act cannot be invoked to their aid. It is critically important, therefore, where an applicant allocates a purchaser a share to the estate of an intestate to disclose when the property was sold to that individual, and by who. It is also important that a written memorandum of the alleged transaction ought to be placed on record. Land is not sold like a piece of ripe banana in an open air market, any sale of land ought to be evidenced by some memorandum in writing. See section 2 of the Law of Contract Act. See also *Rebecca Veronica Adela vs. Prisca Khatambi Kibukosya & another* Nairobi HCSC No. 2853 of 2003 (Rawal J), and *In Re Estate of Ceaser Riungu (Deceased)* [2010] eKLR (Kasango J).

21. The importance of compliance with the proviso to section 71(2) of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules, and specifically with what ought to be addressed in an application for confirmation of grant, was underscored, in *In the Matter of the Estate of Ephraim Brian Kavai (Deceased)* Kakamega HCSC No. 249 of 1992 (unreported) (Waweru J), where the court said:

“What is immediately obvious is that the court (Hon. Tanui J.) did not enquire into or satisfy himself as to the persons beneficially entitled and their respective shares to the estate of the Deceased as required by the proviso to subsection (2A) of section 71 of the Law of Succession Act, Cap 160 before making the order for confirmation of the grant. The proviso is in mandatory terms, and from its wording, failure of the court to so satisfy itself, in my judgment, renders the order of confirmation (and the resulting confirmed grant) illegal. Contrary to what might be thought, confirmation of grant in intestate succession is a not a mere formality. It is probably the most important aspect of intestate succession, as it is at that stage that the court determines who are beneficially entitled to the estate of the deceased and their respective shares therein. In this station and in my previous station (Kisii) I have

come across hundreds of disputes which would have been avoided if the court concerned had performed its statutory duty. The present dispute is one such.”

22. I believe I have said enough to demonstrate that the application for confirmation of grant that has been placed before me for consideration is premature. The orders that I shall make are as follows:

a) That I hereby postpone determination of the application dated 28th November 2019, and require the applicant to take certain steps to bring the application within compliance with the proviso to section 71(2) and Rule 40(4), along the lines discussed in the body of this judgment;

b) That the applicant shall file a further affidavit in which she shall do the following:

(i) Disclose when the dead children of the deceased passed on and who survived them, in terms of their children and spouses,

(ii) Disclose when Arinoli Makwali Nyapola purchased a portion of Butsotso/Ingotse/556 and from whom, attaching relevant documentation,

(iii) Attach documents from any of the daughters of the deceased, and any other survivor, who do wish to take a share from the estate of the deceased,

(iv) Attach a certificate of official search and green card for Butsotso/Indangalasia/415 to demonstrate whether the same was ever registered in the name of Bernard Khasakala, and

(v) Address any other critical issue that I have raised in the body of the judgment herein;

c) That the matter shall be mentioned thereafter, after 45 days, for compliance with the directions given above, on a date to be given at the registry on priority; and

d) That the grant herein shall be considered for confirmation only after the applicant has fully complied with the directions in (a) and (b) above.

23. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF SEPTEMBER 2021

W. MUSYOKA

JUDGE