



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 415 OF 2003

IN THE MATTER OF THE ESTATE OF RICHARD LIPUKU BUTICHI (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 724041, dated 18th March 2003, the deceased herein, Richard Lipuku Butichi, died on 20th January 2003. According to the letter from the Chief of Isulu Location, dated 5th August 2003, the deceased was said to have had been survived by only one widow, Dimphinah Masidza Lupuku. He was said to have had a property known as Butsotso/Shikoti/1522.

2. Representation to the intestate estate of the deceased was sought in a petition that was lodged herein in 25th August 2003 by Dimphinah Masidza Lupuku, in her capacity as widow of the deceased. She listed herself as the sole survivor of the deceased. The estate was said to comprise of Butsotso/Shikoti/1522 and Idakho/Shikulu/2552 and 3365. Johnstone Alielo Ligami was listed as a liability. Representation was granted to Dimphinah Masidza Lupuku, on 10th November 2003, and a grant was issued, dated 25th November 2003. I shall refer to Dimphinah Masidza Lupuku hereafter as the administratrix.

3. The grant was confirmed on 24th October 2004, on a summons for confirmation of grant, dated 21st April 2004. In that summons the deceased was said to have been survived by the administratrix and five children being Adelaide S. Lipuku, Maximellah S. Lipuku, Evans S. Lipuku, Odliyah S. Lipuku and Getry A. Pilupu. It was proposed that Butsotso/Shikoti/1522 devolve wholly upon Dimphinah Masidza Lupuku, with Idakho/Shikulu/2552 and 3365 devolving upon her to hold in trust for the five children. There was filed a consent in Form 37, executed by three daughters, being Adelaide, Odollias and Getry, on 22nd June 2004, supporting the confirmation application. A certificate of confirmation of grant was subsequently issued, dated 29th October 2004, indicating that the three parcels of land were devolved upon the administratrix to hold in trust for the five children.

4. What is for determination is a summons for revocation of grant, dated 29th October 2004. It is brought at the instance of Judith Nekesa. I shall refer to her hereafter as the protestor. She would like the grant of letters of administration intestate made on 25th November 2003 to be revoked, on grounds that it was obtained concealment of matter from the court and without involvement of all entitled heirs, the person to whom grant had been made had failed to proceed diligently with administration, among other grounds. The protestor avers, in her affidavit sworn on 29th October 2004, that she was bringing the application on behalf of one Robert Munzala Lipuku, a son of the deceased. She avers that the deceased had married two wives, being the administratrix herein and the late Namale Namugosa, an aunt of the protestor. She avers that her aunt had been settled on Butsotso/Shikoti/1522 by the deceased. She died without children, and she and the deceased had for all proposes treated the protestor as their child. She avers that the mother of the protestor had not married the deceased, but the deceased had coopted him into his family and as at the time of his death he had been maintaining him as such. She avers that the administratrix had never accepted the protestor in the family, and hence prompted the deceased to take him to stay with his late wife. When the deceased died, the administratrix refused to cooperate with the protestor pertaining to the estate of the deceased. Upon the death of the deceased and his second wife, the protestor became an orphan, and it is in that context that the application had been brought to ensure that he gets his share of the estate. She avers that they only got to know that succession proceedings had been commenced when persons began to visit the land, ostensibly to have it surveyed for purposes of having it sold. She avers that they were not involved in the succession process, and their consents were not obtained. She avers that before distribution or confirmation, the shares of all heirs must be ascertained. She avers that the protestor was a minor who did not know details of the assets of the deceased, and the administratrix had failed to disclose the same to him.

5. The administratrix responded to the application, vide her affidavit sworn on 2nd February 2005. She denies the allegations against her. She said she was unaware that Robert Munzala was a son of the deceased, as he was never adopted by the deceased, and he was never maintained by the deceased. She avers that Robert Munzala never approached her for maintenance, since he never was a member of the family of the deceased. She further avers that he was never brought home in accordance with Luhya customs, and he never attended he burial of the deceased. She avers that his consent was unnecessary as he was never known to be a member of the family of the deceased. she asserts that Robert Munzala is not entitled to a share in the estate, as he is not an heir. She avers that she did not conduct the succession secretly.

6. That reply attracted a response by Robert Munzala Lipuku, sworn on 2nd August 2005. He states that the administratrix had conceded to not proceedings diligently with administration of the estate. He further avers that it was not up to the administratrix to accept him into the family, so long as the deceased recognized and treated him as his child. He states that he actually stayed on one of the assets of the estate, Butso/Shikoti/1522. He urges the court to provide for him, for the administratrix was keen on excluding him from benefit.
7. On 20th June 2012, the revocation application was settled by consent, on terms that the orders made earlier for confirmation of the grant be set aside, and the administratrix to file a fresh application for confirmation of grant, to which Robert Munzala was at liberty to file an affidavit of protest.
8. The fresh summons for confirmation of grant was filed on 27th June 2012, dated 23rd June 2012. In it the survivors are listed as Diphina Masidza Lupuku, widow, and Adelaide S. Lipuku, Maximillah S. Lipuku, Evans B. Lipuku, Odliyah S. Lipuku, Getry A. Lipuku and Hillary S. Lipuku. It is proposed that Idakho/Shikulu/2552 and 3365 devolve wholly up the administratrix, while Butso/Shikoti/1522 is shared equally between Adelaide S. Lipuku, Maximillah S. Lipuku, Evans B. Lipuku, Odliyah S. Lipuku, Getry A. Lipuku and Hillary S. Lipuku.
9. Robert Munzala Lipuku filed an affidavit of protest on 16th October 2012, sworn on even date. He avers to be a son of the deceased, born in 1978, outside wedlock, to the deceased and Fanisi Akolo. Both his parents died, and so he was an orphan. He avers that the deceased took over his care, from his maternal grandparents, when he was four years old, and started living with him in Mombasa, under the care of the administratrix. He avers that he was accepted as a child of the deceased under custom when his hair was shaved at the ancestral home of the deceased and the deceased later stood for his circumcision. Due to mistreatment, the deceased later placed him with his paternal grandparents. When the grandparents died, he was placed with the second wife of the deceased. The deceased settled the protestor and the second wife on Butso/Shikoti/1522, where some structures were put up, from which the second wife was collecting rent. He avers that the deceased settled the administratrix and her children on the ancestral lands at Idakho. After the second wife died, Robert Munzala was left living alone on the Butso property, where he continued to collect rent from the structures on the land, he asserts that he was entitled to a share in the estate as a child and as a dependant. He proposed that the Butso property be devolved to him, while the administratrix and her children share the Idakho lands. He has attached to his affidavit a certificate of birth, serial number 104785, dated 9th June 2006, which shows him as a son of the deceased. I shall refer to Robert Munzala Lipuku hereafter as the protestor.
10. Another affidavit of protest was filed by Johnstone Jack Likami, sworn on 12th February 2013. He avers to have had bought the Butso property from the deceased in 1996, and that he had all along been waiting for the administratrix to convey the title to him. He would like to be recognized as a liability of the estate. He says that there is other property that the protestor can lay claim to. Although the affidavit claims to annex copies of the sale agreement, none is attached.
11. Evans B. Lipuku swore an affidavit on 5th December 2020, and filed it herein on 11th January 2021. He avers that the deceased had only one wife, his mother, and was survived by her and her five children, listed in that affidavit. He avers that the deceased was pre-deceased by a son called Hillary. His daughter Getry died in 2018, and was survived by three children, being Brillian, Eden and Kelly. The deceased died possessed of two parcels of land, being Butso/Shikoti/1522 and Idakho/Shikulu/2552. He had bought Idakho/Shikulu/3365, but the same was not registered in his name, on account of a dispute that had erupted between the sellers and the family after the deceased died. He has attached copy of an official search showing that the same was registered in the name of Salome Betty Mbala since 22nd November 2007, who was issued with a title deed on 29th November 2007. He states that he did not know the protestor and his sister, he had never seen them and they were not heirs. He avers that the two had been hostile and had denied them access to Butso/Shikoti/1522. He proposes that Butso/Shikoti/1522 and Idakho/Shikulu/2552 be shared equally amongst the five children of his mother, the administratrix. Those averments are supported by Maximillah S. Lipuku through her affidavit sworn on 5th December 2020.
12. The protestor filed a further affidavit of protest on 6th May 2021, sworn on 23rd April 2021. He avers that he had conducted a search on Idakho/Shikulu/3365, and established that the same was registered in the name of the deceased. He avers that Idakho/Shikulu/3365 should devolve to the administratrix and her children, while Idakho/Shikulu/2552 should devolve upon him and Annette Kagoya Lipuku, while the Butso property ought to be devolved upon himself exclusively.
13. Directions were given on 29th October 2012 for disposal of the said application by way of *viva voce* evidence.
14. The oral hearing commenced on 8th May 2013, with the protestor on the stand. He said that his mother was not married to the deceased, and that he was brought up by a wife of the deceased. He stated that the deceased educated and fed him, and left him a farm, the Butso property, on which he lived with his sister, Annette Kagoya Lipuku, also born outside wedlock. The wife of the deceased who raised him died in 2004 leaving him on the land. He stated that the first family of the deceased occupied and utilized the other property. He said that he obtained the certificate of birth to legitimize his birth. He also conceded that he did not have documents to show that the deceased paid his school fees. He said he participated in the funeral of the deceased, and that he even spoke there, although he conceded that he had not attached any documents to support that. He said that the other family members were hostile, but his grandfather allowed him to speak. He stated that the deceased did not transfer the property to his name nor that of the second wife of the deceased. He explained that Annette was a daughter of the second wife of the deceased, and that he found the two living together. He could not confirm whether she was a biological child of the deceased, but he asserted that he paid for her education. He stated that he had no objection to the administratrix remaining as such.
15. Annette Lupuku followed. She stated that she lived at Maraba with the protestor, on land which belonged to the deceased, who she referred to as her father. She said that she did not know the father of the protestor, saying that he was brought to them by a younger uncle. She stated that her mother, the second wife of the deceased, lived with the deceased in Mombasa. She could not confirm whether their marriage was statutory. From Mombasa they relocated to Kakamega, where the deceased bought her mother a plot at Maraba, and that was where she lived with the protestor. At that time the deceased worked in Mombasa, and he would visit them, and send them money for utilities. Her mother died in 2004 and was buried in Uganda. When the deceased died he was buried on the land where the administratrix lived. At Maraba there were rental houses, and her mother used to collect the rent, and she would use the money to pay school fees for the protestor. When the deceased died, the protestor was in Standard Eight. She stated that after his death, they became orphans. He said the

protestor was circumcised at Maraba, and that they shared the rent collected equally, and wanted the Maraba plot to be shared equally. She stated that she was not allowed to speak at the deceased funeral, but their grandfather took the protestor by hand and let him speak to the mourners. She said the administratrix had visited the Maraba plot sometime before the deceased died. She knew that he had children, and they met at the funeral, and were introduced.

16. Ernest Mayula Ong'ayo, followed. He was the Assistant Chief for Sichirai Sub-Location, within Kakamega Town. He said he knew the deceased as a resident of his area, within Maraba. He said that he had two families. One lived at Musoli. He had two wives, although he had only met one. He did not know the first wife. The second wife was the one who lived at Maraba. Naomi Namule Namukosa. She lived there with two children, the protestor and Annette Kagoya. He said that the deceased had informed him that the protestor was his son, who he had gotten outside wedlock, but he lived at the Butso property. After the deceased died, the second wife paid fees for the protestor, assisted by well-wishers. He said that he became assistant Chief in 2002, and that he knew the deceased for two years before he died. The deceased was buried in Musoli, at the home of the first wife. He said that the second wife was buried at the Butso property, for he issued a permit for her burial there. He could not tell whether dowry was paid for her.

17. Annette was recalled for cross-examination. She said the deceased was her father, although she did not have her birth certificate in court. She said that birth certificate the protestor obtained was after the demise of the deceased. She got her national identity card in 2007, after the demise of the deceased. She attended the vigils for the deceased, although she could not describe where he was buried. The deceased had not shown them the place, Shikunga. She did not speak at the funeral, as she was not in the funeral programme. She said she did not know whether dowry was paid for her mother, and she did not know the other children of the deceased. She said that she only knew of the Butso property, which the deceased had bought for her mother. She said that she had no agreement to show that it had been bought for her mother. She said that her mother lived there. She said she was in court because the administratrix was claiming the property. She said she could not tell how much was collected as rent. There was a church on the land. It had bought a portion of the land from her mother. The person who bought it was Rajab Shaban, the owner of the church. It was sold to raise money to send the protestor to school. She stated that the deceased left them, when he died, on the Maraba property. She said that she and the protestor were not oppressing anyone, they were merely where the deceased had left them. She said she wanted to get Butso/Shikoti/1522 and Idakho/Shikulu/2552. She said that they had never been to Idakho/Shikulu/2552, and if given Idakho/Shikulu/2552 they would be harassed.

18. The case for the administratrix opened on 2nd December 2020, with her on the stand. She explained that she had been married traditionally, and later in church in Mombasa, in 1993. She had six children with the deceased, being Hillary, Adeline, Maximella, Odilia, Gatrine and Evans. She stated that Gatrine and Hillary had died. Gatrine had Lillian, Edel and Teddy; while Hillary had no children. The deceased had the three parcels of land listed in the application, numbers Idakho/Shikulu/2552 and 3365 and Butso/Shikoti/1522. Idakho/Shikulu/2552 was where the family home was, and where the deceased was buried. Idakho/Shikulu/3365 was a plot not a farm, and a title deed for it had not been obtained by the time he died. She said that the property was still being used by the persons who were selling it to the deceased. She said only Idakho/Shikulu/2252 and Butso/Shikoti/1522 were in the name of the deceased. She said that she did not know Annette and the protestor, for they were never introduced to him by the deceased, he had never informed her that he had another wife. The children were never brought home. She said she never lived with the protestor in Mombasa. She said that she did not see the two children at the funeral, and they did not stand amongst the children at the funeral. She knew Butso/Shikoti/1522 as it was shown to her by the deceased. She saw the houses when they were under construction. They were rental houses, and there was no matrimonial home. The deceased used to collect rent before he died. She said that if the mother of Annette and the protestor was a friend of the deceased it was something that she did not know. After the deceased died she did not collect rent from Butso/Shikoti/1522, for there was no room for her to do so. She never lived there, as it was not a place where a wife could live. She said it was a valuable town plot. She said that if Annette and the protestor were children of the deceased then they should get a share of Idakho/Shikulu/2552, and not from the town plot, for it would be unfair for them to get Butso/Shikoti/1522 exclusively. She said Butso/Shikoti/1522 should be shared amongst all the children, and so should be the case with Idakho/Shikulu/2552. The children of Gatrine should get the share of their mother. She said she could not have been hostile to the protestor and Annette for she never interacted with them. She asserted that she was the widow, and she should be the one sharing the property and not the children. She asserted that the mother of Annette was not a wife of the deceased but a tenant who was his friend. She said Idakho/Shikulu/3365 was estate property. She had a sale agreement to support that fact. The same was not developed. She said she knew Johnstone Mutsami. He was her friend, and an in-law, who he had bought Butso/Shikoti/1522. She denied bringing him into the matter to deny the protestor and Annette their share. She said that he had bought a portion of Butso/Shikoti/1522. She said he should get his portion, and then the survivors can share the rest. She said the property should be shared equally amongst all the children.

19. Evans Vusakhalo Lipuku took the witness stand next. He was a son of the deceased. He said the value of Butso/Shikoti/1522 was about Kshs. 10, 000, 000.00. He said that he did not know Annette and the protestor, and he objected to them getting anything out of the estate. He said Idakho/Shikulu/3365 was sold to the deceased by Salome Betty Mbala, and the title was yet to be transferred to his name. He said that he did not know of any second wife of his father. He said that he did not know whether the second wife lived in Butso/Shikoti/1522. He said that he did not know the protestor and he was not his stepbrother. He also said the same thing about Annette. He said that he did not know whether they lived on Butso/Shikoti/1522, adding that he had never gone to Butso/Shikoti/1522. He said Gertrude was her sister, who died, and was survived by a husband and children. She said that he never used Butso/Shikoti/1522. About Idakho/Shikulu/3365, he said after the deceased bought the land, he used, but after he died, the sellers chased them out, and the administratrix was in the process of reclaiming it. He said that he did not know whether the alleged second wife was using Butso/Shikoti/1522 before she died, asserting that Butso/Shikoti/1522 had not been given to her by the deceased. He said that he did not know whether Annette and the protestor were left on Butso/Shikoti/1522 by both the deceased and the second wife. He said he did not know whether Annette and the protestor depended on Butso/Shikoti/1522. He said that if they were his siblings then they should go home so that they could get to know one another.

20. At the close of the oral hearing, I directed the parties to file written submissions. They complied. I have read through the said submissions and I have noted the arguments made therein.

21. 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

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 protestor, 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 protestor 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.”

22. On administration, there is no contest. The protestor, at the oral hearing, stated that he had no objection to the administratrix being confirmed as such.

23. The principal purpose of confirmation 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 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 protestor shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”

24. Has the proviso to subsection (2) of section 71 been complied with? When the cause herein was initiated, there was no compliance, for the administratrix had only disclosed herself as the sole survivor of the deceased, together with a liability, Johnstone Alielo. It was much later that she disclosed that she had children with the deceased, and that was when she obtained confirmation of her grant. What is clear is that the administratrix and the deceased were married under custom, and their union was later solemnised in church, and they had several children, identified as Adelilde S Lipiku, Maximillah S Lipiku, Evans B. Lipiku, Odliyah S. Lipiku, Getry A. Lipiku and Hillary Lipiku. Then there is Robert Munzala Lipiku and Annette Lipiku, who also claim to be children of the deceased, one from an alleged second wife of the deceased and the other from a relationship outside of marriage. The status of the two is contested, and is a subject for determination in these proceedings. So far, there is adequate disclosure, and compliance with the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules.

25. The proviso to section 71(2) of the Law of Succession Act talks about ascertainment of beneficiaries and also of their shares. Shares refer to distribution of the assets of the estate. Before distribution is done, there must be ascertainment of the assets. It is common ground that the deceased herein died possessed of Butso/ Shikoti/1522, Idakho/Shikulu/2552 and 3365. What emerged from the oral hearing is that Butso/ Shikoti/1522 and Idakho/Shikulu/2552 are registered in the name of the deceased. The registration of Idakho/Shikulu/3365 is contested, for the protestor says that it is in the name of the deceased, while Evans Lipiku says that it is not.

26. The administratrix has proposed, in her distribution, a sharing which only provides for herself and her children, she has not catered for the protestor and Annette. Her case, and that of her children, is that the protestor and Annette are not children of the deceased, hence they are not entitled to a share in the estate. She proposes that Idakho/Shikulu/2552 and 3365 devolve wholly upon herself, while Butso/ Shikoti/1522 should be shared equally between her children. Her son, Evans B Lipiku, has made his own proposal, that Butso/ Shikoti/1522 and Idakho/Shikulu/2552 be shared out equally between the children of the administratrix, without any provision for the administratrix. The protestor and Annette have countered that, asserting that they were too children of the deceased, who are entitled to a share in the estate. They claim that they occupy and were raised on Butso/ Shikoti/1522, and the same had been given to their mother, and, therefore, the same ought to devolve to them, while the administratrix and her family should share the rest of the assets, that is to say Idakho/Shikulu/2552 and 3365. At the oral hearing the parties appeared to change their proposals on distribution. The administratrix said that, if the court found the protestor and Annette to be children of the deceased, then all the assets ought to be shared equally. The protestor and Annette said that they should also get a share in the ancestral land, Idakho/Shikulu/2552, although they expressed the fear that they would be harassed.

27. Before a final order is made on distribution, I must determine the status of the protestor and Annette, in relation to the deceased. They assert that they are children of the deceased, the administratrix and her family argue that they are not. From the affidavit of Judith Nekesa of 29th October 2004, it is not clear whether the protestor was a biological child of the deceased, or a child that his second wife took in and raised as her own, and who the deceased coopted into his family as such. I understand her to be suggesting that he was not a biological child of the deceased, but he was adopted into the family after his second wife had taken him in, and then the deceased coopted him and accepted him as his own child. The protestor himself claims to be a biological child of the deceased, born outside of wedlock. Annette, who claims to be a daughter of the deceased, through his second wife, says that he was brought to her mother, by a younger uncle, and he was accepted and raised within the household. The deceased catered for him as his child, and upon his demise, the second wife, likewise provided for him, until she died. I cannot tell whether he was a biological child of the deceased or not for little evidence was led on that. No evidence was led on the nature of the relationship that the deceased might have had with his mother. No deoxyribonucleic acid (DNA) test records were presented. I can only hang on the claim that he was raised by the alleged second wife of the deceased, during the lifetime of the deceased, and the deceased coopted him into his family.

28. Regarding Annette, she does not feature in the matter at all until 2014. She claims to be a biological child of the deceased, with his second wife. When Judith Nekesa, swore her affidavit of 29th October 2004, in support of the revocation application, she averred that the said second wife, who was her aunt, did not have a child with the deceased, and that was why she had embraced the protestor as her child. I find this curious, that Judith Nekesa, who should be a cousin of Annette, by virtue of Annette's mother being her alleged aunt, did not know that that aunt had a child called Annette, when she was swearing her affidavit of 29th October 2004. No one talks about Annette until the administratrix filed her summons, dated 20th November 2013, seeking orders to restrain a church that was being operated on Butsotso/Shikoti/1522. It is at this stage that the protestor talks, for the first time, in his replying affidavit to that application, sworn on 24th February 2014, of a step-sister that he was staying on Butsotso/Shikoti/1522 with. He did not disclose her name. When he filed his affidavit of protest, sworn on 12th October 2012, he made no mention of a step-sister or an Annette Lipuku. The said Annette only emerged fully at the oral hearing, when the protestor testified that he lived on Butsotso/Shikoti/1522 with her, as his sister, saying that she had been born outside wedlock, for the second wife of the deceased did not have a child. Yet when Annette herself took to the witness stand, she said that she was the child of the second wife with the deceased. It does not all add up.

29. I would have been prepared to find that the two were not children of the deceased, either biologically or otherwise, for there is no concrete evidence, either way. The evidence surrounding how they came to be part of the family of the deceased is hazy. However, their occupancy of Butsotso/Shikoti/1522 is what intrigues me. They occupy that property, which is said to be the more valuable of all the assets, for it is within the suburbs of Kakamega town. They call it their home, which the deceased had bought and put up for the second wife, who they claim was their mother, one way or the other. The deceased died in 2003, and allegedly left them in occupation, together with the alleged second wife. She died in 2004, and left them there, and they have remained there to date. The protestor was said to be sixteen at the time the deceased was dying. It would appear that the administratrix did not ask them to leave, after the deceased died. They have been collecting rent, the administratrix admitted that she never collected rent from the property. I find it curious that she never sought to eject them from the property, if they were total strangers. The only application, that she ever mounted, against a person or entity she accused of intermeddling with or encroaching upon estate property, is that dated 20th November 2013, not against the protestor and Annette, but against a church. One would wonder, if these two were not family members, entitled to occupy the property, why did she let them remain on the property for all those years. Why did she not make moves to remove them. Evans alleged that they could not access Butsotso/Shikoti/1522 due to hostility from the two, but then if that was so, what legal steps did they take to have them removed? Did they ever involve provincial administration, or the police, or the courts to remove them? No evidence was led of any attempts to enter the property to take possession, which attempts were met with resistance or hostility from the two. They have enjoyed quiet possession of the property all these years, collecting rent, and generally living off it, without any interference whatsoever from the administratrix and her family. I shall take it that that was so because the administratrix recognised them as family, who had been put on the property by its owner, the deceased, and she was not prepared to interfere with them. I noted that during the oral hearing, she was not vehement in denying them, for she merely said that if they were found by the court to be children of the deceased, then they should get a share in everything. The finding I make is that the deceased had taken in the two as his children, and it was on that basis that they reside on Butsotso/Shikoti/1522 to date, and I shall proceed to treat them as his children for the purpose of succession to his intestate estate.

30. Creditors, and others who claim the estate is liable to them in one way or the other, fall within the category of persons beneficially entitled to a share in the estate, who should be ascertained and allocated shares, in terms of the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. Such creditors and liabilities would be persons or entities that dealt with the deceased during his lifetime, or with his personal representatives upon representation being granted to them. The administratrix has hoisted Johnstone Alielo Ligami as one such creditor or liability. He is referred to in one of those letters from the Chief of Isulu location, that have been placed on record. I believe he is the same one who filed the affidavit of protest of 12th February 2013, under the name of Johnstone Jack Likami, claiming to have had bought Butsotso/Shikoti/1522, from the deceased, in 1996. The administratrix testified that he had only bought a portion of Butsotso/Shikoti/1522. He has not exhibited any evidence to his affidavit, to demonstrate that he did buy a portion of Butsotso/Shikoti/1522 from the deceased, and no such evidence was tendered at the oral hearing. He did not himself testify at the oral hearing, despite having filed a protest affidavit. I note that he shares an advocate with the administratrix, and he cannot, therefore, plead that the oral hearing happened without his knowledge. I note too that the administratrix has not proposed to give him a share in her confirmation application. No other person has come forward to claim a share as a creditor or liability, even though Annette talked of her mother selling a portion of Butsotso/Shikoti/1522 to raise funds for the educational needs of the protestor. I shall take it that there are no legitimate claims by creditors, and, therefore, the estate shall be distributed exclusively to the administratrix, her children, the protestor and Annette.

31. With regard to the assets, it is common ground that the deceased died possessed of Butsotso/Shikoti/1522, and Idakho/Shikulu/2552 and 3365. I have seen the certificates of official search which confirm that Butsotso/Shikoti/1522 and Idakho/Shikulu/2552 are registered in the name of the deceased. There is, however, confusion regarding registration of Idakho/Shikulu/3365. It is common ground that it had been bought by the deceased prior to his demise. However, two certificates of official search have been placed on record, indicating that Idakho/Shikulu/3365 was registered on 22nd November 2007, and a title deed was issued on 29th November 2007. However, one shows a registration in favour of the deceased, while the other is in the name of someone else, said to be the person who sold the property to him. Obviously, one of those certificates of official search is false. The bottomline, however, is that the property was bought by the deceased. If it is yet to be transferred to his name, then the administratrix should move with haste and have it properly registered. Otherwise, I shall

proceed to deal with it as if it is already registered in the name of the deceased.

32. So, how should the property be distributed? What emerged is that the deceased had two households, that of the administratrix, which I shall treat as the first house, and that of the protestor and Annette, which I shall treat as the second house. He, therefore, died a polygamist. He died in 2003, long after the Law of Succession Act had come into force, and his estate shall, therefore, be distributed in accordance with the provisions of the said law. He died intestate, and Part V of the Law of Succession Act, which governs intestate distribution, shall apply. Since he died a polygamist, section 40 shall apply. Section 40 provides:

“40. Where intestate was polygamous

1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

33. The effect of section 40 is that the estate of a polygamist is distributed according to the houses, with each house representing a widow and her children, if any. Distribution takes into account the number of children in each house. It happens, in the first instance, between the houses, and, thereafter, whatever is allocated to each house, is shared out amongst the members of each house according to sections 35 to 38, depending, of course, on the individual composition of each house.

34. The first house, of the administratrix, has her as a surviving spouse, and her six children. Two of the children died, leaving four, but one of them had children, which would mean that her children should be taken into account, by dint of section 41 of the Law of Succession Act. It shall be taken that the first house comprises of the widow and five children, making a total of six units. The second house, of the alleged second wife, comprises of the protestor and Annette, which translates to two units. Distribution shall, therefore, be at the ratio of 6:2 or 3:1. The three assets, that is Butso/Shikoti/1522, and Idakho/Shikulu/2552 and 3365 shall be distributed between the three houses in the ratio of 3:1. Thereafter, the shares devolving to the first house shall be distributed according to section 35, and those in the second house shall be distributed according to section 38, so that for the first house the property shall first devolve upon the widow, to hold during lifetime, and thereafter to the children in equal shares, and for the second house, the shares shall be distributed equally between the protestor and Annette. The share due to Getry Lipuku shall be distributed equally between her children, Brillian E Lipuku, Eden K. Lipuku and Kelly Lipuku.

35. In conclusion, I shall make the following orders: -

a. That the Summons for Confirmation of Grant, dated 23rd June 2012, and filed herein on 27th June 2012, is hereby allowed, and the grant confirmed;

b. That the estate shall be distributed in terms of paragraph 34 hereabove;

c. That a certificate of confirmation of grant shall issue in those terms;

d. That each party shall bear their own costs, this being a family matter; and

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

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE