REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 286 OF 2009

IN THE MATTER OF THE ESTATE OF SANANGA OKONDA (DECEASED)

RULING

1. On 22nd July 2019, parties the compromised the summons for revocation of grant on record, dated 20th December 2018, on the understanding that Thomas Nathaniel Okonda, Eunice Opindi Keya and Eris Abucheri would be appointed joint administrators of the estate, and that the said new administrators each file their proposed mode of distribution of the estate, in which they would include all the beneficiaries. Orders were made by consent in those terms.

2. I see on record a mode of proposed distribution by Jemimah Eshikumo Emos, Roselyn Nyangasi Toya, Filis Ongachi Omiti and Lydia Andisi Oluchini, who are daughters of the deceased, and whose application, dated 20th December 2018, was compromised on 22nd July 2019. The proposed distribution is then elaborated through written submissions that the daughters of the deceased filed, simultaneously, with the said proposals. When the matter was mentioned on 26th November 2019, Ms. Ayatsi, advocate for Thomas Nathaniel Okonda, indicated that they would not file any proposals as they would support those filed by the daughters. Ms. Masakhwe held brief for Mr. Osiemo for the 2nd administrator, and stated that they had filed submissions, and proposed that Rose Onyoni be given 4 acres. I have not come across any proposal nor written submissions filed by Mr. Osiemo, on behalf of the 2nd administrator.

3. The matter is about distribution. That would mean confirmation of the grant that the court made to the current administrators on 22 nd July 2019. My understanding is that the distribution will be considered in the context of the summons for confirmation of grant dated 11th January 2017. Section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, governs such applications.

4. For certainty, I believe it would be prudent to cite the provisions of section 71, it says:

> "Confirmation of Grants
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> 71. Confirmation of grants
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> (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
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> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
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> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
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> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or
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> (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
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> (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."

5. In confirmation applications, there are two principal factors for the court to consider, appointment of the administrators and distribution of the estate. I do not think I will need to consider the issue of appointment of administrators, for that was done recently, on 22nd July 2019, by consent of the parties. The issue as to whether they were properly appointed does not arise. Neither whether they have gone about the business of administration in accordance with the law arise, since the proposals have been placed on record following directions by the court. The only issue therefore, for me to consider is on distribution.

6. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 provides 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).

7. For clarity and emphasis, the proviso and Rule 40(4) state as follows:

> "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."

> "Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined."

8. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? Have all the persons beneficially entitled to the estate of the deceased been identified and their respective shares at distribution been ascertained.

9. I will first start by considering whether the beneficiaries have been identified. There is a letter on the record from the Assistant Chief of Emmabwi Sub-Location, of Central Bunyore Location, dated 12th January 2002, which is not altogether helpful. It does not identify the persons who survived the deceased. It lists, instead, persons who were said to have been present at a meeting that was held at the Chief's office. The petition for letters of administration intestate, which was filed herein on 14th March 2002, lists six individuals as survivors, being three widows and three sons.

10. The revocation application dated 20th December 2018, had been brought by the four daughters that I mentioned in paragraph 2 here above. Their principal argument was that they had been left out of the process, and they listed nine individuals as the survivors of the deceased, that is to say Jemima Eshikumo Emos, Roselyn Nyangasi Toya, Filis Ongachi Omiti, Lydia Andisi Oluchina, Thomas Nathaniel Okonda, Livingstone Aswani Sawanga, Abigael Kabole Sawanga and Joan Elina Sawanga. It is not detailed how these individuals related to the deceased.

11. One of the responses to that application was by one of the administrator, Eunice Opindi Keah. She recognizes Jemima Eshikumo Emos, Roselyn Nyangasi Toya, Filis Ongachi Omiti, Lydia Andisi Oluchina to be daughters of the deceased, being the deceased's offspring with the late Jefris Okoko Sawanga. She avers that she was also a widow, and the late Jefris Okoko Sawanga had recognized her as such. .the other reply to the application was by Eris Abucheri Sawanga, another administrator of the estate. She confirms Jemima Eshikumo Emos, Roselyn Nyangasi Toya, Filis Ongachi Omiti, and Lydia Andisi Oluchina to be daughters of the deceased with his first wife. She further says that Mwita J had, in a ruling, recognized her and Eunice Opindi Keya and Rose Onyoni as widows of the deceased, and directed that a summons for confirmation of their grant be filed.

12. I have perused the court file. I have noted that in the ruling by Mwita J, the court had noted that the deceased had been survived by the two widows, the subject paragraph 11, here above. The court revoked the grant made to the son and brother of the deceased and made a fresh grant to the two widows, and directed them to file a summons for confirmation of grant as stated above.

13. The two widows, in their summons for confirmation of grant, dated 11th January 2017, identified 15 individuals as having survived the deceased. According to the supporting affidavit, the deceased had married four times. The first wife was the late Jefris Okoko Sawanga, who was the mother of Jemima Sawanga, Maria Sawanga, Rhoda Sawanga, Queen Sawanga and Thomas Nathaniel Okonda. The second wife was Eris Abucheri, who is one of the administrators of the estate appointed on 22nd July 2019, and the mother of Mofat Sawanga, Livingstone Aswani and the late Abigael Kabole and Alice Atieno. The third wife is said to be Rose Onyoni, the mother of Beatrice Khamata Sawanga and Joan Elina Sawanga. Eunice Keya, who is one of the administrators appointed on 22nd July 2019, is listed as the fourth wife.

14. There is an affidavit of service on record, indicating that the confirmation application was served on the individuals named in the application as survivors. According to Rule 40(6), persons who wish to object to that application file affidavits of protest. I have scrupulously gone through the record before me, but I have not come across any protest affidavit.

15. The application, dated 11th January 2017, was at the instance of Eunice Opindi Keah. It would appear that her co-administrator, Eris Abucheri Sawanga chose to respond to it by way of the written submissions filed by her advocate on 24th October 2018. It is unfortunate that parties confuse affidavits with written submissions. Affidavits relate to evidence, while submissions are arguments, based on those affidavits. Written submissions should never be used to convey evidence. What a party ought to do is to file an affidavit to respond to averments made in another affidavit, and, thereafter, file submissions to make arguments on the basis of the affidavits on record. Written submissions cannot

take the place of affidavits, because whatever is contained in them is not on oath and cannot, therefore, pass as evidence. I raise this because after going through the written submissions dated 23rd October 2018, I have noted that they allude to facts which were not the subject of any of the affidavits stated on oath, and which are, no doubt, intended to respond to the affidavit that Eunice Opindi Keah swore on 16 th January 2017 in support of the confirmation application. As it is Eris Abucheri Sawanga has not placed any evidence before me that can form basis for me to determine the application.

16. The administrators who were removed by Mwita J through the ruling of 30th November 2016, Joshua Anakoli Okonda and Thomas Nathaniel Okonda, have not responded to the confirmation application, and, therefore, I have no basis of knowing their position on the proposals. They did not file any affidavit even after the compromise of 22nd July 2019.

17. Rose Onyoni and her household did not also file any responses to the application. Neither have they filed any after the compromise of 2 nd July 2019, save for the remarks made on her behalf in open court on 26th November 2019, by Ms. Masakhwe, that she be given four acres.

18. The only reaction from the first house is the summons for revocation of grant that the daughters from that house filed, which was compromised on 22nd July 2019. It was needless to file the summons for revocation because the issues touching on the appointment of administrators was, in any way, going to be a matter for consideration by the court at the confirmation hearing, in view of section 71(2)(a)(b) of the Law of Succession Act, the very first consideration by a court faced with a confirmation application, and before distributing the estate, is to determine whether the administrators were properly appointed, as a prelude to determining whether to confirm them or not. Filing a revocation application during pendency of a confirmation application is duplicitous. It wastes time since the issues raised in the revocation application can be addressed and the orders sought obtained in the confirmation application. The said provisions say:

> "(2) Subject to subsection (2A), the court to which the application is made, or to which any dispute in respect thereof is referred, may—
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> > (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
> >
> > (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…"

19. I understand the applicants in the revocation application to be arguing that Eunice Opindi Keah and Eris Abucheri Sawanga were not widows of the deceased, and asserting that the deceased had married only once, and the only survivors of the deceased were the children of that one wife, the late Jefris Okoko Opiayo. That approach is no doubt very ill-advised as Mwita J had already made a determination on the status of the two in the ruling of 30th November 2016, and if the daughters were not happy with what the court found, the solution lay with filing an appeal, for that point, so far as this court is concerned was *res judicata*. Happily for everyone, the application was compromised.

20. The daughters, despite being the movers of the application that led to the consent orders of 22 nd July 2019, have not filed a protest affidavit to the application for confirmation of grant. What they did was to file a list of proposed distribution. I should emphasize that courts act on evidence. A confirmation application should be supported by evidence tendered by way of an affidavit in support. Rule 40(6) envisages the filing of a protest affidavit, which is meant to be a response to the proposals on distribution in the affidavit in support. Those proposals should be countered by counter proposals in an affidavit, which adduces evidence. The list of proposed distribution is not evidence and, ideally, it is not a proper basis for dealing with the proposals made by the applicant in the confirmation application.

21. Be that as it may, according to the daughters the deceased had only one wife, their mother the late Jefris Okoko Sawanga, who had the 5 children detailed above. He identifies Eris Abucheri and Eunice Opindi Keah, not as widows of their father, but as dependants. Eris Abucheri is said to have two sons and a daughter, who I have also detailed above. Eunice Opindi is said to have had no children. They have also listed Joan Sawanga as a daughter of the deceased without identifying her mother. There is no mention of Rose Onyoni in their proposals.

22. Let me start with the status of Eris Abucheri and Eunice Opindi. The issue as to whether they were wives of the deceased or not was dealt with by Mwita J in the ruling of 30th November 2016. The court made a categorical finding that they were widows of the deceased, and it was on that basis that the grant that had been to the son and brother of the deceased was revoked, and a grant made to the two women. The issue of their marital status is now water under the bridge. It cannot be revisited. The two cannot be dealt with otherwise than as widows of the deceased. That matter is now *res judicata*. As I said elsewhere, if the daughters were unhappy with the finding by Mwita J on that score, they should have appealed to the Court of Appeal. At the High Court, it cannot be revisited.

23. I note that the daughters describe the two as dependants. Dependency is a concept under Part III of the Law of Succession Act. It arises where the question of reasonable provision has to be made to a family member or survivor of the deceased before confirmation or distribution of the estate. It entails the filing of an application under section 26 of the Law of Succession Act. There is nothing on record to demonstrate that any such application was ever mounted, nor that any orders were ever made by the court declaring the two as dependants. It should be noted that the categories of dependants under section 29 relate only to survivors of the deceased, that is to say his surviving spouses, children and other family members. Under section 29 a stranger cannot qualify as a dependant. Under that provision the only women who would qualify as dependants are wives, daughters, mothers, grandmothers, granddaughters, stepdaughters, sisters, half-sisters and such female children as the deceased might have taken into his family as his own. That would mean any women who he cohabited with and who does not fall under any of those categories of women cannot be a dependant, and if she qualifies to be a dependant, then that would impliedly mean that she was a wife of the deceased. In short, what the daughters are doing in describing Eris Abucheri and Eunice Opindi as dependants of the deceased rather than wives, is to confirm that they were indeed wives, for there was no way they could be dependants if they were not wives of the deceased.

24. Section 29 says:

"Meaning of dependant

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

25. The daughters have also emphasized that their mother, the late Jefris Okoko Sawanga, was married in church, and it would appear that could be the reason they assert that she was the only wife the deceased had, and to dismiss Eris Abucheri and Eunice Opindi as mere dependants. From a marriage standpoint, the marriage between the deceased and their mother was statutory. Which meant that their father lost capacity, during life time to contract other marriages during the substance of the statutory marriage, which then meant that his unions with Eris Abucheri and Eunice Opindi were adulterous. However, under the Law of Succession Act, such adulterous marriages are recognized for succession purposes. That is the effect of section 3(5) of the Law of Succession Act. It should be well for the daughters of the deceased to understand that the argument that their father had no capacity to marry other women, for as long as he was married to their mother, under statute, could only hold sway under marriage law and not in succession. The statutory marriage ends upon the death of one of the partners, upon which section 3(5) would apply to recognize any adulterous relationships that the deceased would have entered into during his lifetime, so long as those relationships pass the test set in section 3(5).

26. Section 3(5) of the Law of Succession Act says:

"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

27. Going by the above provision, it does not matter that the deceased had contracted marriage under statute, any woman that he subsequently married under customary law would be considered to be a wife for the purpose of inheritance. The question is, did the deceased marry Eris Abucheri and Eunice Opindi under customary law, or did he just cohabit with them? I will not venture to answer that question. It was before Mwita J, and, on 30th November 2016, the court answered it in the affirmative, by declaring that the two were wives of the deceased. I believe that should clear the mind of the daughters of the deceased so far as the status of Eris Abucheri and Eunice Opindi is concerned. That issue has been resolved and cannot be reopened. The two were widows of the deceased, and it shall be taken that the deceased died a polygamist. In any event, I do not quite understand why the daughters would have issue with Eris Abucheri and Eunice Opindi being identified as widows of the deceased, when their own brother and uncle, whose grant was revoked on 30th November 2016, had filed a petition herein, on 14th March 2002, in which they had identified them as such. They had even allocated them shares in the estate in their application for confirmation of grant.

28. Before I wind up and venture to ascertain who the survivors of the deceased were, so that I can move on to distribute the estate, let me consider the status of Rose Onyoni and Joan Sawanga.

29. Regarding Rose Onyoni, there was no mention of her in the initial letter from the Chief, dated 12th January 2002. She was not listed in the petitioner as a survivor of the deceased, nor in the confirmation application filed by the initial administrators, dated 17th July 2003, where she was not allocated any share in the estate. It would appear that it was the filing of that confirmation application that brought her existence to the fore. Eunice Opindi wrote a letter to the court, dated 24th September 2003, and filed herein on 8th October 2002. She mentioned that she, Eunice Opindi, was a fourth wife of the deceased, suggesting that there was another wife apart from her, Eris Abucheri and Jefris Okoko. She, however, did not mention the name of Rose Onyoni. That name was introduced into the record through a letter that the Chief of Nzoia Location, Were Ngao Isaiah, wrote to court on 29th September 2003. He identified the deceased's widows as Jeferezi Okoko, Eris Obucheri, Eunice Opindi and Rose Onyonyi. Jeferezi Okoko, Eris Obucheri and Rose Onyonyi were said to reside at Mbururu Farm, while Eunice Opindi was said to be a resident of the Moi's Bridge Farm. When the initial grant was confirmed, Rose Onyonyi was not catered for. There is correspondence from the Federation of Women Lawyers –Kenya, dated 1st March 2006, which mentions her as one of the widows of the deceased. Rose Onyoni Sawanga swore an affidavit on 18th April 2016, in response to an application that Eunice Opindi Keah had filed seeking revocation of the grant. She describes herself, in that affidavit, as the third wife of the deceased, and the mother of Beatrice Sawanga. She states that she resided on the Mbururu Farm with Eris Abucheri, complains about not being consulted on the distribution that had been proposed in the initial confirmation process, and of her daughter being excluded. Then there is an affidavit of protest, sworn by Mophat Swanga Okonda, on 26th April 2016, in purported support of a confirmation application, purported because there was no confirmation application pending at that time, and it would appear he was responding to the summons for revocation of grant. He identifies Rose Onyoni as one of the four wives of the deceased, and proposes that she gets a portion of Mbururu Farm, Nzoia Farm and a plot. The name of Rose Onyoni came up when Eunice Opindi testified, when she mentioned her as one of the wives of the deceased. It was also mentioned by Thomas Nathaniel Okonda, who was an administrator at the time, when he said she was one of the wives of the deceased, but they had divorced by the time he died. He stated that they had a daughter together known as Joan Sawanga. Joshua Anakoli Okonda, the other administrator, also mentioned her among the deceased's wives. In the end Mwita J. concluded that Rose Onyoni had been divorced by the deceased prior to his death.

30. Regarding Joan Sawanga, I note that her name was not in the initial letter from the Chief on 2002, nor in the petition filed herein, on 14 th March 2002. Her name first came up on 28th August 2003, when the summons dated 17th July 2003 was filed for confirmation of the initial grant. It was proposed that she be given 1 acre out of Moi's Bridge/240. She was listed as a daughter of the deceased in the Chief's letter dated 29th September 2003. It merged at the oral hearing of the revocation applications that she was a daughter of the deceased, and the court in the ruling of 30th November 2019 recognized her as such. There is also another daughter of Rose Onyoni known as Beatrice Khamata Sawanga who is mentioned on and off basis, but there is sufficient mention to identify her as s survivor of the deceased. It is however, not clear whether Beatrice and Joan refer to one and the same person.

31. Therefore, from the material before me, I have come to the conclusion that the deceased died a polygamist, having married four times. One of his wives has since died, he had divorced one before he died and two are alive. All the wives had children with him save for his last wife, Eunice Opindi, who had no children. The survivors of the deceased to who the estate should be shared out are as follows:

a. The first house of the late Jefris Okoko Sawanga - 5 children- Jemima Eshikumo Emos, Roselyn Nyangasi Toya, Filis Ongachi Omiti, Lydia Andisi Oluchini and Thomas Nathaniel Okonda.

b. The second house of Eris Abucheri – 3 children – Mophat Sawanga, Livingstone Aswani Sawanga and Abigael Kabole.

c. The third house of Rose Onyoni (divorced) – 2 children – Beatrice Khamata and Joan Elina Sawanga.

d. The fourth house – Eunice Opindi – 0 children.

32. The next consideration should be whether the assets of the estate have been ascertained. This is critical as the succession cause is all about distribution of the property that the deceased died possessed of. The parties have placed on record documents of ownership of the assets. I have seen title deeds relating to Miti Mingi Block 3/477, 1727 and 1728, Butsotso/Shikoti/2452, and W/Bunyore/Embali/337, a lease in respect of Nakuru/Langalanga/1 and a land certificate in respect of Moi's Bridge/240. I have also seen search certificates in respect of Miti Mingi Block 3/477, 1727 and 1728, W/Bunyore/Embali/337 and 424, Nakuru/Langalanga Block 1/1 (encumbered to Kenya Commercial Bank), Kakamega/Moi's Bridge/240 and Butsotso/Shikoti/2452. The parties have referred to several other properties, but have not attached any documents to connect them to the deceased. The assets in that category include Mbururu Farm, Plot No. 288 Rhonda Nakuru, Nakuru/Langalanga/5622/1, Nzoia Farm/151, plot at Chapkaka (Mbururu), plot at Kona Mbaya (Mabusi), Nzoia Scheme /10/151, and Nakuru Municipality Block 29/209 Rhonda. It would also appear that the deceased operated bank accounts at the National Bank of Kenya and Barclays Bank of Kenya Limited.

33. From the material before me, the administrators appear to have only ascertained the following assets as belonging to the deceased, that is to say the property with registration documents, being Miti Mingi Block 3/477, 1727 and 1728, Butsotso/Shikoti/2452, W/Bunyore/Embali/337 and 424, Nakuru/Langalanga/1 (Nakuru/Langalanga Block 1/1) and Moi's Bridge/240. The rest of the assets are not supported by any documentation, and, therefore, there is no certainty that they belonged to the deceased as at the date of his death. I shall not, therefore, venture to purport to distribute them. It would be an indication that the administrators have not completed the exercise of ascertaining the assets of the estate, and that the confirmation application is premature to the extent that distribution is being proposed before all the assets have been ascertained. I note that Nakuru/Langalanga/1 (Nakuru/Langalanga Block 1/1) is encumbered to the Kenya Commercial Bank, it is, therefore, not free property that can be distributed at this stage. I shall leave it out, and the parties shall present it at a later date for distribution once the encumbrance had been removed.

34. The third consideration is how the assets of the estate should be distributed amongst the persons that have been identified as survivors of the deceased. I have already found that that the deceased was a polygamist. From the material before me, and as discussed elsewhere here above, I am satisfied that the deceased died a polygamist, with four wives, and several children. His estate, therefore, has to be distributed taking into account all those considerations.

35. I will need next to identify the law to govern distribution to his estate. From the record, he died in 2001, that was long after the Law of Succession Act had come into force in 1981. He died intestate, for no valid will has been brought forth, and, therefore, his estate is to be distributed in accordance with Part V of the Law of Succession Act, which governs intestate distribution. By virtue of section 2(1) of the law of Succession Act, Luhya customary law will not be relevant to distribution herein, and the estate shall be governed wholly by statute.

36. Section 40 of the Law of Succession Act is the law which governs distribution of the estate of a polygamist. Section 40 of the Law of Succession Act provides as follows:

> "40. Where intestate was polygamous
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> (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.
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> (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."

37. 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 four wives, and, therefore, he had four houses. The first house, at this stage, comprises of one son and four daughters. That would mean that that house has five units. The second house comprises of one surviving widow and two surviving sons and one surviving daughter,

and, therefore, it comprises of four units. The third house has two children, both daughters, for their mother was divorced and, therefore, did not survive the deceased as a widow, therefore, it has two units. The fourth house comprises of only one unit, since there is a surviving spouse but no children. That totals up to thirteen units. The assets available for distribution should, therefore, be divided into thirteen units, out of which the first house should get five units, the second four units, third house two units and the fourth house one unit. The ratio of sharing should work out as 5:4:2:1.

38. According to section 40(2) of the Law of Succession Act, after the assets have been devolved to the houses, as stated in paragraph 38 above, the property that has devolved to each house should then be dealt with in terms of section 35 to 38 of the Law of Succession Act. The second house comprises of a surviving spouse and children, and, therefore, the four units allocated to that house should be distributed in terms of section 35 of the Act. The fourth house comprises of a surviving spouse without children and, therefore, section 36 shall apply. The other first and third 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.

39. Sections 35, 36 and 38 state as follows:

> "35. Where intestate has left one surviving spouse and child or children
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> (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—
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> (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) …
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> (3) …
>
> (4) …
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> (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.
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> 36. Where intestate has left one surviving spouse but no child or children
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> (1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to— (a) the personal and household effects of the deceased absolutely; and (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and (c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.
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> (2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).
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> (3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.
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> 37. …
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> 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."

40. The application of the ratio is usually straightforward where there is only one property to be shared out. It is more tricky were there are several assets of varying sizes and values occupied by some of the survivors. In this case it is said that the assets that are vast in size and are of greater value, and which appear to be where a majority of the survivors reside, have not been proved to be registered in the name of the deceased. I am talking of such assets as the Mbururu Farm and Nzoia Farm. In total, the deceased is said to have died possessed of twelve assets, but these two appear to be the most valuable, and it would appear I cannot distribute the rest of the assets and leave these two and do justice. I believe the best way out of the situation is to postpone distribution in terms of section 71(2) (d) of the Law of Succession Act, to give time to the administrator to obtained ownership documents for all the assets of the estate, and especially of Mbururu Farm and Nzoia Farm, to enable distribute of the estate in a manner that is fair and just to all.

41. The orders that I am inclined to make at this stage are as follows:

> **a. That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) of the Law of Succession Act;**

b. That the administrators are hereby granted leave to file a further affidavit in which they shall provide documents on the ownership of the assets of the estate that are so far not supported by any documentation, and especially Mbururu Farm and Nzoia Farm/151;

c. That the administrators shall also clarify whether Beatrice Sananga and Joan Sananga are different persons, and whether they both are children of Rose Onyoni;

d. That the matter shall be mentioned after thirty days for compliance and further directions; and

e. That the final orders on the summons for confirmation of grant on record shall be made only after compliance with the directions given above.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE