REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 903 OF 2007

IN THE MATTER OF THE ESTATE OF WASILWA KISEMBE (DECEASED)

JUDGMENT

1. The application for determination is the summons for confirmation of grant dated 15th December 2016. It is brought at the instance of Violet Nekesa Wasilwa, the administratrix. She avers that the deceased was survived by two widows, herself and Salome Nambuye Wasilwa; and ten sons, being Jackson Masengeli. Lucas Ngosasia, James Tawai, Andrew Sirengo, Job Kisembe, Musa Wambuto, Thomas Wasilwa, Kisembe Ayub, Mukweyi Wasilwa and Wanjala Wasilwa. Job Kisembe Wasilwa and Mary Wasilwa are in that list of survivors, but it is not indicated how they are related to the deceased. individuals are listed in the column of dependants, and they are described as purchasers. They are Sabastian Mushira Lugongo, James Muya, John Muhando, Juma Chibuyi Bushasa, David Kivisi, Ernest Mukabwa, Full Gospel Church, Esther Irusa and Margaret Nasimiyu Wesonga. The deceased is said to have died possessed of North/Kabras/Kivaywa/599, 1286 and 1571. It is proposed that the three parcels of land be shared out between the various individuals named in the application. The application was filed simultaneously with a consent on distribution, dated 15th December 2016, executed by various individuals.

2. An affidavit of protest was filed against the application by Solome Nambuye Wasilwa, sworn on 26th November 2018. She says that the deceased had married three times, to the late Priscilla Naliaka, Solome Nambuye and Violet Nekesa. The children are said to be, starting with sons: Jackson, Lukas Ngosasia, James Tawai, Moses Wambuto, Job Kisembe, Ali Mukwei, Andrew Sirengo, Wanjala Wasilwa, Joseph Kisembe, the late Mukoyani Wasilwa and the late Thomas Wasilwa. The daughters are said to be Mary Injete Wasike, Jane Muswe, Rose Lukasia, Wakasa Wasilwa, the late Sarah Wasilwa, the late Rodah Wasilwa, Nancy Wasilwa, Nasike Wasilwa, Joyce Wasilwa, Mary Injete Wafula, Watuve Wasilwa, Nasimiyu Wasilwa, Makonjo Wasilwa and Mary Injete Wasilwa. She avers that the deceased died possessed of North/Kabras/Kivaywa/599, 1286 and 1571, and compensation from the National Land Commission as per court order made on 8th April 2015. She proposes distribution of the land as between some of the sons and some of the daughters of the deceased, and persons she describes as genuine buyers. The persons she identifies as genuine buyers are said to be Sebastian Muchira, James Muya, John Muhando, Juma Bashasha, David Kivisi, Ernest Mukavana, Esther Irusa, Margaret Nasimiyu Wesonga, Joseph Wamocho, Full Gospel Church, Margaret Malanga, Edward Ibwaga, Thomas Hamasi, Anunda and Shivatsi.

3. Another affidavit of protest was filed by Jackson Masengeli Wasilwa, sworn on 24th April 2019. He avers that the deceased had married three times, and that he was a son from the first house. He introduces individuals that he says are also beneficiaries. These are Knight Namaemba Wasilwa and Jane Nelima. He proposes that North/ Kivaywa/Kabras/Kivaywa/599 be shared out between himself, Lukas Ngosasia, James Tawai and Andrew Sirengo. He states that North/Kabras/Kivaywa/1330 was vacant, and the deceased had sold it to some individuals. He also avers that the land had tentatively been divided amongst family members from each of the houses. He avers that part of the land was taken by Kenya National Highways Authority (KENHA) for road rehabilitation, and the family was to be compensated. He accuses the administratrix of having taken the land meant for the entire family and had made it her own, and says that she should include other family members. He avers that the initial payment of Kshs. 681, 000.00 had not been disclosed to the family, and proposes that the balance of the compensation ought to be shared out equally.

4. The administratrix filed a further affidavit, sworn on 2nd October 2020. It largely responds to the affidavits of protests, and is intended to amend some of the proposals on distribution. She avers that compensation had not been paid by KENHA, for the Authority was waiting for the grant to be confirmed. She proposes that the compensation be given to Salome Nambuye Wasilwa, Violet Nekesa Wasilwa and Jackson Masengeli Wasilwa, to hold in trust for the family to be shared equally amongst individuals in a list she has provided. She also proposes that part of the money, Kshs. 400, 000.00, be paid to Shitsama & Company Advocates, for reasons that are not disclosed.

5. A document was placed on record, titled objection to grant being made. It is dated 1st December 2020, and was filed herein on even date, by Hannah Muthoni Mbugua, and she expresses herself to be opposed to grant being made in respect of the estate of the deceased. She claims that her late husband, whose name is not disclosed, had purchased a portion of North/Kabras/Kivaywa/1571, being 0.12 acres, from James Tawai Wasilwa, and, therefore, she wished to be treated as a liability of the estate. She complains that the succession cause was done in secrecy.

6. Another affidavit of protest was filed herein by Kisembe Wasilwa, sworn on 4th December 2020. He avers that North/Kabras/Kivaywa/599 ought, to be shared equally between the three house; North/Kabras/Kivaywa/1571 should be given to the first house; while the compensation for North/Kabras/Kivaywa/1330 should be shared equally between the three houses. He also calls for accounts by the administratrix, Jackson Masengeli and Lukas Ingosasia. He states that the family had already settled the legal fees and there was no need for any of the compensation funds to be expended in paying lawyers.

7. The administratrix filed and swore a further affidavit, sworn on 18th January 2021, responding to the affidavit of protest by Kisembe Wasilwa. The new facts deposed include the fact that the first house had nine children, the second house ten children, while the third had seven children. It is further deposed that the deceased had settled each of the three wives in different parcels of land, with North/Kabras/Kivaywa/599 being given to Priscilla Naliaka Wasilwa and Violet Nekesa Wasilwa, where they had settled. The deceased is said to have sold one of his lands and purchased another parcel of land at Mbande, where he settled the second house of Salome Nambuye. It is further averred that after the deceased died, the clan had sat and shared out North/Kabras/Kivaywa/1330 and 1571 amongst all the beneficiaries. North/Kabras/Kivaywa/1571 was allegedly given by the clan to James Tawai Wasilwa and Lukas Ngosasia Wasilwa from the first house, Thomas Wasilwa from the second house and John Mukoyani from the third house. From that distribution Thomas Wasilwa disposed of his interest to Lukas Ngosasia. She deposes that North/Kabras/Kivaywa/1330 had been disposed of by the deceased prior to his death to the persons that she had listed in the petitioner as purchasers, and that it was also the same property subject to the KENHA compensation. She further deposes that the clan elders had previously distributed portions of North/Kabras/Kivaywa/1330 as plots to the last born sons in each house. Andrew Sirengo Wasilwa is said to have had demolished the houses on his portion. John Mukoyani is said to have had sold his plots, with the houses. to Margaret Wesonga, who has been listed in the petition as a purchaser or beneficiary. Isaac Wanjala is said not to have sold nor demolished the houses given to him. She avers that the compensation due from KENHA was available to Isaac Wanjala and the purchasers of the plots from the other sons. She states that she had nothing to do with the money given to Jackson Masengeli, and that the protestor ought to pursue the said Masengeli. She avers that the protest was in bad faith, given that the protestor was party to family meetings where distribution was discussed and agreed upon. She has attached to her affidavit a number of handwritten documents with relation to the settlement and distribution by the clan, and the sales of the plots in North/Kabras/Kivaywa/1330 by some of the sons.

8. The application was heard orally. Kisembe Wasilwa, a son of the deceased, and one of the protestors, was the first to take to the witness stand. He confirmed that the deceased had married three times, and had died possessed of the three assets set out in the papers filed by most of the parties. The deceased died in 1998, and by then his mother, Salome, had been moved to Vihiga, in 1974. He stated that the Vihiga property belonged to the deceased. He stated that the deceased had also bought North Kabras/Kivaywa/253, which he said measured ten acres or thereabouts, and where he occupied three acres, and which property was not yet transferred to the deceased. He said that North/Kabras/Kivaywa/599 was about ten acres and the families of Priscilla and Violet remained thereafter Salome moved to Vihiga, and when the deceased died they were the ones in occupation, but the land had not yet been transferred to their names. He said the Kaburenge land was ancestral and he stated he wanted to be allocated a share there, and if his siblings wanted a share in the Vihiga land, they were equally entitled, as it was land that the deceased bought. He said Lucas Ingosasia had been given Kshs. 200, 000.00 as compensation by KENHA, after his shop at the flyover was demolished to pave way for the highway. He said Violet had also received Kshs. 689, 000.00 being value for the demolished shops. He said that the deceased had bought the property, which had shops, but he had shared them out, and Lucas Ngosasia had sold one of them. The said land was described as North/Kabras/Kivaywa/1330.

9. During cross-examination, he said that the deceased had sold property to some individuals, and had the same transferred to some of the individuals. He said that North/Kabras/Kivaywa/1330 was taken over by the flyover. He said that the family never sat to agree on distribution of the land. He said that it was not true that the deceased had given the shops to the three last born sons. He said that Moses Wambuto Wasilwa was his last born blood brother, and that he was unaware that he had been given a shop on North/Kabras/Kivaywa/1330. He said that he was aware that Moses and their mother sold the shop, but added that their mother was not representing the rest of the family. On the KENHA payments, he prevaricated, in one breathe saying that there were witnesses to payments having been made, and in the other saying he was aware that payments had not been done as the Authority was waiting for the succession process to be over. He conceded to attending a meeting where distribution was discussed and agreed, and that he had signed a document to that effect. He stated that North/Kabras/Kivaywa/1330 ought to be shared out between the family and the buyers, with the buyers pursuing the individuals who sold the property to them. He also stated that the KENHA should be shared amongst the family members. On the Vihiga land, he said the same should be given to his house.

10. The administratrix, Violet Nekesa Wasilwa followed. She said that the deceased had four pieces of land, and that North/Kabras/Kivaywa/599 was where she lived with Priscilla. She said that the deceased had distributed the property before he died. She said the widows and last born sons were to get portions of North/Kabras/Kivaywa/1330. She said that Salome sold her share of the plots on North/Kabras/Kivaywa/1330 to someone else. She said that Priscila's son, Sirengo, demolished the shop on the plot allocated to Priscilla, and constructed another structure on the plot. She said her shop was dilapidated, and was demolished by KENHA. She said that the deceased had sold many portions of land to educate his children, and that explained why she had listed a good number of persons as purchasers. She explained that Salome Nambuye did not wish to live with her and Priscilla, and so the deceased bought her eight acres of land elsewhere, and moved her there. She said she occupied five acres in North/Kabras/Kivaywa/599, while Priscilla and her children occupied the other five acres. She invited the court to accept her proposals, which had been accepted by all, except the protestor, Kisembe. She said KENHA had not yet paid compensation, and that it was waiting for the succession cause to be concluded.

11. During cross-examination, she confirmed that she and Priscilla were on North Kabras/Kivaywa/599, while Salome and her family was in Vihiga. She explained that the deceased had sold a portion of North Kabras/Kivaywa/599, to raise money to buy the Vihiga property. She said each of the three wives had five acres of land. She explained that the deceased had distributed his property before he died, and that she was not the one distributing. She said that Mary Njete Wasilwa was not a child of the deceased from one of his wives, but from the widow of his brother that he had inherited. She was given a plot by clan elders, from North Kabras/Kivaywa/1330, and she sold it. She said that she was paid some money after her shop on North Kabras/Kivaywa/1330 was demolished by KENHA.

12. Jackson Masengeli Wasilwa testified next. He expressed himself to be in support of the distribution proposed by the administratrix. He said that the second house had been settled at Vihiga, a piece of land described as parcel number 253, measuring fifteen acres. The deceased was said to have had bought another five acres in Vihiga for that house, and that it was that house that had exclusive control of the property at Vihiga. He stated that he did not object to Mary Njete getting a share in the estate. It was said that that Mary Njete was not complaining.

He stated that the last born sons and the widows benefited from shops. He further said that no one was complaining about the money given to the administratrix, except the protestor. He stated that the KENHA money was yet to be paid, and that an account had been opened for the purpose of receiving that money, in the names of the administratrix, Salome and himself, on the understanding that the compensation money was to be shared out equally, including the persons who had bought the plots. He stated that he had received Kshs. 60, 000.00. He said that he was not going to get a share in North Kabras/Kivaywa/1571, but he would get two plots from North Kabras/Kivaywa/1330 for his house, and one for himself. He said that some of the children would benefit from North Kabras/Kivaywa/1330, and that the protestor had gotten a share, equal to his.

13. Moses Wasilwa Wambuto testified next. He said that after the deceased died, the clan shared out North Kabras/Kivaywa/1330. Each child got a plot, and the last born sons got the clubhouse. One of the last born sons, Mukoyani, sold his share to a person described as Mama Aaron. He said that he was a witness to that sale. The widows, Violet and Salome, had shops. He said that he sat a family meeting where the estate was distributed, and signed minutes, and added that he was not opposed to what was agreed. He said that his issue was with North Kabras/Kivaywa/1330. He said that it had been shared out amongst the houses, and each house got its share. He said after that some of the individuals and houses sold their shares.

15. At the conclusion of the oral hearings, the parties filed written submissions, which I have read through and noted the arguments made in them.

15. What is for determination is a summons for confirmation of grant. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

> "Confirmation of Grants
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> 71. Confirmation of grants
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> (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.
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> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
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> (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
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> (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."

16. I will start with the first issue, appointment of administrators. The issue has not arisen, for the protestor has not complained that the administratrix was not properly appointed, nor that she had mishandled the estate, nor that she would not properly complete administration, after confirmation, should she be confirmed as administratrix. His issues revolve around the proposed distribution. There is, therefore, no reason not to confirm the administratrix as such.

17. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 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 had properly identified the shares due to them. The proviso is emphatic 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) 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? On the first limb of the proviso, as to whether the applicant has identified all the persons beneficially entitled, I find that she has not. In the petition, the petitioner only disclosed the widows and sons of the deceased. The individuals disclosed in the petition are the same ones that the administratrix lists in her application for confirmation of grant, and proposes distribution to. Yet, the deceased also had daughters in the three houses, as disclosed by the protestor in his affidavit. The said daughters are Mary Njete Wasike, Jane Muswe, Rose Lukasia, Wakasa Wasilwa, the late Sarah Wasilwa, the late Rodah Wasilwa, Nancy Wasilwa, Nasike Wasilwa, Joyce Wasilwa, Mary Njete Wafula, Watuve Wasilwa, Nasimiyu Wasilwa, Makonjo Wasilwa and Mary Injete Wasilwa. The deceased died in 1998, after the Law of Succession Act had

come into force on 1st July 1981. His estate falls for distribution in accordance with Part V of the Law of Succession Act, which does not discriminate between sons and daughters, and not under customary law, which discriminates against daughters. The administratrix were bound to disclose the daughters of the deceased, the fact that she did not meant that the proviso to section 71(2) and Rule 40(4) were not complied with. The administratrix, therefore, only catered for a section of the family of the deceased.

19. The other item for ascertainment, according to the proviso to section 71(2) and Rule 40(4), is the shares due to each of the persons beneficially entitled to shares in the estate. The matter of shares should take us to the assets of the estate. It is common ground that the deceased owned North/Kabras/Kivaywa/599, 1286 and 1571. Yet at the oral hearing it emerged that the deceased also had land at Vihiga, where the second house resided, whose acreage did not come out clearly, but was said to be somewhere between ten acres and eighteen acres. None of the parties placed evidence on record of existence of this property, although it was common ground that the same existed and the second family lived there. Indeed, I was told that the deceased sold a portion of North/Kabras/Kivaywa/599 to raise funds to buy that Vihiga property. No proper description of the property was given, save that the same was parcel number 253. That property was not listed in the petition, nor in the summons for confirmation of grant, and it was not proposed for distribution. It appears to be a substantial chunk of the estate, and distribution ought not to be proceeded with before the same is brought on board. If the property had not been brought to the name of the deceased as at the date of his death, then the administratrix ought to have taken steps to have it transferred to the estate in readiness for distribution. It is the duty of personal representatives to do so, and that the duty, defined in section 83(b) of the Law of Succession Act, of getting in all the free property of the deceased, is what it is about. Get in, collect and gather the estate together, and preserve it, before proposing it for distribution, after paying out the debts and liabilities of the estate. The fact that this property, has not been collected, gathered and brought within the estate, is testimony that the administratrix has failed in some of her duties.

20. As to whether the shares that the persons identified as beneficially entitled to had been ascertained, there is no compliance. In the first place, the daughters of the deceased have not been disclosed in the summons for confirmation of grant, and they have, therefore, not been allocated shares in the estate. As stated above, the deceased died after the Law of Succession Act had come into force. His estate is for distribution in accordance with the Act and not customary law, for customary law has been eclipsed by the Act, by dint of section 2(1) of the Act. See *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J), *Rono vs. Rono and another* [2005] 1 KLR 538 (Omolo, O'Kubasu & Waki JJ), *In re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita J) and *Kuria and another vs. Kuria* [2004] KLR (Musinga AJ). Sons and daughters of the deceased are equally entitled to inherit, regardless of whether they are married or not. They should have been brought on board and allocated shares in the estate. It is not for the sons or the widows of the deceased or the administrators to decide whether the daughters should get a share in the estate or not. Their right is stated in the Law of Succession Act, the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women. See *In re the Estate of the Late George Cheriro Chepkosiom (Deceased)* [2017] eKLR (M. Ngugi J), *Ejidioh Njiru Mbinga vs. Mary Muthoni Mbinga & another* [2006] eKLR (Khaminwa J), *In Re Estate of Susan Wakonyo Kahio (Deceased)* [2005] eKLR (Muga Apondi J), *James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others* [2014] eKLR (Emukule J), *In re Estate of MWW (Deceased)* [2018] eKLR (Muigai J), *In re Estate of Michael Waweru Gitau (Deceased)* [2018] eKLR (Muigai J), *In re Estate of Lusila Wairu Waweru (Deceased)* [2020) eKLR (Nyakundi J), *In re Estate of M'Raiji Kithiano (Deceased)* [2017] eKLR (Gikonyo J), *In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)* [2017] eKLR (Mabeya J) and *Stephen Gitonga M'Murithi vs. Faith Ngira Murithi* [2015] eKLR (Waki, Nambuye & Kiage JJA). They should have been allocated their share at distribution, unless they, of their own freewill, chose to renounce or waive or forgo the right. Secondly, some of the sons and daughters of the deceased are dead. The administrators have not made a proper disclosure of which of these children are dead, and who survived them. The persons who survived them have not been brought forth and involved in this process. The death of a child of the deceased does not extinguish their right to inherit, unless they did not have a survivor Section 41 of the Law of Succession Act provides that their share passes to their children. So, where a child of the deceased died, their children step up to take what should have accrued to their parents. So, such dead children of the deceased ought to be disclosed, and so should their survivors. The failure to disclose them means that the administratrix failed to properly ascertain persons beneficially entitled to a share in the estate, and has also failed to allocate to such persons the share due to them in law.

21. Since the proviso to section 71(2) and Rule 40(4) have not been complied with, I ought not go ahead to consider the proposals on distribution. The administratrix shall have to comply first with those provisions before I can consider her proposals on distribution, as well as those by the protestor. I can only distribute the estate after all the persons beneficially entitled to a share in the estate have been disclosed.

22. The deceased died a polygamist. Distribution of the estate ought to be in terms of section 40 of the Law of Succession Act. He had three wives, the administratrix has not made any effort to group the children of the deceased in accordance with the three houses, yet I am required to distribute the assets after taking into account the children in each house. How can I possibly do that when I have not been given the names of all the children of the deceased in each house. Section 40 can only be fully complied with where there is full disclosure of all the survivors according to their houses.

23. There appears to be some unclear issue about the entitlement of Mary Njete Wasilwa. It is not clearly articulated what the problem is, but it appears to have something to do with the fact that she is not a child of any of the wives of the deceased, since she was sired by the deceased with a widow of his brother, after he inherited her. It would appear that a section of the family could be uncomfortable with her being treated as a survivor of the deceased. It is not disputed that she is a daughter of the deceased. The only difference between her and the other children of the deceased is that her mother was not married to the deceased. However, section 3 of the Law of Succession Act, on children for the purposes of succession, does not discriminate against the children, in terms of whether they were born within or outside wedlock. What is critical is whether the child carried the blood of the deceased, and if they were not his biological children, whether the deceased had taken them in and treated them as his own. It would appear that Mary Njete Wasilwa was a biological child of the deceased, I shall treat her as such. She has all the rights of a child of the deceased, whether born within or outside wedlock, and should be treated equally with the children born within wedlock, be they male or female. Whoever doubts her paternity should apply to court to have a deoxynucleic acid (DNA) test carried out to settle that question.

24. I was told that the deceased had distributed his property prior to his death, and, therefore, what the parties hereto are doing is to effect that distribution, by asking the court to endorse what the deceased had allegedly done. By raising that argument, I understand the parties to be saying that the deceased had done an inter *vivos* distribution of the estate. A complete *inter vivos* distribution would mean that the deceased obtained the consent of the relevant land control board to subdivide the parcels of land, so as to create separate sub-titles, for registration in the names of the sons. That, apparently, did not happen, for the parcels of land are still in the name of the deceased. Courts have pronounced that if the deceased did all what was necessary for transfer of the property to the beneficiaries, and died before he could do

the final act, then the court ought to treat that as an *inter vivos* transaction. The deceased apparently did nothing that suggests that he intended to make any *inter vivos* transfers in favour of his sons. He did not obtain consents to subdivide and transfer the land to them, and he did not execute any transfer documents in their favour. It cannot, therefore, be argued that he intended to make any *inter vivos* transfers to them, but died before he could do the final act of transferring the property to their names. Consequently, there was no *inter vivos* distribution, and the estate herein shall have to be distributed strictly in accordance with Part V 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). If the deceased had intended *inter vivos* gifting, he would have taken concrete steps towards actualizing that intention. As it is, there is no evidence of the same. He died fully intestate, and his estate shall be distributed fully in conformity with Part V of the Law of Succession Act.

25. I was told about the clan intervening after the deceased died, to distribute North/Kabras/Kivaywa/1330 amongst the sons and widows. Let me start by saying that the property of a dead person can only be distributed in accordance with the Law of Succession Act. Under the Law of Succession Act, only the court has the mandate to distribute such estate. Any other entity that purports to exercise such mandate, outside of the provisions of the Law of Succession Act, would be committing the offences defined in section 45 of the Act, described as intermeddling. The clan is not mandated in law to interfere with the property of a dead person. It can only intervene with the express permission of the court, through a valid court order. That was not the case here. There is no order, in the record before me, made by this court, allowing the clan to intervene in the matter, and the intervention in question ran afoul of section 45, and amounted to intermeddling with the estate. See *In Re the Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu J), where it was held that intervention by a clan in a succession matter was of no legal effect, as the clan elders had no authority to distribute the properties of a dead person, they held no grant of representation and their purported distribution amounted to intermeddling. See also *In re Estate of Kahindi Gona Konde (Deceased)* [2018] eKLR (Thande J). Such is criminal activity, and things done in furtherance of criminal enterprise can have no iota of validity or legality. Clans enforce customary law, and the danger with engaging them in such exercises, as distributing estates of dead persons, is to allow them to apply customary law through the backdoor, yet customary law is expressly ousted by section 2(1) of the Law of Succession Act, and it exposes some of the survivors to the risk of being disinherited through the customary law norms that the Law of Succession Act has outlawed. See *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J), *Rono vs. Rono and another* [2005] 1 KLR 538 (Omolo, O'Kubasu & Waki JJ), *In re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita J) and *Kuria and another vs. Kuria* [2004] KLR (Musinga AJ).

26. The final point is that the only purchasers, that the court will take into account, are those who bought a portion of the estate from the deceased, for it is only such who have a valid claim against the estate. Persons who purchased property after the deceased died, from either the widows or children of the deceased, have no claim against the estate, but against those that purported to sell the property to them. They can only look up to the persons who sold the property to them, but not to the estate. They can only claim from such persons, and only after the grant has been confirmed, and the property transmitted or conveyed to the persons who sold it to them. The parties told me that the deceased had sold property to many people, yet those many persons were not identified. It was not indicated when they transacted with the deceased, how much land was sold, and for what consideration. I will only honour transactions with the deceased that will be supported by documentary evidence.

27. Having taken into account everything, I shall only make partial orders, as follows, on the application dated 15th December 2016:

a. That I hereby postpone determination of the application dated 15th December 2016;

b. That I direct the administratrix to make a full disclosure of all the sons and daughters of the deceased, including those who are dead, and a full disclosure of all the children of such dead sons and daughters of the deceased;

c. That after making the disclosures in (b), above, the administratrix shall allocate to all the sons and daughters of the deceased, or, in the case of any dead sons or daughters, their children, their due share in the estate;

d. That should any child of the deceased, whether a son or daughter, or any child of a dead son or daughter of the deceased, be not interested in taking a share in the estate of the deceased, let the administratrix file affidavits sworn by the such son or daughter of the deceased, or child of any dead son or daughter of the deceased, renouncing or waiving their entitlement to a share in the estate;

e. That the administratrix shall cause the property in Vihiga, being Parcel Number 253, to be brought into the estate and its distribution proposed;

f. That the administratrix shall also provide documentary support for claims that the deceased had sold portions of the land of the estate to third parties;

g. That the administratrix shall also list all the children, dead or alive, according to the houses to which they belong;

h. That I shall only distribute the estate herein upon the administratrix fully complying with the directions that I have given above, whereupon she shall file a further affidavit addressing the issues raised;

i. That the matter shall be mentioned on a date to be obtained at the registry, for compliance and further directions;

j. That each party shall bear their own costs; and

k. That any party, aggrieved by the orders that I have made herein, has leave of twenty-eight (28) days to move the Court of Appeal, appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 12TH DAY OF NOVEMBER,2021

W MUSYOKA

JUDGE