



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 1329 OF 2012

IN THE MATTER OF THE ESTATE OF DAVID ATABACHI

AMONYELA alias ATABACHI AMONYERA (DECEASED)

JUDGMENT

1. This cause relates to the estate of David Atabachi Amonyela, who died on 17th December 1998, according to certificate of death, serial number 262542, of 11th December 2012. According to a letter from the Assistant Chief of Shirulu Sub-Location, Khayega Location, dated 6th December 2012, the deceased had four children, named as the late Diameta Imbase, the late Alfred Mukhobi Atabachi, Morris Utunga Atabachi and Beretta Ilako Atabachi, being three sons and one daughter. It is also indicated that the two late sons of the deceased were themselves survived by children, listed in the letter. The children of the late Diameta Imbase are said to be Cedrick Shikunzi Imbase, Pencillus Mweleme Imbase, Cornelius Atabachi Imbase and Khatambi Imbase; while those of the late Alfred Mukhobi Atabachi are listed as Felix Mukhobi and Ann Mukhobi.
2. A petition was lodged herein on 14th December 2012, by Morris Utunga Atabachi, in his capacity as son of the deceased. He listed the survivors of the deceased to be one son and three grandsons, being Morris Utunga Atabachi, Cedrick Shikunzi Imbase, Cornelius Atabachi Imbase and Felix Mukhobi. The deceased was said to have died possessed of Kakamega/Lukose/8 and 413. Letters of administration intestate were duly made to the petitioner on 18th March 2013, and a grant was duly issued on 19th March 2013.
3. An undated summons was filed in the cause on 28th August 2017, by Cedrick Shikunzi Imbase and Cornelius Atabachi Imbase, seeking to stop Morris Utunga Atabachi from carrying on certain dealings with respect to the estate assets, being Kakamega/Lukose/8 and 413. Apparently nothing was done on the said application and it is still pending.
4. A summons for confirmation of grant was lodged herein on 25th September 2017, by Morris Utunga Atabachi. The persons identified in that application as sharing the property of the deceased are Morris Utunga Atabachi, being the son of the deceased and the three grandsons, that is to say Cedrick Shikunzi Imbase, Cornelius Atabachi Imbase and Felix Mukhobi. It is proposed that Morris Utunga Atabachi and Felix Mukhobi share Kakamega/Lukose/413 equally, while Cedrick Shikunzi Imbase and Cornelius Atabachi Imbase hold Kakamega/Lukose/8 jointly. Attached to the application is a Form 37, purported to bear the signatures of the four persons proposed to share the property.
5. While that application was still pending, a summons, dated 16th October 2017, was filed herein by Clement Amonyera Atabachi, seeking revocation of the grant. He asserted that the letter from the Chief did not disclose all the survivors of the deceased, but he did not give the names of the persons who were not disclosed. He stated that he had bought Kakamega/Lukose/8 from the deceased, and he attached documents to evidence the alleged sale. He asserted that all the survivors of the deceased were well aware of the alleged sale.
6. The said summons, although served on Morris Utunga Atabachi, was not opposed. It was placed before the Judge on 30th October 2018, and was allowed. That meant that the grant made on 18th March 2013 was revoked. The effect of the revocation order was that the confirmation application, dated 25th September 2017, was spent.
7. What followed was the filing of a summons for rectification of grant, dated 17th October 2018, filed at the instance of Morris Utunga Atabachi, essentially seeking that a fresh grant of letters of administration intestate be made to him and Clement Amonyera Atabachi. He also proposed a fresh mode of distribution, which included him, Clement Amonyera Atabachi and the three grandsons. Clement Amonyera Atabachi was to get nothing out of Kakamega/Lukose/8 and 413. That application was allowed on 4th March 2019; and on 25th March 2019, it was directed that either of the new administrators could file a summons for confirmation of their grant.
8. A summons for confirmation of the said grant was lodged at the registry on 14th June 2019, by Clement Amonyera Atabachi, dated 14th June 2019. I shall henceforth refer to him as the applicant. He identified the children of the deceased as three daughters and four sons, being Angela Shisiali, Berita Irako, Colletta Khamete, Clement Amonyera Atabachi, Morris Utunga Atabachi, the late Francis Imbase and the late Alfred Mukhobi Atabachi. He named the children of the late Francis Imbase as Cornelius Namusende Imbas, Mweleme and Cedrick

Shikunzi Imbase. The child of the late Alfred Mukhohi Atabachi was said to be Felix Makhule Atabachi. He explained that the deceased owned two parcels of land, being Kakamega/Lukose/8 and 413, copies of whose titles he attached to his affidavit. He further explained that before his demise, the deceased had already given him his share of the land, being Kakamega/Lukose/7, which was registered in his name. According to him, the property available for distribution was, therefore, Kakamega/Lukose/8 and 413. He further explained that the deceased had also sold to him a portion of Kakamega/Lukose/413, measuring 141 feet by 27 feet by 25 feet. After that he, the applicant, sold the same portion to one Josphat Kwasira, who he proposed ought to be treated as a liability of the estate to that extent. He proposed that the 141 feet by 27 feet by 25 feet be excised from Kakamega/Lukose/413 and allocated to Josephat Kwasira, and the balance shared out equally between Morris Utunga Atabachi, Cornelius Namusende Imbase, Cedrick Shikunzi Imbase, Mweleme and Felix Makhule Atabachi. He proposed that Kakamega/Lukose/8 be shared equally between the same individuals, to wit Morris Utunga Atabachi, Cornelius Namusende Imbase, Cedrick Shikunzi Imbase, Mweleme and Felix Makhule Atabachi.

9. Attached to the affidavit of the applicant is a consent to the mode of distribution, dated 14th June 2019, which is not signed by anyone. There are copies of certificates of official searches in respect of Kakamega/Lukose/8 and 413, dated 11th April 2019, which show the two properties to be registered in the names of Morris Utunga Atabachi, one of the administrators. There is also a copy of a certificate of official search in respect of Kakamega/Lukose/7, dated 7th June 2014, showing the registered proprietor thereof to be one Clement Atabachi, since 7th August 1973.

10. On 23rd October 2019, four documents, being an objection to confirmation of grant and three affidavits in purported support of the objection, were filed at the registry. Rule 40(6) of the Probate and Administration Rules provides for filing of an affidavit of protest, Form 10, by any person opposed to the application for confirmation of the grant, for whatever reason. The document lodged herein, by Felix Makhule Atabachi, is not in the form prescribed. For avoidance of doubt, Rule 40(6) provides as follows:

“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”

11. I am tempted to strike out the alien papers titled as “objection” and the affidavits in support of the “objection,” but I am alive to Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules. I need not state their purport. I shall consider the offending objection and its supporting documents in the spirit of the two provisions above on their merits. I shall hereafter refer to Felix Makhule Atabachi as the first protestor.

12. In the document titled “objection”, the first protestor raised several issues. He complained that the information given in the confirmation application was incomplete, inaccurate and false; and that the applicant had not consulted his co-administrator, Morris Utunga Atabachi, and other survivors of the deceased, before he made the distribution placed before the court. He conceded that the deceased had had three daughters and four sons, just as disclosed in the application. He stated that the deceased had distributed his property amongst his four sons prior to his demise. Clement Amonyera Atabachi was allegedly given Kakamega/Lugose/7, the Francis Imbase was allegedly given Kakamega/Lugose/8 and Kakamega/Lukose/413 was to be shared equally between the late Alfred Mukhohi Atabachi and Morris Utunga Atabachi. To support that contention, he attached a letter from the Chief of the area, dated 19th September 2019. He also argued that the distribution did not confirm with section 38 of the Law of Succession Act, Cap 160, Laws of Kenya, in that grandsons do not directly inherit from the estate of their late grandfather. He accused the applicant of attempting to inherit a part of the estate, by claiming to have had bought a portion of Kakamega/Lukose/413, asserting that he could not have bought it since that property had been allocated to his late father and to Morris Utunga Atabachi. He proposed that Kakamega/Lugose/8 be shared equally amongst the survivors of the late Francis Imbase, and Kakamega/Lukose/413 be shared equally between Morris Utunga Atabachi and the survivors of the late Alfred Mukhohi Atabachi. He asserted that the deceased did not have any liabilities as at the date of his death.

13. The objection was supported by affidavits sworn by Angela Shisiali Atabachi, Colleta Khamete Ambeyi and Bartha Irako Azangu, all sworn on 28th October 2019, being complete replicas of each other, in terms of style and content. The deponents were all daughters of the deceased, and confirmed that he died intestate on 17th December 1998. They confirmed that he had three daughters and four sons, the same individuals listed in the application and the objection. He was said to have had owned three parcels of land, being Kakamega/Lugose/7, 8 and Kakamega/Lukose/413, and before his demise he had shared them out amongst his sons. Kakamega/Lugose/7 was given to Clement Amonyera Atabachi, Kakamega/Lugose/8 to the late Francis Imbase and Kakamega/Lukose/413 to Morris Utunga Atabachi and the late Alfred Mukhohi Atabachi. Kakamega/Lugose/7 was transferred to the name of Clement Amonyera Atabachi, and he built his home there and lived there. The late Francis Imbase was said to have put up his home at Kakamega/Lugose/8, where he also planted coffee. The daughters stated that they had no beneficial interest in the estate, and that the children of their late brothers could not directly inherit.

14. There is an affidavit protest, filed on 18th February 2018, by Morris Utunga Atabachi, sworn on 12th February 2020. I shall refer to the said Morris Utunga Atabachi as the second protestor. He averred in it that he was protesting to the mode of distribution proposed in the application for confirmation of grant. He stated that he was not opposed to confirmation per se, but only aspects of it. For one, he asserted that one of the survivors of the deceased, known as Khatambi Imbase, was being left out. Secondly, he complained that his co-administrator, the applicant, did not consult him, nor the other survivors, before arriving at the mode of distribution proposed. He averred that the deceased had only married one wife, they had begat seven children, the three daughters and four sons listed in the application. He implied that the deceased had three pieces of land, which he had shared out amongst his sons before he died. Kakamega/Lugose/7 was given to Clement Amonyera Atabachi, Kakamega/Lugose/8 to the late Francis Imbase and Kakamega/Lukose/413 to Morris Utunga Atabachi and the late Alfred Mukhohi Atabachi to share equally. Kakamega/Lugose/7 was transferred to the name of Clement Amonyera Atabachi, and he built his home there and he lived there with his family. He asserted that the deceased never sold a portion of Kakamega/Lukose/413 to Clement Amonyera Atabachi, as the said property had been given to him, the second protestor, and the late Alfred Mukhohi Atabachi. He explained that in 1994, a dispute had erupted between the deceased and the late Francis Imbase, after the deceased sought to disinherit the late Francis Imbase, by selling Kakamega/Lugose/8 to Clement Amonyera Atabachi. The dispute was referred to the Shinyalu Land Disputes Tribunal, which, allegedly reversed the decision by the deceased, and the late Francis Imbase remained on Kakamega/Lugose/8, where he planted coffee and built a home. The distribution that the second protestor proposed, that Kakamega/Lugose/8 should be shared equally amongst the children of the late Francis Imbase and Kakamega/Lugose/413, should be shared equally between himself and the only child of the late Alfred Mukhohi Atabachi; while Kakamega/Lugose/7 should be given to Clement Amonyera Atabachi. He stated that since the grandchildren

were not direct beneficiaries, they should not take directly from the estate, but should take through their parents. He asserted that the deceased did not have any liability as at the date of his death. He further stated that the daughters of the deceased had sworn affidavits in support of the protest, and have also declared that they had no beneficial interest in the estate of the deceased.

15. Directions on the disposal of the application were given on 6th November 2019, for *viva voce* evidence. The oral hearing happened on 19th February 2020. Although the hearing date had been given in open court, in the presence of both sides, on 19th February 2020, only the two protestors were in attendance.

16. The second protestor was the first to take the witness stand. His testimony largely mirrored the averments made in his affidavit of protest. Only two items are worth highlighting, from his testimony that Khatambi Imbase was to get a share out of Kakamega/Lugose/8 and that any person who might have bought any property ought to get whatever portion from those that sold the property to them. He asserted that he was not aware that the deceased had sold a portion of Kakamega/Lugose/413 to the applicant, adding that the applicant did not file any papers to support that contention. The first protestor testified next. He largely agreed with the position taken by the second protestor.

17. At the close of the oral hearing, directions were taken, on filing of written submissions. Only the protestors filed written submissions, which do nothing more than reproduce the averments made in their protests. They have cited no statutory provisions nor any case law.

18. The application for determination is for confirmation of the grant made on 4th March 2019. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the 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.”

19. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. The principal purpose of confirmation is distribution of the assets.

20. Before I consider the matters of appointment of administrators and distribution of the assets, that is before I look at the merits of the application, it is important that I address the proviso to section 71(2) (d) of the Law of Succession Act first, which requires me to be satisfied that the administrators have ascertained all the persons beneficially entitled to a share in the estate, and have identified their respective shares. It goes on to require that I should not confirm the grant before I am so satisfied. It would mean that I should be satisfied that all the persons beneficially entitled to a share in the estate have been ascertained and their shares identified, failing which I should not consider the application on its merits. I 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.

21. The provisions in the proviso to section 71(2), have been written into the probate and administration procedures through Rule 40(4) of the Probate and Administration Rules, in the following language:

“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. For the purpose of these proceedings I have asked myself, has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? The record before me appears to be clear that the two administrators, the daughters of the deceased and the first protestor are in full agreement that the deceased had married only once, out of which marriage came three daughters

and four sons. It is also common ground that two of the four sons have since died, and were survived by children. The names of the children have been disclosed. The only little matter is that the applicant omitted the name of one of the children of the late Francis Imbase, Khatambi, in his proposals. Overall, it would appear that there is full ascertainment of the survivors of the deceased.

23. The only concern though that I have is with respect to one Ann Mukhobi. At the initiation of this cause, the petitioner lodged a letter from the Assistant Chief of Shirulu Sub-Location, dated 6th December 2012. That letter says that the late Alfred Mukhobi had been survived by two children, identified as Felix Mukhobi, the first protestor with respect to the confirmation application, and Ann Mukhobi, a daughter. In the filings thereafter, the name of Ann Mukhobi has been suppressed, by all who have filed any papers herein, including the second protestor, who was the petitioner in 2012, who introduced the letter of 6th December 2012. In his affidavit of protest and his oral evidence, he asserted that the late Alfred Mukhobi was survived by only one child, the first protestor, Felix Makhule Atabachi. The said letter was placed on record so that the court could rely on it. It discloses that the deceased had a granddaughter known as Ann Mukhobi. The parties cannot, having introduced her to the court, seek to suppress her existence, and proceed as if she never was there. They should seek to explain to the court what became of her, so that she should not be considered as one of the survivors of the deceased.

24. Related to that is the matter of whether or not the estate was indebted to anyone, and in particular Josephat Kwasira. A creditor of the estate would be a person with a claim against the estate. Josephat Kwasira was disclosed by the applicant as a person that he, the applicant, had sold to a portion of Kakamega/Lugose/413, that he, the applicant, had allegedly bought from the deceased. The alleged sale between the deceased and the applicant is contested by the protestors. Whether Josephat Kwasira is a *bona fide* creditor, and, therefore, a person beneficially entitled to a share in the estate, is a matter that I shall have to determine later in this judgment.

25. The second issue that I have to determine is whether the shares of the persons that have been ascertained as beneficially entitled have been identified. The applicant proposed distribution of the estate of the deceased to all the persons that he had identified as beneficially entitled, including the alleged creditor, Josephat Kwasira. His administrator, the second protestor, also did the same, and so did the first protestor. Therefore, there is ascertainment of all the persons ascertained as beneficially entitled, save for Ann Mukhobi. Again, I shall address the question of Ann Mukhobi later in the judgment.

26. To a large extent, the requirements of the proviso to section 71(2) of the Law of Succession Act have been met. That being the case, I can consider the application before me as against the provisions in section 71(2) of the Law of Succession Act. As indicated above, what section 71(2) requires is that I consider, for the purpose of confirming the grant, two principal matters, which are what the confirmation process is about, appointment of administrators and the distribution of the estate.

27. I will begin by considering the first arm of that, which is the appointment of administrators, which is covered by section 71(2)(a). Under that provision, I am required to consider whether the administrators were properly appointed, and, if that they were so appointed, whether they administered the estate in accordance with the law, and whether they will, upon being confirmed, continue to administer the estate in accordance with the law. I should confirm the administrators to continue to administer the estate once I am satisfied of the three factors.

28. The two administrators currently were appointed in office on 4th March 2019, after an application for revocation of grant was allowed. None of them has raised issues with their appointment, neither have the other parties. To that extent I shall find that they were properly appointed. On whether they have gone about administering the estate in accordance with the law, no serious issues have been raised by either of them on how each of them has gone about the administration of the estate. The filings by the other survivors have also not raised any issue with regard to the manner that the administrators have gone about the administration. I shall, therefore, find that they have gone about the administration in accordance with the law. The only issue to highlight could be with respect to Ann Mukhobi. They were under a duty to ascertain her status, and to disclose it to the court, having placed a record before the court that identified her as a survivor of the deceased. But that alone, in my view, should not take away from the fact that the administrators do not appear to have administered the estate in a manner that can be said be contrary to the law. Would they continue to administer the estate in accordance with the law, were they to be confirmed? Since they do not appear to have breached the law in the manner they have handled the estate so far, and it has not been demonstrated that they have become incompetent in any manner, I would find that they appear to be competent enough to continue to administer the estate in accordance with the law.

29. Having disposed of the matter of appointment of administrators, I now turn to deal with the matter of distribution of the estate. The deceased died on 17th December 1998, and, therefore, after the Law of Succession Act had come into force on 1st July 1981. His estate is, therefore, available for distribution in accordance with the provisions of the Law of Succession Act. He died intestate, for no will has been availed, no one has alleged that he left one, and the nature of representation sought to his estate is that of letters of administration intestate. Distribution in intestacy is provided for in Part V of the Law of Succession Act, and the estate herein should be distributed in accordance with that Part of the Law of Succession Act.

30. The mode of intestate distribution to be adopted by the court is dependent on whether the deceased was married or not, and if he or she was whether he died a monogamist or polygamist, and whether he had children or not. If he had married, the issue will be as to whether he was survived by a spouse or not. In the instant matter, the deceased had married only once and, therefore, he was a monogamist. He had children too. It would appear that his spouse did not survive him, at least as at the date representation was being sought and at the time confirmation was being sought.

31. The provision in Part V of the Law of Succession Act that governs the distribution of an intestate survived by children only, without a spouse, is section 38, which provides as follows:

“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.”

32. An application of section 38 of the Law of Succession Act, to the facts in the instant case would mean that the assets available for distribution should be shared out equally amongst the seven children of the deceased. The distribution should be regardless of the gender of the children, for the provision is gender neutral. Therefore, the property should be shared out equally between the sons and daughters of the deceased. However, I have seen the affidavits sworn by the three daughters. They averred that they had no beneficial interest in the estate. I do not exactly understand what they meant by that, for the language of section 38 makes them persons with a beneficial interest. They are entitled to a share in the estate, and that makes them beneficiaries, in terms of being persons beneficially interested in the estate. They did not testify during the trial, but I was told that the daughters were not interested in taking shares in the estate. I shall construe the averments made by the daughters in their respective affidavits, that they had no beneficial interests in the estate, to mean that the daughters were not interested in taking their shares in the estate. In other words, I shall take it that the daughters have waived or renounced their interest in the estate. The effect of a renunciation by the daughters is that the estate shall be distributed to the sons, exclusively. The two administrators have proposed distribution to all four sons, which fits in with section 38.

33. Let me turn to the distribution itself. The deceased is said to have had owned three parcels of land, being Kakamega/Lugose/7, 8 and 413. The two administrators and the other survivors, who filed papers in court, were all agreed that the only parcels of land available for distribution were Kakamega/Lugose/8 and 413, since Kakamega/Lugose/7 had already been transferred to the name of the applicant by the deceased, and as at the time of his death, it was in his name, that is to say Clement Amunyora Atabachi. Certificates of official searches on record show that Kakamega/Lugose/8 and 413 were registered in the name of the deceased as at the date of his death. Kakamega/Lugose/7 was registered in the name of Clement Amunyera Atabachi since 7th August 1973, the same date when Kakamega/Lugose/8 and 413 were registered in the name of the deceased. As at the date of the confirmation application, the registration of Kakamega/Lugose/8 and 413 had been transferred to the second protestor, Morris Utunga Atabachi, on 11th July 2013, following his appointment as administrator on 18th March 2013. The applicant proposed that Kakamega/Lugose/8 and 413 be shared out in a manner that excluded him, equally between the first and second protestors and the children of the late Francis Imbase, provided that Josephat Kwasira got a share of Kakamega/Lugose/413 that he, the applicant, had allegedly bought from the deceased. The protestors propose distribution that would exclude the applicant because he had been given his share. Their position is that the deceased had distributed Kakamega/Lugose/8 and 413 too before he died, amongst his three other sons, so that the late Francis Imbase took Kakamega/Lugose/8, while the protestors share Kakamega/Lugose/413 equally, without making any provision at all for the alleged creditor, Josephat Kwasira. The protestors appear to base their proposal on the basis that the late Francis Imbase was settled at and farmed on Kakamega/Lugose/8, while the family of the late Alfred Mukhobi was settled on Kakamega/Lugose/413.

34. The distribution proposed by the applicant conforms to section 38, equal distribution amongst the persons entitled. The proposals by the protestors do not conform with section 38, instead it is based on two factors, a distribution that is said to have been made by the deceased during his lifetime and on how they are settled on the ground. The Law of Succession Act allows the court to take into account any distribution that the deceased may have done during his lifetime, or, at any rate, any arrangements that were on the ground. That is provided for in section 42 of the Law of Succession Act, which is also in Part V, which provides as follows:

“42. Previous benefits to be brought into account

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

35. I do not have before me any material that would prove that the deceased had distributed the property in the manner proposed by the protestors. However, the larger part of the family appears to support that position, and I am tempted to take it to be the correct position. However, I note that although the two surviving sons of the deceased and the three daughters, and the son of one of the dead sons, have stated their position, the position of the family of the seventh child, the other dead son, the late Francis Imbase has not been heard. None of them filed any papers, and none of them testified at the oral hearing. There is also no evidence that they were ever served with the confirmation application. I cannot, therefore, take the position taken by the protestors as the correct position before I get input from the family of the late Francis Imbase. I will also need to hear from Ann Mukhobi.

36. I am fortified in what I have stated above by the provisions in Rule 40 of the Probate and Administration Rules. Rule 40(6), which I have recited elsewhere, envisages the filing of an affidavit of protest by persons who wish to object to the proposed confirmation of grant. A person can only file an affidavit of protest raising his objection, only after being served with the application, or only upon the said application being brought to his notice. The right to object or protest is available to persons who are beneficially entitled to a share in the estate. However, for them to exercise that right they must be served or the application must be availed to them. Rule 40(8) on the other hand, envisages execution of a consent in Form 37, by all persons beneficially entitled, and the court is required to allow the application only after it is satisfied that such a consent has been filed. The consent in Form 37 that was filed herein, on 14th June 2019, bearing an even date, was not signed or executed by anyone, not even the children of the late Francis Imbase. The said consent, therefore, is a useless piece of paper, and it would mean that Rule 40(8) was not complied with. Execution of Form 37 would be evidence by the person or persons signing it, that they were aware of the application. Non-execution would suggest unawareness of the application, or lack of support for the application. Rule 40(8) envisages that where the consent is not signed by those who ought to sign it, the court should not allow the confirmation application, until further directions are given, ostensibly with respect to service on the persons who have not signed the consent. Rule 40(8) is in mandatory terms, and since it was not complied with, I should not go ahead to confirm the grant before those who have not consented to the application are served and eventually heard on the application.

37. Rule 40(8) provides 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 37 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.”

38. 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 in the distribution proposed. That is the utility of Form 37. The input of the other persons beneficially entitled to the estate to the proposed distribution is through Form 37. If it is found that they have not executed any consents in Form 37, then the court ought to arrange to hear them. It gives a platform for beneficiaries who are not administrators, and who have not file affidavits of protest, an opportunity to be heard. 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.”

39. Section 71(2)(d) of the Law of Succession Act allows the court to adjourn the confirmation application for various reasons. I feel that I should exercise that discretion to allow the administrators comply with Rule 40(8) of the Probate and Administration Rules, by obtaining the consents of the survivors in terms of Form 37, or to have the family of the late Francis Imbase file affidavits stating whether they agree with the distribution proposed by the applicant or that proposed by the protestors, before I make final orders on distribution.

40. The other issue relates to the status of Josephat Kwasira. He is not a survivor of the deceased, for he was not related to him at all. His claim is that of a creditor. In fact, Josephat Kwasira himself has not filed any documents. It is the applicant who alleges that he should be allocated a portion of the estate because, he, the applicant, had bought a portion of Kakamega/Lukose/413 from the deceased, which interest he later on sold to Josephat Kwasira. The alleged sale of a portion of Kakamega/Lukose/413 by the deceased to the applicant was contested by the protestors. They contended that no evidence was provided.

41. Is there any such evidence? Although the applicant makes averments in his affidavit in support of the application, sworn on 14th June 2019, about the sale transactions between him and the deceased, and between himself and Josephat Kwasira, he attached no documents to his affidavit in support the contention that he bought the land from the deceased. Secondly, when the matter came up for hearing on 19th February 2020, the applicant did not testify to breathe life to his contentions, despite the hearing date having been given by the court in open court, in the presence of his advocate. I have noted that in his first filings in this cause, in the summons dated 16th October 2017, for revocation of the grant, he did not talk about buying and selling a portion of Kakamega/Lukose/413, instead he was talking about buying a portion of Kakamega/Lukose/8 from the deceased, which he later sold to individuals unnamed in his affidavit sworn on 16th October 2017. The documents that he attached to that affidavit to support those contentions refer to Kakamega/Lukose/8, not Kakamega/Lukose/413. I would agree with the protestors, that there is no evidence that the applicant bought a portion of Kakamega/Lukose/413 from the deceased, which he later sold to Josephat Kwasira. The said Josephat Kwasira cannot possibly be a creditor or liability for the estate for that reason. In any event, the said Josephat Kwasira did not transact with the deceased, and he cannot, therefore, have any claim against the estate.

42. I believe that I have said enough. The orders that I am inclined to make at this stage on the application, dated 4th June 2019, are as follows:

(a) That I hereby postpone confirmation of the grant made on the 4th March 2019 in terms of section 71(2)(d) of the Law of Succession Act;

(b) That the administrators are hereby directed to:

(i) get the children of the late Francis Imbase to file consents in Form 37 or to swear an affidavit or affidavits to confirm whether they support the proposals made by the applicant or those by the protestors, and

(ii) file an affidavit to confirm the status of Ann Mukhobi as a daughter of the late Alfred Mukhobi;

(c) That the matter shall be mentioned after thirty (30) days for compliance and further directions; and

(d) That the final orders, on the summons for confirmation of grant, dated 4th June 2019, shall be made only after compliance with the directions given above.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF July, 2020

W. MUSYOKA

JUDGE