



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 106 OF 1991

IN THE MATTER OF THE ESTATE OF JAFRED KAKAI MURANDA (DECEASED)

JUDGMENT

1. The deceased person, to whose estate this cause relates, known as Jafred Kakai Muranda, died on 15th March 1989. There is a letter on record from the office of the Assistant Chief of Matsakha Sub-Location, South Kabras Location, dated 16th April 1991. It indicates that the deceased had been survived by a widow, Rodah Nanyama Kakai, and four sons, being William Kakai, Muranda Moses, Wafula Muranda and Fred Muranda. The deceased is said to have died possessed of the property described Kakamega/Matsakha/189.
2. Representation to his estate was obtained by the widow, Rodah Nanyama Kakai, through a petition which had disclosed her and her four sons as the survivors of the deceased. Letters of administration intestate were made to her on 21st April 1994, and a grant of even date was duly issued to her. I shall hereafter refer to her as administratrix. That grant was confirmed on 29th November 1994, and the estate was devolved upon the widow and her four sons. The widow and Wafula Muranda took 1¼ acre each of Kakamega/Matsakha/189; while the other three sons got 1 acre each of the said property. Another property, Ndivisi/Muchi/1620, was unearthed, and the certificate of confirmation of grant was accordingly rectified, following orders made on 2nd April 2014, and the said property was shared out between the widow and Moses Kakai Muranda, and three other individuals, said to be buyers.
3. An application was filed herein on 2nd September 2014, by Walter Japhud Angatia, dated 28th August 2014, for revocation and annulment of the grant, principally on the basis that the succession proceedings had been commenced and continued without notice to him. He claimed to be a biological child of the deceased who had been left out. He asserted that Wafula Muranda and Fred Muranda were grandchildren of the deceased, while Anthony Tawayi Wamukota, Jessie Wekesa Wesonga and Everlyne N. Lumbasi were strangers to the estate. He accused the widow of selling the two estate assets, Kakamega/Matsakha/189 and Ndivisi/Muchi/1620.
4. Another application was filed herein on 2nd September 2014, by Francis Ndunde Museve, which was undated, although said to be for revocation of the certificate of grant and confirmation, seeking revocation of title deeds in respect of Kakamega/Matsakha/189, said to be registered in the name of the widow and Joseph Kakai Mandila, who claimed to be a purchaser of the said property, having bought it on 20th December 2010. That application was struck out by the court on 24th May 2016, because it was undated. Francis Ndunde Museve filed the same application, seeking the same orders on 2nd March 2016, dated 29th February 2016, founded on the same grounds, that he had, on 20th December 2010, bought a portion of Kakamega/Matsakha/189.
5. Directions were given on 29th September 2015 and 20th June 2016, to the effect that the application dated 28th August 2014 be disposed of by *viva voce* evidence. Kariuki J. took oral evidence on 26th September 2016, and delivered, on 12th October 2016, a ruling in which both applications, dated 28th August 2014 and 29th February 2016, were determined.
6. The application dated 29th February 2016 was dismissed. The court found that Kakamega/Matsakha/189 was registered in the name of Joseph Kakai Mandila, following succession proceedings in Kakamega HCSC No. 30 of 1995, and the property was not, therefore, part of the estate of the deceased in this cause. The court went on to advise Francis Ndunde Museve to sue the widow, if he was so minded, at the Environment and Land Court, with respect to the same, on the basis that she sold to him land that she had no capacity to sell.
7. Regarding the application dated 28th August 2014, Kariuki J. implicitly appointed Japhuled Kakai Muranda as a co-administrator, by directing that the grant be rectified to include two administrators, being the widow and himself. Secondly, the said Japhuled Kakai Muranda was implicitly treated as a survivor of the deceased, for the court directed that an affidavit of proposed distribution be filed to enable the court rectify the grant. It was further directed that the parties conduct searches on the ownership of the estate's assets. I believe that these orders were made in error, as Japhuled Kakai Muranda is the deceased person the subject of these proceedings, and the court perhaps meant Walter Japhud Angatia, the person who had made the application that culminated in the making of the said orders.
8. For avoidance of doubt, the relevant portion of Kariuki J's ruling reads as follows:

“13. The court thus dismisses chamber summons dated 29th February, 2016 with nor (sic) orders as to costs and grants application dated 24/8/2014 in the following terms; He has to file and serve:

- Affidavit of proposed distribution to enable court rectify grant;

- Procure Search certificates of both parcels of lands forming the estate of the deceased;

- the grant will be rectified to include 2 administrators who are a co-administrator namely Rodah Wanyama Kakai and Japhuled Kakai Muranda to enable them pursue recovery of parcel land 189 and distribution of the deceased estate.”

9. Walter Japhed Angatia filed an affidavit herein on 21st October 2016, which he had sworn on 14th October 2016, expressed to be in support of confirmation of grant, and which appears to be intended to be in compliance with the orders by Kariuki J. of 12th October 2016. In that affidavit, he discloses that the deceased had married three times and had children with all three wives. He does not list the children according to each house, but indicates that as at the time of death, the deceased was survived by one of his wives, Rodah Nanyama Kakai; six daughters being Sarah Muranda, Ruth Cheloti, Joinah Naliaka Muranda, Pamela Muranda, Gladys Muranda and Rebecca Jafred; and three sons, William Barasa, Moses Muranda and Walter Japhed Angatia. He indicated that there was only one asset to be distributed, being Ndivisi/Muchi/1620. He has attached to that affidavit a certificate of official search in respect of Ndivisi/Muchi/1620, which shows that the same was subdivided in 1994 and the register closed. The subdivisions were registered in favour of the persons to whom that property was devolved as per the rectification orders made on 2nd April 2014. He proposes that the said property be distributed as follows:

1st house

(a) Rodah Nanyama – ½ acre

(b) William Barasa – 2½ acre

(c) Moses Muranda - 1 acre

2nd house

Pamelah Muranda and Gladys Muranda - ¼ acre

3rd house

(a) Walter Japhed Angatia – 2 ½ acre

(b) Rebecca Jafred

10. He then followed up the affidavit of 14th October 2016 with filing a summons for confirmation of grant on 5th December 2016, dated 2nd December 2016, in which he sought that the grant made on 21st April 2014 be confirmed to add his name, Walter Japhed Angatia, as administrator and to include the other beneficiaries of the deceased who had been left out. He also sought that the court issues a new grant of letters of administration. The affidavit that he attached in purported support of the application is a replica of the affidavit that he swore on 14th October 2016 and filed herein on 21st October 2016. To that affidavit he attached a consent to distribution, signed by himself, Rebecca Jafred, Pamela Muranda, Gladys Muranda and William Barasa.

11. I have noted from the record that the Deputy Registrar processed an order purporting it to be an extract from the orders that Kariuki J made on 12th October 2016. The formal order, dated 19th December 2016 and issued on 16th December 2016, purports that Kariuki J had ordered that the new numbers released from Ndivisi/Muchi/1620 be nullified until a new grant was issued to Walter Japhed Angatia. The new number were listed as Ndivisi/Muchi/8686, 8687, 8689 and 8690. The said order was signed and sealed by the Deputy Registrar and was collected by Walter Japhed Angatia, as per the endorsement at the back of the court copy. I have read and reread the handwritten and typed copies of the ruling that Kariuki J delivered on 12th October 2016, and it is clear to my mind, beyond peradventure, that Kariuki J. made no such orders. The good Judge did not address his mind to the subdivision of Ndivisi/Muchi/1620 as that issue was never before him at all.

12. Walter Japhed Angatia then filed another affidavit on 10th November 2017, sworn on 6th July 2017, in which he alleged that the family had consented that Kakamega/Matsakha/189 be confirmed to his name and that of William Barasa Muranda.

13. William Barasa Muranda filed his own application dated 15th November 2017, in which he sought to substitute his mother, Rodah Nanyama Kakai, who had had grown old and tired, as administrator, rectification of the grant to include Walter Japhed Angatia as an administrator and re-distribution of the estate. In his affidavit in support of the application, he proposes distribution of both Kakamega/Matsakha/189 and Ndivisi/Muchi/1620, subject to Kakamega/Matsakha/189 being recovered from its current owner as directed by Kariuki J. In his orders of 12th October 2016. His proposals are as follows:

(1) Ndivisi/Muchi/1620

(a) 1st wife

(i) Rodah Nanyama Kakai – ½ acre

(ii) William Barasa – 2 ½ acres

(iii) Moses Muranda – 1 acre

(b) 2nd wife

Pamela Muranda and Gladys Muranda – ¼ acre

(c) 3rd wife

Walter Japhed Angatia and Rabbecca Japhed – 2 ½ acres

(2) Kakamega/Matsakha/189

William Barasa Muranda and Walter Japhed Angatia – to pursue recovery.

14. William Barasa Muranda filed another application on 26th February 2018, of even date, which was a replica of that dated 15th November 2017, save for the prayer that his mother, Rodah Nanyama Kakai, be restrained from selling and intermeddling with the estate. He accuses her of threatening to sell the entire Ndivisi/Muchi/1620 to an Antony Tawayi Wamukota. He has attached copy of a sale agreement to his affidavit in support, the agreement is dated 23rd June 2010. The said application was placed before Njagi J on 27th February 2018 and injunctive orders were granted.

15. Rodah Nanyama Kakai swore an affidavit on 19th July 2018, titled replying affidavit, ostensibly in response to the various applications filed by Walter Japhed Angatia and William Barasa Muranda, for it does not state what it is replying to. She avers that she was unaware of the ruling by Kariuki J. of 12th October 2016, for she was never served with the application dated 26th February 2016. She asserts that as widow she ranked in priority over the children of the deceased with respect to appointment of administrators. She accuses William Barasa Muranda, her son, of being the sole cause of problems in the estate, and points to a succession cause that he had filed in the Webuye court, being Webuye SPMCSC No. 26 of 2013, where he excluded her and other survivors of the deceased from the process. She also contests that Walter Japhed Angatia was a son of the deceased, saying that she never saw him during the entire lifetime of the deceased. She denied intermeddling with the estate and failing to file an affidavit on distribution as she had not been informed about filing such an affidavit. She asserts that any form of distribution must be with the consent of all, and all the survivors ought to sit and agree on it. She accuses William Barasa Muranda of excluding his brother Moses Muranda Kakai from distribution. She further alleges that upon the demise of the deceased the clan had met and distributed the property amongst the children and erected boundaries. She has attached several documents to her affidavit, the most critical are :

(a) An official search certificate dated 10th January 2014, which shows that the deceased had been registered in 1974 as proprietor of Ndivisi/Muchi/1620;

(b) A land certificate for Ndivisi/Muchi/1620, dated 2nd May 1974, showing the deceased as proprietor thereof; and

(c) Documents that had been filed in Webuye SPMCSC No. 26 of 2013, to show that William Barasa Muranda and Walter Japhed Angatia had sought representation in the estate of the deceased through that cause, where they listed themselves and Moses Muranda Kakai as the sole survivors of the deceased.

16. Moses Kakai Muranda swore an affidavit of protest on 19th July 2018, and lodged it at the registry in this cause on even date. I shall refer to him as the protestor. He avers that the deceased was his father and the administratrix his mother. He objects to the distribution proposed by William Barasa Muranda, and further opposes his appointment as administrator in the place of the administratrix. He echoes the words of the administratrix, that after the demise of the deceased the clan had met and distributed the property amongst the children of the deceased and demarcated the boundaries that ought to be respected.

17. The affidavits by the administratrix and Moses Kakai Muranda prompted a response from William Barasa Muranda. He swore two affidavits, a further affidavit and a reply to the protest affidavit, both sworn on 22nd July 2018 and filed in court on 23rd July 2018. He accuses the administratrix of having had commenced these proceedings secretly, where she had excluded Walter Japhed Angatia from the process and instead brought strangers as beneficiaries. He asserted that Walter Japhed Angatia was a son of the deceased by his third wife, the late Mary Bulimo. He states that Walter Japhed Angatia and his mother lived at the deceased's home at Maraka, Webuye, where the deceased was buried in 1989. He asserts that Walter Japhed Angatia participated in all the customary burial rites and it could not be true that the administratrix did not know anything about him. He asserts that the administratrix had been served with the application dated 26th February 2018, and points at an affidavit of service sworn to attest to that. He states that the administratrix and the protestor were arraigned in a court at Kakamega, in connection with selling estate assets to strangers. He concedes to filing Webuye SPMCSC No. 26 of 2013, but asserts that he did not file it secretly. He asserts that the administratrix was aware of the initiation of the proceedings, but declined to participate in them, saying that the estate belonged to her sons only. He states that it was the administratrix who did not disclose that she had initiated the instant case during the pendency of Webuye SPMCSC No. 26 of 2013, and that they only became aware of the instant cause when they sought transmission of the assets to their names after their grant in Webuye SPMCSC No. 26 of 2013 was confirmed, after which Walter Japhed Angatia filed the application that culminated in the orders that the court made on 12th October 2016. He contends that after the said order the administratrix refused to file the affidavit on re-distribution of the estate as ordered, saying that was because the persons to whom she had sold property were demanding their share of the land they had bought. He states that the rightful beneficiaries had shared out

the land in terms of the subdivision done by the clan. He asserts that the administratrix had intermeddled with the estate and that meant that he was most fit person to administer the estate.

18. Directions were taken on 22nd October 2018 that the matter be disposed of by way of oral evidence and that the parties were at liberty to file witness statements. It was not stated which matter was to be disposed of that means, whether it was the matter of redistribution of the estate as per the affidavit of Walter Japhed Angatia of 14th October 2016, or the application by Walter Japhed Angatia, dated 2nd December 2016, or the two by William Barasa Muranda, dated 15th November 2017 and 26th February 2018. I shall presume that the directions related to all four. I have seen on record witness statements filed by William Barasa Muranda.

19. The oral hearing happened on 2nd July 2019, with William Barasa being the first to take the stand. He stated that after the administratrix was appointed she sold family property and that was why he came to court. He asked the court to appoint him administrator in her place. He described, Walter Japhed Angatia as his brother. He said that Walter Japhed Angatia was eight years old when the deceased died. His mother remarried after the deceased died. He suggested that Walter Japhed Angatia be appointed administrator together with him. He stated that the deceased had not shared out his property before he died. He asserted that there were no boundaries on the ground. He said that the administratrix was not the only wife of the deceased, there were two others. He said that he was unaware that Walter Japhed Angatia had brought a land suit at the Land Disputes Tribunal, adding that what he knew was that it was the purchasers who had brought the suit. He said he should get more than his brother Moses Kakai Muranda, since he, the witness, was older. He said that he did not support equal distribution. He said that he opposed the administratrix and Moses Kakai Muranda because they were selling estate property, yet there were other children, including daughters, who would be prejudiced. He said that he had no problem with the Webuye file being called for by the court.

20. Stephen Murunga Nakitari followed. He was a brother of the deceased. He confirmed that the deceased had married three wives. He said that he was among the clan elders who shared out the deceased's land amongst his children. He said that surveyors were not present and no measurements were taken. He stated that they distributed the property following culture and tradition. He also stated that they took into account that the administratrix and Moses Kakai Muranda had sold some land but did not share the proceeds of sale with other family members. He stated that Walter Japhed Angatia was introduced to the administratrix at the funeral, but she was not interested. He said that Walter Japhed Angatia was not living with the deceased prior to his death, but he was brought to the burial ceremony by his maternal uncles. His parting shot was that it was up to the court to decide whether the property should be shared equally or not.

21. Edwin Shivakale Skem was the next witness. He said that he was the executive officer of Terevi Association, based at Webuye. He said that the deceased was his uncle in the clan. He said that he was born in 1982, while the deceased died in 1989, which meant that he was seven years old by then. He stated that the association was a union of two clans, but it was not registered. He stated that the association met on 2nd April 2017 and distributed the estate. .

22. Walter Japhed Angatia was the final witness. He described the deceased as his father. He stated that he did not use his father's name. He said that he used to live with the deceased before he died. After his demise, the administratrix chased him away. He denied that he was brought to the compound after the deceased died. He stated that the clan tried to intervene but with little success. They put boundaries on the ground. He said that he was party to proceedings that were before the Tribunal, as a complainant. He said that he informed the Tribunal that at the time of those proceedings that he lived with his maternal uncles at Kabras. He stated that it was after school that he went to claim his share of his father's property. He concluded by saying that he did not oppose equal distribution.

23. The administratrix testified next. She stated that she was the only wife of the deceased at the time of his death. She said that she did not know the other two women, Florence Matsisa and Mary Bulimo, who were said to be the wives of the deceased. She stated that the deceased was survived by two sons and four daughters, who she identified as William Barasa, Moses Kakai, Ruth Bachimoi, Anna Nelima, Joyner Naliaka and Sarah Nawire. She said that all the daughters were married. She said that she did not know Walter Japhed Angatia, when he was circumcised nor where he raised. She said that he did not attend the deceased's funeral. She stated that the deceased had shared out his property before he died, with each child being allocated their piece. She said that William Barasa Muranda had gone against those wishes, and began to interfere with the share allocated to Moses Kakai Muranda. She said that she saw no need to revisit the sharing of the land. She stated that Anthony Tawayi and Jays Wesonga bought land from Moses Kakai Muranda. She said she did not know who Evaline Muchesi was. She conceded that she did sell estate property but to raise money to pay school fees. She asserted that she was the only wife of the deceased, and that she never lived with Walter Japhed Angatia. She said that the land was shared out before the deceased died, and, therefore, the property that Moses Kakai Muranda sold was his own. She said that what Moses Kakai Muranda remained with was one acre. She said that the sharing happened so long ago that she could not possibly have the documents to prove it. She said that she was the one who bought the Webuye property, although the same was registered in the name of the deceased; while the other piece of land was family property.

24. Moses Muranda Kakai was the witness for the administratrix. He stated that after the deceased died his uncle came in 1991 and shared out the land equally between him and William Barasa Muranda. He stated that William Barasa Muranda subsequently destroyed his houses and moved into the share allocated to him, saying that he was not satisfied with what was allocated to him. He stated that the administratrix had no money to meet administration costs, so she sold a portion of the land allocated to him for that purpose. He stated that William Barasa Muranda began to cause trouble after the grant was confirmed. He said that the other women that William Barasa Muranda alleged were wives of the deceased were never married by the deceased. He confirmed that he was aware that there was another cause at Webuye. He stated that the Tribunal gave some land to Walter Japhed Angatia and his sisters. He asserted that he stood by the distribution done by the elders. He said that the boundaries were fixed by the elders, and that they were visible on the ground. He stated that he was not party to the sharing that was done by elders in 2017, and he only found that the sisal boundary had been removed and replaced. He conceded that the administratrix sold land to some people, who were in possession of the land they bought. He said that the administratrix had bought the land, but the same was registered in the name of the deceased. He said that he had not been born when the land was bought. He stated that the land that the administratrix sold was on his side.

25. At the close of the oral hearing. The parties were directed to file written submissions. There has been compliance, as both sides have filed written submissions. I have read through the same and noted the arguments advanced in both of them.

26. I must start by saying that the parties hereto have proceeded in an untidy manner. Kariuki J. had given directions that would have guided the conduct of this matter to a faster resolution. Instead they embarked on a route that has delayed finalization of the cause. The grant herein had been confirmed. The orders of 12th October 2016 took that into account when it was directed that the co-administrator appointed in that ruling files a fresh affidavit for re-distribution. That meant that there was no need for the parties to file for confirmation of grant, but to simply file an affidavit on distribution, after which the court was to make orders redistributing the estate and thereafter the certificate of confirmation of grant on record would be rectified. The parties hereto resorted to filing multiple applications and affidavits, which was totally unnecessary. Only one affidavit should have been filed.

27. I note that the order of 12th October 2016 has an error, which might have contributed to the confusion. The Judge appointed the deceased as co-administrator of his own estate, instead of appointing Walter Japhed Angatia. That anomaly could have been cured merely by Walter Japhed Angatia coming back to court for review of the orders of 12th October 2016. That would have made life easier for everybody.

28. Be that as it may. Kariuki J did not revoke the grant made to the administratrix, neither did he set aside the orders that the court had made earlier for confirmation of her grant. All what he did was to appoint a co-administrator and to direct that the co-administrator does certain things. One of them was to conduct searches on the two estate assets - Kakamega/Matsakha/189 and Ndivisi/Muchi/1620, so as to determine their state of registration as from the date of the order, 12th October 2016, to facilitate the making of orders that would culminate in the re-distribution thereof and rectification of the certificate of confirmation of grant. Of course, the court noted that Kakamega/Matsakha/189 had been transferred to the name of a third party in other succession proceedings, and had directed the administrators to taken legal proceedings to recover the property, and it was only after that recovery that the court could venture to distribute Kakamega/Matsakha/189.

29. The proceedings that I conducted were intended to address the issues that Kariuki J identified in the ruling of 12th October 2016. It is about the re-distribution of the estate to accommodate Walter Japhed Angatia and the other beneficiaries that had been left out, and thereafter to order rectification of the certificate of confirmation of grant dated 3rd April 2014. For that reason I shall treat the filings by William Barasa Muranda and Walter Japhed Angatia as attempts to comply with Kariuki J's directions. I shall, therefore, deal with the matter strictly within the directions of 12th October 2016.

30. Distribution of estate assets is facilitated through confirmation of grants, which is provided for in section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. The provision on confirmation of grants may not altogether be relevant. Distribution itself is regulated by Part II of the Law of Succession Act, where the deceased died testate, in which case, his estate would be distributed in accordance with the terms of his will. Where the deceased died intestate, distribution would be subject to Part V of the Law of Succession Act. The critical factors to be taken into account in intestacy would be the question of the persons who had survived the deceased. Under Part V, these would be family members. If he was survived by one spouse and children, section 35 would apply. If he was survived only by a spouse but no children, section 36 would apply, but if he had children but no spouse at the point of his death section 38 would apply. Section 39 caters for a person who was not survived by a spouse or children, in such case his survivors would be his parents, siblings and other relatives. Where no relatives can be traced, the property passes to the state in *bona vacantia*. Section 40 provides for distribution in a polygamous setting.

31. The deceased herein died intestate, for no will has been placed on record, alleged to have been executed by him, and no one has claimed that he had made one. Part V of the Law of Succession Act would apply here. The question would be which particular provision applies, that is as between sections 35, 36, 38, 39 and 40. The administratrix alleges that she was the sole wife of the deceased, and that they had had children together, that would mean, if we go by her case, that section 35 of the Law of Succession Act would apply. William Barasa Muranda and Walter Japhed Angatia argue that the deceased died a polygamist, with three wives and children with all three, and, going by that argument, section 40 of the Law of Succession Act would apply. Both sides placed evidence before me in an effort to establish their respect cases. Unfortunately, I do not have to determine that question, for the same was dealt with by Kariuki J in the ruling of 12th October 2016. At paragraph 10 of that ruling, the court made a finding that Walter Japhed Angatia was entitled to an equal share of Ndivisi/Muchi/1620 with the survivors of the deceased. That would mean that I do not have to make an enquiry into whether or not Walter Japhed Angatia was a survivor of the deceased, since that is now water under the bridge. Paragraph 10 of the ruling reads :

“As for 1620, the applicant is entitled to an equal share with the survivors of the deceased.”

32. From that finding, there is no doubt that the deceased was a polygamist, and his estate fell for distribution in terms of section 40 of the Law of Succession Act. From the material placed before me by Walter Japhed Angatia and William Barasa Muranda, and their witnesses, I am satisfied that the deceased died a polygamist, with three wives, and several children. The case presented by the administratrix comprised of nothing more than mere denials. She did not call any independent witness from the extended family to support her contention.

33. Section 40 of the Law of Succession Act provides as follows:

“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.”

34. The effect of that provision is that the assets would be divided as between the houses of the deceased, taking into account the number of children in each house, and adding any surviving widow as an additional unit to the children. From the material before me, the deceased had married three wives, and, therefore, he had three houses. The first house comprises of a widow, two sons and three daughters. That would mean that that house comprises of six units. The second house comprises of two daughters, and therefore it comprises of two units; while the

third house had two children, a son and a daughter, and, therefore, it has two units. That totals up to ten units. Ndivisi/Muchi/1620 should, therefore, be divided into ten units, out of which the first house should get six, and the second and third houses two units each. That would mean that Ndivisi/Muchi/1620 should be shared out at the ratio of 3:1:1.

35. According to section 40(2) of the Law of Succession Act, after the assets have been devolved to the houses, as stated in paragraph 34 above, the property that has devolved to each house should then be dealt with in terms of sections 35 to 38 of the Law of Succession Act. The first house comprises of a surviving spouse and children, and, therefore, the three units allocated to that house should be distributed in terms of section 35 of the Act. The other two houses do not have a surviving spouse, but comprise of surviving children only, and, therefore, section 38 would apply to the two units to be allocated to each of the two houses.

36. Sections 35 and 38 state as follows:

“35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

36. ...

37. ...

38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be.”

37. I have seen a certificate of official search dated 13th October 2016 for Ndivisi/Muchi/1620. It shows that the register for that property was closed on 6th July 2014, following subdivision into Ndivisi/Muchi/8686, 8687, 8688, 8689 and 8690 and registration in the names of the administratrix, Moses Kakai Muranda, Anthony Tawayi Wamukota, Jesie Wekesa Wesonga and Everlyne Lumbasi. So as it is that property is not available for distribution as it no longer exists. However, the record is clear that as at the date of the deceased's death, the property was registered in the name of the deceased.

38. Secondly, the administratrix and her witness testified that they were the ones who sold property to these individuals after the deceased died, allegedly to finance the succession cause. There is a document on record titled mode of distribution dated 22nd February 2014, filed by the administrator, which describes the three individuals as such. There is also a certificate of official search on Ndivisi/Muchi/1620, dated 10th January 2014, which indicates that as at that date the said property was still registered in the name of the deceased. Ndivisi/Muchi/1620 was introduced into this matter through an application for confirmation of grant dated 22nd February 2014, where the mode of distribution dated 22nd February 2014 is attached. The application was heard on 2nd April 2014, and the administratrix and Moses Kakai Muranda are recorded as saying that they had omitted Ndivisi/Muchi/1620, which they had sold to purchasers. The application was allowed as prayed and it was directed that a fresh confirmed certificate be issued. A certificate of confirmation of grant dated 3rd April 2014 issued with the names of the three buyers. There is, therefore, adequate evidence that the three purchasers had allegedly acquired portions of Ndivisi/Muchi/1620 before the grant that the administratrix held had been confirmed.

39. The estate of a dead person vests in the administrator by virtue of section 79 of the Law of Succession Act. That means that the administrator holds the property in the same manner as an owner, having all the rights and powers of an owner. The powers are set out in section 82 of the Law of Succession Act. An administrator is also under the duties set out in section 83 of the Law of Succession Act. One of the powers is that to sell estate property. The power of sale is granted to enable an administrator, or executor, dispose of estate property for various reasons – to raise funds to settle debts and liabilities, to pay legacies, to meet administration expenses, among others. However, there is a caveat in section 82(ii) of the Law of Succession Act, that an administrator cannot exercise the power of sale to dispose of immovable property before confirmation of grant. That means that that power can only be legitimately exercised after the grant has been confirmed. In any case, according to section 80(2), a grant of letters of administration only takes effect from the date the same is made, and the powers set out in section 82 can only be exercised by a grant-holder. Under section 45 a person who does not hold a grant intermeddles with the estate should he handle the property, and that amounts to a crime. Sections 45, 79, 81 and 82(ii) states as follows:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

“79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

“80. When grant takes effect

(1) ...

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant. “

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) ...

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) ...

(ii) no immovable property shall be sold before confirmation of the grant.”

40. Ndivisi/Muchi/1620 was immovable property. Going by section 82(ii) of the Law of Succession Act that property could not be legitimately sold by the administratrix before her grant had been confirmed. No sale agreements or other memoranda in writing was placed before the court as evidence of such sale, but there are documents on record filed before the grant was confirmed where the administratrix stated that she had sold the property to strangers. The administratrix told the court so on 2nd April 2014 and 2nd July 2019. The said sales were, therefore, unlawful and of no effect, since they were contrary to section 82(ii) of the Law of Succession Act. The administratrix could not enter into a binding contract to dispose Ndivisi/Muchi/1620 before her grant was confirmed, unless she obtained leave of court first. At the time the three individuals allegedly bought a portion of Ndivisi/Muchi/1620 from the administratrix, the grant had not been confirmed and there was no evidence that the administratrix has obtained leave of court to allow her to sell the property. There was, therefore, no valid sale of Ndivisi/Muchi/1620 or of a portion thereof, and no property had passed. For that reason the three individuals had acquired no stake at all in the property to warrant the same being devolved to them at confirmation of grant. The property was, therefore, wrongly devolved upon the said individuals, and should be restored back to the estate so that it can be distributed amongst the rightful beneficiaries.

41. Regarding Kakamega/Matsakha/189, Kariuki J. had found that it had been devolved upon a third party in other succession proceedings and, therefore, the same did not form part of the estate of the deceased. It was directed that the administrators take time to sue the registered owner of Kakamega/Matsakha/189 with a view to restore it to the estate. That has not been done, and, therefore, Kakamega/Matsakha/189 does not, as yet, form part of the estate, and is not available for distribution.

42. Both sides alluded to the sharing of Ndivisi/Muchi/1620 at various stages. The administratrix said the sharing was done by the deceased before he passed on. William Barasa Muranda says that there was no sharing before the demise of the deceased. Indeed, he takes the position that there was no sharing at all at any stage. Walter Japhed Angatia says that there was sitting by his uncle sometime in 2017, at which the estate was shared out. Moses Kakai Muranda on his party appears to concede that the event that Walter Japhed Angatia refers to did happen, but he was not party to it. He said that there was a sharing by the clan in 1991 where the land was shared out between him and William Barasa Muranda. He did not make any reference to the sharing that the administratrix talked about.

43. What do I make of the alleged sharings? The administratrix provided no written evidence of the sharing by the deceased that she talked about, and she called no witness to support her case on that score. Moses Kakai Muranda similarly provided no evidence of the sharing that he alluded to and, therefore, I have nothing before me as proof that after the deceased's death the clan distributed the estate. The same would

apply to the allegation by Walter Japhed Angatia that his uncle or the clan did distribute the estate. I must state that even if the clan did meet and subdivide the property, the same would have been an exercise in futility, for the deceased died in 1989, after the Law of Succession Act had come into force in 1981. The estate of the deceased fell for distribution in accordance with the Act, by virtue of section 2(1) of the Law of Succession Act, and since the deceased died intestate, the law on distribution would be Part V of the Law of Succession Act, and not the customs of the tribe from which the deceased came from. From the provisions of the Act, it should be clear that there is no role for the clan. Intestate estates of persons dying after 1st July 1981 are distributed by the court, not the clan, in accordance with the Act, not custom, culture or tradition. The clan would be caught up in section 45 of the Act if it interferes with the property of a dead person without the authority of the court. The acts by the clan or by the uncles, that Moses Kakai Muranda and Walter Japhed Angatia alluded to, amounted to intermeddling with the estate, for they happened outside of the provisions of the Law of Succession Act, they were not sanctioned by the court, and they, therefore, amounted to intermeddling. The alleged distributions or sharing of the assets by the clan or by the uncles was of no effect.

44. In note that the administratrix appears to take the view that the estate should be distributed only amongst the sons of the deceased, to the exclusion of the daughters. It bears pointing out that under the Law of Succession Act, there is no gender discrimination. That law is gender neutral. It treats both gender equally. The provisions on distribution in intestacy make no distinction between male and female children, neither does it disqualify female children from benefit on account of their marital status. All the children of the deceased are equal, ought to be treated equally and must be provided for equally.

45. William Barasa Muranda was asking to be made an administrator. Kariuki J disposed of that issue on 12th October 2016. It is not a matter before me. The court then appointed Walter Japhed Angatia as a co-administrator to the administratrix, and at that time the issue of her selling estate property had arisen but that notwithstanding the court did not remove her as administratrix. I note that the court made an error in the appointment of Walter Japhed Angatia in that it appeared to appoint the deceased, instead of Walter Japhed Angatia. I shall deal with the anomaly in the final orders.

46. I believe that I have said enough. Before final orders on the distribution of Ndivisi/Muchi/1620 can be made, several other things must be done first. Firstly, the file in Webuye SPMCSC No. 26 of 2013 must be called for the purpose of being consolidated with the instant one, for it is unacceptable that two parallel proceedings relating to the same estate are conducted. Secondly, the subdivision of Ndivisi/Muchi/1620 into Ndivisi/Muchi/8686, 8687, 8688, 8689 and 8690 should be cancelled since the same is no longer tenable following the orders of 12th October 2016. The same should be restored to the position that obtained as at the date of the death of the deceased on 15th March 1989.

47. The orders that I shall make in the circumstances are:

- (a) That I hereby appoint Walter Japhed Angatia a co-administrator of the estate of the deceased with the administratrix;**
- (b) That the grant of letters of administration intestate issued on 21st April 1994 shall be rectified accordingly to conform with (a) above;**
- (c) That I hereby direct the Land Registrar responsible for Bungoma County to cancel the subdivision of Ndivisi/Muchi/1620 into Ndivisi/Muchi/8686, 8687, 8688, 8689 and 8690, and to restore the said property to the registration that prevailed as at the date of the death of the deceased on 15th March 1989, so as to facilitate distribution of the same to the rightful beneficiaries of the deceased herein;**
- (d) That the Deputy Registrar shall call for the court file in Webuye SPMCSC No. 26 of 2013;**
- (e) That I shall make final orders on distribution of the estate upon compliance with (c) and (d) above; and**
- (f) That the matter shall be mentioned after forty-five (45) days for compliance and further directions.**

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

W. MUSYOKA

JUDGE