REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 196 OF 2010

IN THE MATTER OF THE ESTATE OF KAKAI LIVINGSTONE ODUMO (DECEASED)

JUDGMENT

1. According to the certificate of death on record, the deceased died on 2nd August 1998. The letter from the Chief indicates that he was survived by four individuals, Okoyana Ambululi, Shem Makiya Mukira, Charles Makokha Khasatsili and Samson Soita. Their relationship with the deceased is not disclosed.

2. Representation to the estate was sought by a petition filed herein on 25th March 2010, by Okoyana Ambululi, in his capacity as a son of the deceased. He was expressed to have died possessed of a property known as South Kabras/Shamberere/1133. He listed himself and Shem Makiya Mukira, Charles Makokha Khasatsili and Samson Soita, who are described as sons of the deceased, as the survivors of the deceased. Letters of administration intestate were made to him on 27th December 2010, and a grant was issued, dated 29th December 2010.

3. The administrator filed a summons for confirmation of grant on 2nd June 2011, dated 27th May 2011. He identifies Okoyana Ambululi, Shem Makiya Mukira, Charles Makokha Khasatsili and Samson Soita as the survivors of the deceased, but without mentioning how they were related to the deceased. He proposes that the property, Kabras/Shamberere/1133, be shared out between Okoyana Ambululi and Shem Matia, at ratios of 1.75 HA and 0.25 HA.

4. The application elicited a response from Charles Makokha Khasatsili. The affidavit, which he swore on 3rd October 2011, does not purport to be in protest to the confirmation application, but I shall, nevertheless, treat him as a protestor, and shall hereafter refer to him as the 1st protestor. He avers that he bought 3½ acres of Kabras/Shamberere/1133 from the deceased. He states that his name had been listed in the letter from the Chief, which led to the filing of the cause, but come confirmation, his name was omitted. He has attached documents which show that the deceased had applied for subdivision of Kabras/Shamberere/1133 into two portions, measuring 6.0 acres and 3 ½ acres, where the 3 ½ acres were to be transferred to him. That is the purport of the application for consent of Land Control Board that the deceased allegedly made on 18th January 1982 to the Kabras Land Control Board. The Kabras Land Control Board sat on 26th February 1982, and consented to the subdivision and transfer to Charles Makokha Khasatsili. There is a letter on record to that effect dated 26th February 1982 from the Kabras Land Control Board. There is also copy of a pro forma for subdivision, prepared by the Kabras District Agricultural Officer dated 25th January 1982.

5. The 1st protestor died on 26th April 2012, and was substituted, vide an application dated 5th November 2012, which was allowed by consent on 12th November 2014. His substitute was Evans Mukamani Makokha, his son.

6. There is another protest affidavit, sworn by Samson Soita, on 18th April 2017. I shall refer to him as the 1st protestor. He avers that he was recognized as one of the beneficiaries of the estate in the Chief's letter. He states that he had also bought a portion of Kabras/Shamberere/1133, and was utilizing a portion thereof. He confirms that he was listed as a beneficiary in the petition, but protests that he was erroneously referred to therein as a son. He alleges to have had purchased a portion from Joram Harrison Makokha, who he describes as the original purchaser of the property from the deceased. He avers that the administrator was a witness to the sale transaction. He accuses the administrator of seeking to disinherit him by excluding him from the confirmation proceedings. His claim is for 1.1 acres. A copy of the sale agreement dated 3rd January 2007, shows that he bought the same from Joram Harrison Makokha

7. Directions were taken on 30th June 2015, for disposal of the application, by way of oral evidence. Parties were ordered to file witness statements, and they complied.

8. The oral hearing commenced on 26th November 2016, before Mwita J. The 1st protestor, Evans Mukamani Makokha, national identity card number [xxxx], was the first on the stand. He stated that his late father, the original protestor, had bought 3½ acres of Kabras/Shamberere/1133 from the deceased, and asserted that he was fighting for his father's share. He stated further that the administrator was not even a son of the deceased, since the deceased did not have any children. He stated that the transaction happened in 1982, when he was only 5 years old, and, therefore, he was not party to it. He stated that he did not have copy of any sale agreement between the deceased and his father. He said that the deceased died before he had transferred the property to the name of the name of his after.

9. The next witness testified on 4th July 2019, before me. That was Jesca Makokha Khasatsili, national identity card number [xxxx]. She was a daughter-in-law of the deceased, and the widow of the original protestor, Charles Makokha Khasatsili. She described the administrator as a nephew of the deceased, by virtue of being a son of a brother of the deceased known as Ambululi Otuma. She described the protestor, Evans Mukamani Makokha, as a grandchild of the deceased. During cross-examination, she confirmed that she was the mother of the substitute protestor. She stated that she lived on Kabras/Shamberere/1133. She said that they were the original buyers, and after that the deceased sold land to Shem and Soita. She stated further that the administrator was not a son of the deceased, as the deceased did not have any children, and it was Charles Makokha that he treated as his son. She stated that the process had gone up to the land control board, and they were only waiting for registration. She explained that the delay in getting the property transferred to the name of her husband was because the latter fell ill. She described the administrator as a son of Otuma, saying that Otuma had three sons, Livingstone, Ambululi and Mwerema. Livingstone, the deceased was said to have had never married, and, therefore, he did not have children, and it was Ambululi who took care of him. She expressed the opinion that Ambululi should have taken part in the proceedings. She stated that after her husband died, he was buried on Kabras/Shamberere/998. She further said that Joram bought land from the deceased she described that Joram as son of her husband, Charles Makokha Khasatsili. Joram died and he was also buried in Kabras/Shamberere/998, adding that none of her family members were buried on Kabras/Shamberere/1133.

10. Herbert Anyonje Makokha, national identity card number [xxxx], followed. He described the deceased as his grandfather. The witness was the son of the original protestor, who he said had bought land from the deceased in 1982. He stated that his stepmother, Jesca Makokha Khasatsili, lived on Kabras/Shamberere/1133. He also stated that Joram was also planting maize on Kabras/Shamberere/1133, before he sold his portion to Soita. He stated that the administrator also utilized the same land. According to him, the persons entitled to the asset are Shem Makia, Charles Makokha and Samson Soita, who had all been listed in the Chief's letter. During cross-examination, he conceded that he was not a witness to the sale agreement between his father and the deceased, and that he had not seen a copy of the said agreement. He also stated that he was not in a position to explain why there was delay in the transfer of the interest that his father had bought to his father's name. He said that he lived on Kabras/Shamberere/498, which he said was his father's land, and that his father and Joram were buried there. He stated he had no claim himself to Kabras/Shamberere/1133. He said that Samson Soita had bought land from Joram in 2007, by which date the deceased had since died. He said further said that it was Soita who utilized that land.

11. The 2nd protestor followed, Samson Soita, national identity card number [xxxx]. He said that he bought Kabras/Shamberere/1133 from Joram Makokha, who had bought it from the deceased/ he said that their sale agreement was entered into on 3rd January 2007. He bought 1.15 acres and paid the purchase price in full in instalments. He testified that Joram had shown him the agreement that he had signed with the deceased, which was written in a book and which book was put in evidence as an exhibit. He complained that his name was left out of the confirmation application, and that was the reason why he filed a protest. He said that his claim was for the 1.15 acre, which he bought and took possession of, and utilized. He explained that he stopped using it after the summons for confirmation of grant was filed excluding his name, because the administrator had asked him to stop using it. He stated that the deceased did not have a child. He had sold his entire land, and no portion remained after he bought his 1.15 acres from Joram. He complained that the administrator had not involved him at all in the succession cause. He confirmed that at the time he was buying his portion the deceased had long since died, and succession proceedings relating to his estate had not yet commenced. He said that he had not obtained permission of the court to transact on the land.

12. The administrator took the stand on next, Okoyana Ambululi, national identity card number [xxxx]. He described the deceased person as his uncle, who was the owner of Kabras/Shamberere/1133. He stated that the deceased had sold a portion of Kabras/Shamberere/1133 to Shem Akiri Mukire. He stated that when the deceased died in 1998, he searched his title and established that the same was clean. He called a meeting and asked the person who was in occupation, how he came to occupy the land, and Shem said that he had bought the same from the deceased, and provided him with a copy of the sale agreement. He stated that Joram did not produce a copy of any sale agreement at that sitting. He said that it was on that basis that he proposed that the property be shared between himself, that is to say the administrator, and Shem. During cross-examination, he confirmed that the deceased did not have a wife, nor children. He said that at the meeting he called after the deceased died, the village elder attended. He said that Makolo was not a buyer, and that Shem wanted to get a number for his land, and Joram did not have a sale agreement. He said that Joram was not claiming a share, as he had no agreement. He said that he did not know Samson Soita. He said that Joram and Soita did not buy land from the deceased. He said that he did not know that Joram had bought land from the deceased. He said that he knew Herbert Anyonje, who he described as a nephew, being a son of his brother. He said Henry and John were brothers. He said that he was prepared to settle the debts of the deceased, so long as the claimants had agreements. He said that the persons that he had listed in his petition were not entitled to a share in the estate, except for himself. He said that he did not know who listed those persons in the petition and in the confirmation application as survivors. He said that the family of Charles Makokha was on the land by force. He asserted that he could not give them a share, as they were not children of the deceased. He said that he had one brother, who he had asked to join him in the matter but he refused. He said that it was the Chief who listed the persons who appeared in the Chief's letter. When examined by the court, he said that he had a brother known as Joram Otuma Ambululi, as well as four sisters, whose names he gave as Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo. He said that the deceased was the only brother of his father, Ambululi. He said that another brother of the deceased had died earlier, his name was given as Mwerema Otuma.

13. At the conclusion of the oral hearing the parties were directed to file written submissions. They have complied. I have gone through them and noted the arguments made, eventhough the said submissions are not altogether useful, to the extent that they do not cite any case law nor statutory provisions to guide the court.

14. In confirmation applications, there are two principle factors for the court consider, appointment of the administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

> "*Confirmation of Grants*
>
> *71. Confirmation of grants*
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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.*

(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."

15. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 is that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

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

16. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? There is a letter on the record from the Chief of Kabras Location, dated 23rd June 2008, indicates that deceased was survived by the four individuals, one named as administrator, while the other three were named as beneficiaries. These four individuals are listed in the petition for letters of administration intestate, which was filed herein on 26th August 2002, as the survivors of the deceased, specifically as sons of the deceased; and in the summons for confirmation of grant as children of the deceased. The fact of the matter is that none of them were children of the deceased. One was a nephew of the deceased, while the rest were persons who claimed to have had bought property from the deceased.

17. It transpired at the oral hearing, that the administrator was not even the sole survivor of the deceased, there was another nephew called Joram Otuma Ambululi, who was not disclosed. The administrator did not also disclose his sisters, nieces of the deceased, known as Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo. The deceased's other brother, Mwerema Otuma, was said to have had died earlier, but it was not disclosed whether he had been survived by a widow or children. The administrator was entitled to the estate of his deceased uncle, equally with Joram Otuma Ambululi, Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo, and also to a right to administer the estate equally with them.

18. It is clear from the filings that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules were not complied with. Some of the survivors of the deceased were left out. The legitimate survivors left out did not file any documents to waive or renounce their interests in the estate. Neither were they brought to court at the hearing of the matter to state their position. The distribution proposed by administrator, only provides for the administrator, and leaves out Joram Otuma Ambululi, Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo, who have not even executed the consent document in Form 17. There was no compliance at the confirmation process with the said provisions to the extent that the administrator did not disclosed these survivors. It meant that the administrator had not fully ascertained all the persons who were beneficially entitled to the estate of the deceased, for all the children of dead brothers of the deceased were his survivors, and they are beneficially entitled to shares in his estate, whether the said children were nephews or nieces.

19. What comes out very clearly to me, from the material before me, is that the deceased was survived by other nephews and nieces apart from administrator. Going by the proviso to 71(2) of the Law of Succession Act and Rule 40(4) pf the Probate and Administration Rules, the administrator had not ascertained those individuals, and, therefore, the matter was not ripe for confirmation. He misled the court into believing that he had ascertained all the persons who were beneficially entitled to the estate. He did not provide any evidence, by way or renunciations or other documents, where the individuals left out had signed away their rights. Confirmation of grant cannot be allowed under the circumstances.

20. What emerges from the above, is that the administrator had not, since his appointment, administered the estate in accordance with the law. The proviso to section 71(2) of the Law of Succession Act, requires administrators to satisfy the court as to the identities of and shares of all the persons beneficially entitled to the estate of the deceased. The effect of this provision is that the administrators have a duty, before they seek distribution of the estate, and indeed solely for that purpose, to ascertain the assets of the estate and the persons who are beneficially entitled to a share in the estate. It is the persons who are beneficially entitled to a share in the estate, who ultimately get to be allocated shares in the estate. They should all be listed in the application as survivors of the deceased. If they are not taking a share in the estate, it should be shown in the distribution schedule that they were not taking a share, supported by renunciations of their shares or by a consent in Form 17. In the absence of that it would be mean that the application was premature.

21. The proviso to section 71 (2), by way of repetition, for emphasis sake, says:

"*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."*

The said provision is reinforced by Rule 40(4), which, again I shall hereby repeat for emphasis, which says, by way of imposing a duty on the administrator, that:

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

22. By ascertaining persons who are beneficially entitled means identifying the persons who are entitled to a share in the estate of the intestate. Under Part V, the persons who are entitled to the estate of an intestate are the survivors, that is to say the persons mentioned in sections 35, 36, 38 and 39 of the Law of Succession Act, meaning surviving spouses, children, parents and siblings of the deceased, and other relatives of the deceased up to the sixth degree. The persons, who the administrator herein omitted from the petition and the application for confirmation of grant, are a nephew and nieces of the deceased, who are, for purposes of Part V of the Law of Succession Act, survivors of the deceased, and, therefore, persons who are beneficially entitled to a share in the estate of the deceased.

23. The provisions that I have referred to above, say 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. Where intestate has left one surviving spouse but no child or children

(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

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(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.

37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

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 equally divided among the surviving children.

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

24. The administrator knew about the other nephew and the nieces of the deceased. He knew that for a fact, and there was nothing for him to ascertain so far as they were concerned. He knew them since they were his siblings, born of the same mother, and they were raised together with him. The fact of their non-disclosure can only be described as fraudulent and designed to mislead the court as to the true status of the estate and the family of the deceased. The court was misled, lied to and hoodwinked. There was mischief. I reiterate that the proviso to section 71(2) and the provision in Rule 40(4) of the Probate and Administration Rules were not complied with, and, therefore, the confirmation application was fundamentally flawed.

25. Rule 40(8) of the Probate and Administration Rules, is also relevant. It requires administrators, when applying for confirmation of their grants, to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Such survivors or dependants include all the nephews and nieces of a deceased person who was not survived by immediate family of his own. It 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."*

26. Rule 40(8) envisages that a consent, in Form 17, be signed by all the persons beneficially entitled to the estate of the deceased. All such persons include the survivors of the deceased as identified in sections 35, 36, 38, 39 and 40 of the Law of Succession Act, being surviving spouses and all the surviving children of the deceased, whether they would be taking a share in the property or not. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased. In this case the application for confirmation of grant was not supported by the consents in Form 17.

27. Rule 40(8) of the Probate and Administration Rules, does not declare so in loud language, but it quietly requires administrators, when applying for confirmation of their grants to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Under that provision, a confirmation application may be disposed of by the court without hearing any party, so long as no affidavit of protest has been filed and all the persons beneficially entitled have executed consents in Form 17. However, where there is an affidavit of protest on record or where any person who is beneficially interested in the estate has not signed the consent in Form 17, then the court should not proceed to give orders on distribution before it has heard such persons. That is the purport of Rule 40(8).

28. From the language of Rule 40(8), the court addresses the question as to whether the other persons beneficially interested in the estate have had a say to the distribution proposed. That is the utility of Form 17. The input of the other persons beneficially entitled to the estate to the proposed distribution is through Form 17. If it is found that they have not executed any consents in Form 17, then the court ought to arrange to hear them. Rule 40(8) is in mandatory terms, and should be read together with Rule 41(1), with respect to such persons being heard, which says as follows:

"*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."*

29. It is my finding that at the oral hearing conducted herein the other persons beneficially interested in the estate were not heard, such as Joram Otuma Ambululi, Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo. They did not execute the consent form envisaged in Rule 40(8), in the nature of Form 17. Both Rules 40(8) and 41(1) of the Probate and Administration Rules are in mandatory language. Both provisions were not observed in these proceedings. It was only democratic, just and fair that all the persons beneficially entitled to a share in the estate of the deceased got to be heard on the distribution of the assets of their late uncle. That is what the law expects, and the process would be fundamentally undermined where opportunity to be heard was not afforded to all the persons beneficially entitled.

30. The second 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. Both sides are agreed on the assets that were left in the name of the deceased. I am satisfied, therefore, that the assets that made up the estate were ascertained, nothing has been concealed, nor omitted from the schedule.

31. 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. It is common ground that the deceased was not survived by a spouse nor children, his immediate survivors were the children of his dead brothers. Under Part V of the Law of Succession Act, which governs intestate succession, where intestacy happens, like in the instant case, distribution would take several forms, depending on whether the deceased was survived by a spouse and children, section 35, or by a spouse without children, section 36, or by children but no spouse, section 38, or by no spouse nor children, section 39, or was a polygamist, section 40. I have addressed those provisions elsewhere.

32. In the instant case, the estate should be shared out only amongst the surviving nephews and nieces of the deceased. Yet a majority of the nephews and nieces have not been included nor involved in the process. They were not disclosed in the letter from the Chief, and in the petition, and also in the application. All this was wrong. They should have been listed in all those instances. The right way to go about it is to involve them at all the stages of the process, and if they are not interested get them to sign consents to that effect. It should not be assumed that they would not be interested merely because they have not come forward to participate in the proceedings, or did not pay for the succession proceedings, as alleged by the administrator. Their entitlement to administration and shares in the estate is not dependent on whether or not they pay for the expenses of the administration. Their rights are spelt out by the Law of Succession Act in black and white.

33. I would have disposed of the application at this stage, on the basis that the application was premature, as the administrator had not ascertained all the persons beneficially entitled to a share in the estate, and the proceedings had so far proceeded without involvement of a large constituency of survivors of the deceased. However, there is the issue of creditors that I need to deal with.

34. I have stated that apart from the administrator, the other persons disclosed in the Chief's letter, the petition and the application, were not blood relatives of the deceased, but persons who claimed a stake in the estate as buyers. Two of them claimed to have had bought a portion of the estate from the deceased, while the other claims to have had bought a share from a person who had bought a portion from the deceased. The administrator appeared to acknowledge only one of the alleged buyers, but not the other two. No documents were placed before the court as evidence that that the alleged buyers had indeed transacted with the deceased. An administrator has a duty to demonstrate that what he is doing is above board, so that where he claims a person to whom estate property is being conveyed is a creditor, he ought to provide documents to prove the same. The office of an administrator is one trust. A trustee is expected to account. The administrator should be seen to be doing the right things. I am talking of Shem Akiri Mukire.

35. The other buyer who claimed to have dealt directly with the deceased was the 1st protestor. He did not produce a sale agreement between him and the deceased, but he did produce documents to show that the deceased had applied for consent of the Kabras Land Control Board, seeking to be allowed to subdivide his land and to transfer one of the subdivisions to the 1st protestor. That application was allowed and a copy of the consent of the Kabras Land Control Board was exhibited. The deceased died before that transaction could be finalized. It would appear that that transaction was genuine, but then again, sitting as a Judge of the High Court, I do not have jurisdiction to make determinations with relation to whether certain land transactions were valid or not, since that jurisdiction reposes elsewhere. That would be so particularly in cases where the validity of a transaction is called to question, such as the instant one, which has been questioned by the administrator. The option open to the 1st protestor should be to move the Environment and Land Court appropriately to determine the question as to whether there had been a valid purchase of an interest in South Kabras/Shamberere/1133 by him from the deceased.

36. The claim by the 2nd protestor is a lot more straightforward. He did not deal directly with the deceased. Indeed, he claims to have had acquired his portion from a person who had dealt directly with the deceased. To that extent he cannot be a creditor of the estate, and he cannot possibly have any claim against the estate. He should not look up to the estate but instead to the person who he transacted with. His transaction happened long after the deceased had died, and long before representation was grant to the estate.

37. I believe that I have said enough. The orders that I am inclined to make at this stage on the application dated 17th April 2015 are as follows:

(a) That I find that the summons for confirmation of grant dated 27th May 2011 is so fundamentally flawed that no orders can be granted on it, consequently I do hereby dismiss the same;

(b) That I hereby direct the administrator to file a fresh application for confirmation of grant which shall comply fully with section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules;

(c) That in the application to be filed under (b), above, the administrator shall provide for Joram Otuma Ambululi, Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo, and the children of Mwerema Otumo, if he had any;

(d) That should Joram Otuma Ambululi, Alasha Ambululi, Florence Shivoko, Nechesa Ambululi and Susie Mutondo, and the children of Mwerema Otumo, if he had any, be minded to waive or renounce their right to a share in the estate of the deceased, they shall be at liberty to file an affidavit or affidavits in which they shall so renounce such rights;

(e) That the matter shall be mentioned after thirty days for compliance and further directions; and

(f) That any party aggrieved by the outcome here above, shall be at liberty to move the Court of Appeal, appropriately, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE