



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION APPEAL NO. 6 OF 2019

(An appeal arising from the decision of Hon. W. Lopokoiyit, Resident Magistrate (RM)

delivered on 21st February 2019 in Kakamega CMCSC No. 1163 of 2018)

GERALD AMBOSA LIONA.....1ST APPELLANT

PETER SHITEKHA LIONA.....2ND APPELLANT

MAURICE OKWEMBA LIONA.....3RD APPELLANT

PROTUS MUYEMBE LIONA.....4TH APPELLANT

HENRY AGOLA LIONA.....5TH APPELLANT

VERSUS

ERNEST SHIPOCHE LIONA.....RESPONDENT

JUDGMENT

1. These proceedings relate to the estate of Donald Liona Muyembele, who died on 27th October 1993. The letter on record, from the Chief of Shisere Location, where he hailed from, shows that the deceased was survived by a widow, Rita Indasi Liona; six (6) sons, being Gerald Ambosa Liona, Peter Shitekha, Ernest Shipoche, Maurice Okwemba, Protus Muyembele and Henry Agola; and one daughter, Kalara Shiamenekha. Also listed, as a 'liability,' is Alfred Mwisukha Makwaka.

2. A petition was lodged, in Kakamega CMCSC No. 1163 of 2018, initially Kakamega HCSC No. 858 of 2015 before it was transferred to the Chief Magistrate's Court, on 7th December 2015, by Gerald Ambosa Liona, in his capacity as son of the deceased, seeking representation to the intestate estate of the deceased. He listed in the petition, as the survivors of the deceased, the persons named in the Chief's letter referred to in paragraph 1 above, save for the widow. He expressed the deceased to have had died possessed of property described as Idakho/Shiseso/780, 1028 and 1425. The filing of the cause was publicized in the *Kenya Gazette* of 29th April 2016. Letters of administration intestate were duly made to the petitioner on 13th July 2016, and a grant was subsequently issued, dated 9th September 2016. I shall hereafter refer to the petitioner, Gerald Ambosa Liona, as the administrator. The said grant was confirmed on 21st February 2019, on an application dated 14th September 2017. Idakho/Shiseso/780 was devolved wholly and absolutely upon Kalra Shitekha Liona; Idakho/Shiseso/1028 was devolved 'jointly' to the six sons - Gerald Ambosa Liona, Peter Shitekha, Ernest Shipoche, Maurice Okwemba, Protus Muyembele and Henry Agola; and Idakho/Shiseso/1425 was to devolve upon the person described as a 'liability,' Alfred Mwisukha Makwaka. A certificate of confirmation of grant in those terms issued, dated 21st February 2019.

3. It is the confirmation of the grant that prompted the initiation of the instant appeal, through a memorandum of appeal filed herein on 21st March 2019, dated 28th February 2019. From my understanding of the grounds of appeal listed, the key issues are:

(a) That the confirmation proceedings were conducted in the absence of the administrator and other interested parties;

(b) That the trial court erred by including a stranger in the distribution, one Alfred Mwisukha Makwaka;

(c) That the trial court erred by including one Ernest Shipoche Liona as a beneficiary;

(d) That the certificate of confirmation of grant issued on 21st February 2019 should be cancelled as it includes Ernest Shipoche Liona, who had sold his parcel of land;

(e) That Idakho/Shiseso/780 and 1028 are supposed to be shared amongst all the beneficiaries, excluding Ernest Shipoche Liona and Alfred Mwisukha Makwaka; and

(f) That the decision by the trial court was predetermined, biased and a travesty of justice.

4. The appeal was first placed before me on 29th April 2019, for directions, whereupon I ordered that the trial court record be made available, and that the appellants file and serve a record of appeal. The matter was mentioned next on 25th April 2019 for compliance. I noted that a record of appeal had been prepared and served, and the trial court file availed. Whereupon, I directed that the appeal be disposed of orally and that the respondent be served. The oral hearing happened on 11th November 2019, when oral submissions were made by the three appellants in attendance, that is to say Gerald Ambosa, who is also the administrator of the estate, Peter Shitekha Liona and Maurice Okwemba Liona. The respondent was not in attendance, despite having been served.

5. The administrator, who is the 1st appellant in this appeal, submitted that the deceased had distributed his estate before his demise. He stated that the trial court changed all that. The deceased had wanted Idakho/Shiseso/780 to be shared out amongst the six sons - Gerald Ambosa Liona, Peter Shitekha, Ernest Shipoche, Maurice Okwemba, Protus Muyembele and Henry Agola. He complained that that particular property was given to an unmarried daughter of the deceased. He stated that he was the one that was supposed to administer the estate, yet the court did not appoint him as such. Regarding Idakho/Shiseso/1425, he submitted that the deceased had not distributed it, but the court gave it to the alleged 'liability,' Alfred Mwisokha.

6. Peter Shitekha Liona submitted that they had come to the High Court because the administrator had put Alfred Mwisokha on Idakho/Shiseso/1425. He asserted that that person was not a member of their family, and had not bought the property from the deceased. He stated that it was the administrator who put him on that land after the deceased died. He said that he wanted Alfred Mwisokha to get out of the land so that they could redistribute the estate as per the wishes of the deceased.

7. On his part, Maurice Okwemba Liona submitted that his problem was with the administrator selling land to Alfred Mwisukha. He stated that when the matter was before the trial court, they were told to go outside and thrash out the issues. They were unable to.

8. One thing that I find noteworthy in this appeal is that the 1st appellant is the administrator that the trial court appointed on 13th July 2016 and issued with a grant of letters of administration intestate on 19th September 2016. The record before me indicates that he was the person who collected the said grant, from the court registry on 29th September 2016. I, therefore, find it surprising that he is complaining that the court never appointed him administrator. The submissions by the other two appellants appear to be in the same vein. They appear to hold the view that the administrator was someone else, other than Gerald Ambosa Liona. That is a fallacy since the person that the court appointed as administrator was Gerald Ambosa Liona and not anybody else. Indeed, from the record it is clear that Gerald Ambosa Liona has not, to date, been removed as administrator.

9. The second issue of note is that the appellants attack the orders made by the trial court in a manner that suggests that they were alien to the summons for confirmation of grant that gave rise to the impugned orders. From the tenor of the grounds of appeal, and the oral submissions, it would appear as if the application was made by a person other than the administrator himself, Gerald Ambosa Liona. I have seen the summons for confirmation of grant that was placed before the trial court. It is dated 14th September 2017 and was filed in court on even date. It is purported to have been brought at the instance of the administrator, Gerald Ambosa Liona, and it bears a signature purported to be his. He is purported to have sworn an affidavit on 14th September 2017, which bears a signature purported to be his. In the grounds of appeal, and the oral submissions, the administrator did not renounce the said application. He did not submit that he did not file the summons for confirmation of grant, nor renounce the signature that appears on that application and in the supporting affidavit, purported to be his.

10. In the grounds of appeal and the oral submissions, the appellants have renounced Ernest Shipoche Liona and Alfred Mwisukha Makwaka. Ernest Shipoche Liona is acknowledged to be a son of the deceased, but it is said that he had sold his share of the estate, and, therefore, he ought not to have been provided for at distribution. Yet, the administrator, in his affidavit sworn in support of the confirmation application, specifically at paragraph 5, proposed that the said Ernest Shipoche Liona, gets a share of Idakho/Siseso/1425. If his position as administrator was that the said Ernest Shipoche Liona was not entitled to a share in the estate, because he had sold his share to someone else, then he ought to have made that averment in his affidavit in support of the application.

11. It may be worth of note that under section 82(ii) of the Law of Succession Act, Cap 160, Laws of Kenya, immovable assets of the estate should not be sold before the grant is confirmed. If Ernest Shipoche Liona purported to sell a portion of any of the immovable assets of the estate before confirmation of the grant, then such sale was null and void, in view of section 82(ii) of the Law of Succession Act. The person to whom he purported to sell his share of that asset could not be treated as an heir or beneficiary of the estate due to the illegality of the transaction. Such alleged buyer cannot, therefore, take the place of Ernest Shipoche Liona at distribution, or even be treated as person beneficially entitled to a share of the estate. The illegality of the transaction meant that Ernest Shipoche Liona was still entitled to be listed as a beneficiary and allocated his share. After transmission of his share to him, he would then sort out or deal with the person that he had purported to sell the property to before confirmation of the grant, for such person was, literally, his baby and not that of the estate.

12. Regarding Alfred Mwisukha Makwaka, it is alleged that he was a stranger to the estate, who should not have been allocated a share of it. My understanding is that the succession cause in Kakamega CMSC No. 1163 of 2018, was initiated by the 1st appellant herein, who is also the administrator, Gerald Ambosa Liona. He is the person who, on 7th December 2015, filed the petition in that cause, together with all the documents that accompanied it. In the affidavit that he swore on 7th December 2015, in support of the petition, he listed, at paragraph 4, Alfred Mwisukha Makwaka, as a 'liability.' The administrator lodged the letter from the Chief of Shisere Location, referred to earlier, dated 2nd December 2015. In that letter the Chief listed Alfred Mwisukha Makwaka as a 'liability' of the estate. After that the administrator filed

the summons for confirmation of grant dated 14th September 2017, which was the basis upon which the trial court made the orders that the administrator is now complaining about. In the affidavit that the administrator swore on 14th September 2017, in support of the application, the administrator listed Alfred Mwisukha Makwaka, at paragraph 2, as a 'liability,' and then proceeded, at paragraph 5 of the same affidavit, to allocate to him Idakho/Shiseso/1028. There is also a consent on distribution, dated 14th September 2017, and lodged herein simultaneously with the application, presumably by the administrator, where Alfred Mwisukha Makwaka is listed against Idakho/Shiseso/1028. The 1st appellant cannot, therefore, be right or correct to claim that Alfred Mwisukha Makwaka was a stranger. He is the one who hoisted him in the proceedings as a 'liability' of the estate. He cannot denounce him now. He is the one who brought him on record. Curiously, there is no narrative in the affidavit in support of the application to explain the circumstances under which the said Alfred Mwisukha Makwaka became a 'liability' of the estate. It is not enough that such persons are thrust into the record and described as liabilities without any explanations being offered.

13. With respect to Ernest Shipoche Liona and Alfred Mwisukha Makwaka, it was submitted that the two should not have gotten anything out of the estate. This argument is set out in ground 5 of the memorandum of appeal. I will take the same together with ground 6, since the two are related, which says that the decision of the trial court was pre-determined, biased and a travesty of justice. This is a very curious argument, because the trial court confirmed the grant in the terms that were proposed by the administrator the 1st appellant herein, in his application for confirmation of grant, dated 14th September 2017. The trial court did not add or remove anything from the proposals made in that application, and the certificate of confirmation of grant dated 21st February 2019 is word for word the proposals made in paragraph 5 of the affidavit of the administrator, Gerald Ambosio Liona, sworn on 14th September 2017, and the consent on distribution of the estate dated 14th September 2017, that the administrator lodged in court simultaneously with his application. The trial court cannot have rendered a decision that was predetermined or biased or a travesty of justice, where the said decision merely adopted the proposals that the administrator placed before the court. If the administrator did not wish that Ernest Shipoche Liona and Alfred Mwisukha Makwaka get shares of the assets, then nothing would have been easier than for him to have omitted them from the proposals that he had made in his affidavit and the consent on distribution.

14. I have elected to address ground 1 of the memorandum of appeal last, because it does not dwell, like the rest, on the details of distribution of the assets, but on the process. The appellants complain that the confirmation proceedings were conducted in the absence of the administrator and unnamed interested parties. As I have said above, the trial court allowed the application dated 14th September 2017 as drawn, which meant that it approved the proposals on distribution of the assets as placed before it. The application that was before the court was that by the administrator. The court could have still granted the same if there was no opposition to it, by dint of Rule 40(8) of the Probate and Administration Rules, as shall be seen shortly, notwithstanding the absence of the administrator or the applicant. On the day of the hearing, the administrator was represented by an advocate, Mr. Shivega, who held brief for Ms. Andia. It was Mr. Shivega who urged the application on behalf of the administrator. Since he was represented by an advocate, it cannot be said that the proceedings were conducted in his absence. He has not renounced Mr. Shivega as having been acting on his behalf that day without instructions, neither has he renounced Ms. Andia as his advocate.

15. However, regarding Ms. Andia, I have gone through the record and noted that when she placed herself on record, on 24th October 2017, through a notice of even date, that notice indicated that she was to act only for Ernest Shipoche Liona, and not the administrator or any of the other beneficiaries. That would then mean that the trial court incorrectly recorded her as appearing for the administrator on 8th November 2018 and 21st February 2019. That then would raise questions as to whether the administrator was in court on that day.

16. Was the administrator in attendance on the two dates the matter was placed before the trial magistrate? This is what was recorded:

“8/11/18

Before Hon. W. Lopokoiyit RM

C/A Anita

Pet

Benef

Andia for Petitioner (applicant): One beneficiary is deceased Henry Agola Liona. We intend to file an affidavit to add his wife & children. I pray for a further date for confirmation.

Court: Any party with an objection to file it & serve the petitioner.

Mn. 21/2/19

21/2/19

Before Hon. W. Lopokoiyit

C/A Anita

Pet

Resp

Shivega H/B for Andia for Petitioner: Matter is to confirm respective affidavits of protest, none have filed a protest. Today's date was taken by consent. I pray the summons be confirmed in terms of paragraph 5.

Court: Grant is hereby confirmed, mode of distribution is adopted by the court. Beneficiaries present."

17. Looking at the proceedings of 8th November 2018 and 21st February 2019, questions come to my mind, with regard to the role of Ms. Andia in the proceedings. On both occasions, the record projects her as acting for the administrator, while in reality she was not on record for the administrator, but for Ernest Shipoche Liona, who, himself, was not an administrator. The advocate who held for Ms Andia brief on 21st February 2019 urged the confirmation application, dated 14th September 2017, as if Ms. Andia was on record for the administrator, instead of the administrator applicant arguing the application himself. Indeed, the record, with respect to the occasions when dates were given at the registry, for the hearing of the application, that is on 24th October 2017, 13th December 2017, 13th February 2018, 28th March 2018 and 7th September 2018, it was always at the instance of Ms. Andia, or someone from her office, and she is reflected, on all those occasions, save for 24th October 2017, as doing so as advocate for the administrator. I have noted from the tenor of the appellants oral submissions that they appeared to project that the application before court was not by the administrator, and indeed that the administrator himself was not even an administrator and that the administrator was in fact another person or someone other than the actual administrator. The record of the proceedings of 8th November 2018 and 21st February 2019 appear to give credence to that argument. Ms. Andia believed herself to be acting for the person who had filed the application dated 14th September 2017, and the application was argued by an advocate on her behalf when it came up for hearing. That would suggest that that application had not been filed by the administrator the 1st appellant but by Ms. Andia's client, Ernest Shipoche Liona, hence the dissociation by the appellants with the application and their implicit reference to Ernest Shipoche Liona as the administrator, when, in fact , he was not. I get the general sense that everything was not right with the way the proceedings were conducted at the confirmation of the grant.

18. Looking at the record before the trial court, it is not clear whether or not the administrator was in attendance. By administrator herein, I refer to the 1st appellant, for I believe the word 'pet' on the record was the abbreviation of 'petitioner,' and there is only one petitioner in that record, the administrator, who is also the 1st appellant herein. Now that Ms. Andia expressed herself to the court as appearing for the petitioner, while in fact she appeared for Ernest Shipoche Liona in those proceedings, reference to petitioner in that record could also mean the said Ernest Shipoche Liona, and not the actual administrator, Gerald Ambosa Liona. There is credence, therefore, to the submission that these proceedings were conducted in the absence of the actual administrator, for the person who was being referred to as a petitioner, and, therefore, the administrator, was an impostor.

19. The other thing about the record is that it is not clear on exactly who was in attendance on both dates. It is not clear what the abbreviations 'pet,' 'benef' and 'resp' refer to. I have hazarded a guess in the foregoing paragraph that 'pet' perhaps referred to petitioner, and that there was confusion as to whether the petitioner referred to was Gerald Ambosa Liona or Ernest Shipoche Loina. 'Benef' perhaps refers to beneficiary. Apart from the administrator, the petition listed six other children of the deceased. It is not clear which of the other six was in attendance. 'Resp' perhaps refers to respondent. A summons for confirmation of grant is of such nature that it has no respondent. It is not clear, therefore, who was being referred to as respondent in that record. It helps in proceedings of this nature to have persons in attendance being recorded by their actual names so as to avoid confusion. I note that in the order of 21st February 2019 the trial court stated that the beneficiaries were present. Ideally, that should have been recorded in the Coram. I concede though that attendance of the parties can also be recorded elsewhere, although the convention is that they are recorded under Coram, so long as the beneficiaries in attendance are identified by their respective names. As it is, it is not clear from the record whether any of the survivors of the deceased were in attendance, and, if they were, who was in attendance. The appellants would be justified to argue that those proceedings were conducted in the absence of critical stakeholders. I would advise against the use of abbreviations at all in such proceedings, to avoid confusion, and as far as possible the court should record and refer to the parties in attendance by their official names rather than referring to their positions as parties in the cause.

20. Confirmation of grant is the most critical stage in the life of a succession cause. It sets in motion the process of the distribution of the estate, which is the reason the succession cause is filed in the first place. After confirmation, the cause comes to a close. Since distribution is the reason for the filing of the succession cause, it is important that the same be handled with care, for whenever the confirmation proceedings are bungled the parties do not get closure.

21. Section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, provides for confirmation of grants and says 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.”

22. From the wording of section 71, it is plain that in a confirmation application, the court is called upon to confirm appointment of the administrators and the distribution of the estate. None of those issues arise in this case, and it would appear that the matter before me revolves around the manner in which the confirmation proceedings were conducted.

23. The process for handling confirmation applications is set out in the Rule 40 of the Probate and Administration Rules. The provisions provide for filing of protests by persons who wished to object to the confirmation of the grant, see Rule 40(5) (6). Under Rule 40(5), the protests are envisaged from caveators, if there be any. Rule 40(6) envisages protests by any other person, other than caveators, and would mean the persons referred to in Rule 40(4), those beneficially entitled to a share in the estate. Any other person could be creditor, heir, survivor, dependant or beneficiary. Such persons would have to be notified of the filing of the application, so that they can then file their protests, for, otherwise, how would they know that such an application has been filed, unless the same is served on them or brought to their attention in some way. The only way in law, of bringing such applications to the attention of parties, is through service of the relevant process on the affected parties. That would mean that the summons for confirmation of grant, dated 17th September 2017, ought to have been served on all the survivors of the deceased, and any other persons beneficially entitled, so that they could decide whether or not to file protests in terms of Rule 40(6) of the Probate and Administration Rules.

24. I have perused the court record. There is nothing to indicate that the application dated 14th September 2017 was ever served on anyone. I have noted that when a date was given at the registry, on 24th October 2017, for the hearing the said summons, dated 14th September 2017, on 13th December 2017, the court registry officer, who gave out that date, minuted that all the beneficiaries were to attend court on due date. The said beneficiaries could only attend court if notified that the matter was due for hearing on 13th December 2017. Again, there is nothing on record to indicate that notice of the hearing scheduled for 13th December 2017 was ever served. There was no court appearance that day, for reasons that are not documented. The next date was given at the registry on 13th December 2017, the hearing was scheduled for 13th February 2018, and the court registry officer who gave the date duly indicated that all beneficiaries attend court on the due date. Again, there is no evidence, by way of affidavit of service, that a hearing notice was ever served on any of the survivors of the deceased. The hearing scheduled for 13th February 2018 did not happen, and the reasons are not assigned. On that day, 13th February 2018, the registry allocated another date for the hearing of the matter, 28th March 2018, and it was minuted that the advocate who took that date, Ms. Andia, to serve. There is nothing on record to indicate that she served notice of the hearing scheduled for 28th March 2018 on the survivors of the deceased. Again, the hearing did not happen as scheduled on 28th March 2018, and the registry allocated another date for hearing, 16th July 2018, with a rider that Ms. Andia serves. There is no evidence on record that Ms. Andia ever served a notice of that scheduled hearing on the parties.

25. The hearing scheduled for 16th July 2018 collapsed for unknown reasons, and fresh dates were given at the registry on 7th September 2018, for a hearing on 8th November 2018, with an endorsement that the parties to be in attendance. That date was obtained by a representative from the office of Ms. Andia. It was an *ex parte* date, and that presupposed that a notice of the hearing date would issue upon the survivors to enable attend. There is nothing on record to indicate whether the office of Ms. Andia ever served notice on the survivors. On 8th November 2018, there was an appearance before Lopokoiyit, RM. Ms. Andia was said to be present for the administrator/applicant. The record is vague as to who else was present. The matter did not proceed for directions were given that the same would be mentioned on 21st February 2019, and any party with objection was to file the same and serve it on the administrator. Since it would appear from the record that the survivors were not in attendance, they should have been served with the order so that if there was any of them needing to file objection, they would do so before the mention date, and of notice of the mention date, to enable them attend court on due date for directions. The order containing those directions was not extracted and, therefore, the directions were not brought to the attention of the parties. Secondly, I have seen no evidence that a mention notice was ever served on the other parties. Nevertheless, when the matter came up for mention on 21st February 2019, the court treated the same as a hearing and proceeded to allow the application, ostensibly on grounds that protests had not been filed. I note that the court did not enquire into whether or not the parties had been served. Had that been done, it would have emerged that there had been no service of notices on the other parties. The court should not have concluded that the application was not opposed, since there was no affidavit of protest on record, before it had satisfied itself, in the first place, that the application had been served or brought to the notice all the persons beneficially entitled.

26. Quite apart from Rule 40(5) (6) of the Probate and Administration Rules, there is Rule 40(8), which governs, among others, situations where no affidavit of protest has been filed. The provision says as follows:

“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit.”

27. Before I examine the purport of Rule 40(8), I shall pay some attention to what Form 17 is about. It is a general form, for the purposes of Rule 40(8), in the nature of a consent to confirmation of grant. Rule 40(8) is not phrased in mandatory terms with respect to survivors executing this consent, but the language of the sub-rule is clear, in the event the consent is not executed, that the execution of that form, by

persons who are beneficially interested in the estate, is, in fact, a mandatory requirement. According to Rule 40(8), where the consent, in terms of Form 17, is executed by all the beneficiaries, the court need not hear the summons for confirmation of grant. The court does not have to have the beneficiaries attend court or to have the application urged before it. It may dispose of it administratively, by having the registrar place it before the judge or magistrate in chambers, who may then, so long as the court is satisfied in terms of Rule 40(4), that the consent is executed by all the persons beneficially entitled, proceed to allow the application.

28. However, Rule 40(8) is in mandatory language when it comes to situations where the application is placed before the court, and the court notes that an affidavit of protest has been filed or any person beneficially entitled has not consented in writing. In such a case the court must not allow the application, instead, it should set the matter down for directions on the way forward, presumably on the hearing of the application as envisaged in Rule 41(1) of the Probate and Administration Rules. It should be clear that, according to Rule 40(8), the court should not allow the application for confirmation of grant so long as any person, who is beneficially entitled has not consented to the confirmation. I would like to emphasize that that should be the case even where only one out of a hundred persons has not consented, the application should not be allowed before that one person has been given an opportunity to be heard.

29. Was Rule 40(8) of the Probate and Administration Rules complied with, with respect to having all the persons beneficially entitled execute consents in the mould of Form 17? According to the letter from the Chief, which I have referred to above, the deceased was survived by a widow and seven children. There is also a mention of person referred to as a 'liability,' who would fit the description of a person beneficially entitled to the estate by virtue of Rule 40(4). Although the letter from the Chief was clear that the widow survived the deceased, no mention is made of her in the petition filed herein, nor in the summons for confirmation of the grant, and it has not been clarified whether or not she could have died before the cause was initiated. Anyway, let us assume, that the deceased was survived by the children only. Of the seven, one of them is the administrator, so the other six, going by Rule 40(8), should have executed a consent in Form 17, if they supported the distribution proposed by the administrator in his application. The applicant did file consent in Form 37 alright, simultaneously with the summons dated 14th September 2017. It lists the seven children of the deceased, and the 'liability,' the persons identified in the letter by the Chief as the persons beneficially interested in the estate. However, of the eight individuals only three signed the consent in Form 37, that is to say the administrator, the 'liability' and Ernest Shipoché Liona. The other five children of the deceased, who were persons beneficially entitled to the estate, did not sign the consent. Going by Rule 40(8), the court should not, in the circumstances, have allowed the application, since five of the persons beneficially entitled had not consented to the confirmation application. The court was obliged to comply with Rule 40(8), it did not, hence the difficulties that have arisen.

30. The mere fact that a summons for confirmation of grant is not opposed, through an affidavit of protest, does not mean that the same ought to be granted as a matter of course. The filing of an affidavit of protest is one safeguard, the other is the consent in Form 17. If the affidavit of protest has not been filed, the court ought to look out for Form 17, and if it finds that the same was not executed by all the persons envisaged in Rule 40(4), then it should not proceed to allow the application, but to provide opportunity for the persons who have not executed the consent to be heard. The affidavit of protest is not the only licence to being heard with respect to a confirmation application, Form 17 is the other basis for so being heard, for parties who have not executed the same. The right to a hearing is a constitutional fundamental.

31. That fundamental is underscored in Rule 41(1) of the Probate and Administration Rules. Those who should be heard with respect to a confirmation application are the applicant/administrator, the protestor and any other person interested. It is on that basis that courts should insist that all beneficiaries, meaning all the persons beneficially interested or affected or entitled, in terms of Rule 40(4), attend court at confirmation of grant, so that they can get the opportunity, provided by Rule 41(1), to be heard. Rule 41(1) takes us back to what I addressed earlier, that the summons for confirmation of grant ought to be served on all the individuals contemplated in Rule 40(4), so that they can get to be heard under Rule 41(1). For avoidance of doubt, Rule 41(1) says:

“At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall hear the applicant and each protestor and any other person interested, whether such person appear personally or by advocate or by a representative.”

32. I do not think I should say more. The hearing of the summons for confirmation of grant, dated 14th September 2017, was not properly handled, for the reasons that should emerge from the above discussion. I find, therefore, that there is merit in the appeal herein. The same is for allowing.

33. The final orders that I shall make in the end are:

(a) That I hereby allow the appeal herein, so that the orders made in Kakamega CMCS No. 1163 of 2018, on 21st February 2019, on the application dated 14th September 2017, are hereby vacated;

(b) That I direct that the court file in Kakamega CMCS No. 1163 of 2018 be returned to the Chief Magistrate's Court, for the hearing afresh of the application dated 14th September 2017, in strict compliance with and observance of Rules 40(4)(5)(6)(8) and 41(1) of the Probate and Administration Rules;

(c) That the grant that was issued to Gerald Ambosa Liona on 9th September 2016, in HCSC No. 858 of 2015, is hereby cancelled and a fresh grant shall issue to him out of Kakamega CMCS No. 1163 of 2018, to be thereafter confirmed in the manner set out in (b) above;

(d) That each party shall bear their own costs; and

(e) That any party aggrieved by the orders that I have made in this judgment, has a right of appeal to the Court of Appeal, within twenty-eight (28) days. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF February, 2020

W. MUSYOKA

JUDGE