



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 125 OF 2013**

**IN THE MATTER OF THE ESTATE OF DAVID LIVINGSTONE LOKA INJENE (DECEASED)**

**JUDGMENT**

1. David Livingstone Loka Injene, the deceased herein, died on 10<sup>th</sup> January 1989. According to a letter from the Chief of Butso Central, dated 17<sup>th</sup> January 2013, the deceased was said to have been survived by a widow, two sons and three daughters, being Eggrey Injene Loka, Linah Akosa, Rose Anyolo Loka, Wycliffe Shikanda Loka and Margaret Lubandwe Musungu, the children of the Jascah Andika Loka. Another letter of the same date from the same Chief lists his survivors as Mercyline Nambiru Loka, Damary Macho Loka, Ambrose Jumba Loka, Caroline Mulima Loka, Bosiana Namakula Loka, Margaret Makalu Loka, Young Litali Loka, Josiah Andalo Loka, Dhinous Loka and Paul Malingo Loka. The two letters indicated that the deceased had died possessed of property known as Butso/323, 326 and Butso/Bukura/425.

2. Representation to the intestate estate of the deceased was sought by Ambrose Jumbo Loka, in his capacity as son of the deceased. He expressed the deceased to have had been survived by thirteen individuals whose relation with the deceased was not disclosed in the petition, being Eggrey Injene Loka, Wycliffe Shikanda, Ambrose Jumbo Loka, Young Litali Loka, Josiah Andala Loka, Phineas Loka, Paul Malingo Loka, Damary Macho Loka, Caroline Mulima Loka, Bosiano Namakula, Margaret Makalu Loka and Mercyline Nambiru Loka. The deceased was expressed to have had died possessed of the property listed in the Chief's letter. Letters of administration intestate were made to the petitioner on 17<sup>th</sup> June 2013, and a grant was issued to him dated 24<sup>th</sup> July 2013. I shall hereafter refer to him as the administrator.

3. On 7<sup>th</sup> October 2013, a summons was lodged herein, of even date, seeking revocation of the grant herein. The application was at the instance of Young Litali Injene Loka, who I shall hereafter refer to as the applicant for the purpose of that application. The grounds upon which the application is premised are set out on the face of the application, while the factual background is given in his affidavit sworn in support of the application on 7<sup>th</sup> October 2013. He avers that the grant was obtained fraudulently as it was based on false statements, the administrator was intermeddling with the estate and that it was false to claim that Stanley Ominde Khayinga was a liability to the estate. He complains that the said Stanley Ominde Khayinga did not buy Butso/Bukura/425 from the deceased but from the administrator. He also states that the administrator had left out the names of some of the survivors from the list of beneficiaries, that is to say Prudence Mapesa a daughter of the late son of the deceased known as Patrick Loka, a daughter of the deceased known as Rose Loka, a daughter of the deceased known as Lina Akotsa and a daughter of the deceased known as Leonida Loka.

4. While that revocation application was still pending, the administrator lodged an application on 7<sup>th</sup> February 2014, of even date, seeking confirmation of his grant. He stated that the deceased had been survived by ten children, being Ambrose Jumbo Loka, Eggrey Injenje Loka, Wycliffe Shikanda Loka, Young Likali Loka, Phineas Loka, Paul Malingo Loka, Mercyline Nambiru Loka, Damary Macho Loka, Caroline Mulima Loka and Bosiana Namakula Margaret Makalu Loka. He also listed Stanley Ominde Khayinga as a liability. He proposes that Butso/323 be shared between Eggrey Injenje Loka and Wycliffe Shikanda Loka equally, while Butso/326 goes wholly to Ambrose Jumbo Loka, while Butso/Bukura/425 devolves wholly upon Stanley Ominde Khayinga.

5. Directions were given on 7<sup>th</sup> October 2014 that the two applications be disposed of simultaneously. Parties were to file witness statements.

6. The two applications were on 7<sup>th</sup> December 2015 compromised by consent of the parties in the terms that the grant of 17<sup>th</sup> June 2013 was revoked and that a fresh grant was to issue to Ambrose Jumbo Loka and Young Litali Injene Loka. The new administrators were given the liberty to apply for confirmation of their grant. A grant of letters of administration intestate was issued in their names, dated 7<sup>th</sup> December 2015.

7. A summons was subsequently lodged at the registry on 31<sup>st</sup> October 2016, by Ambrose Jumba Loka, who I shall hereby refer to as the applicant, dated 28<sup>th</sup> October 2016, for confirmation of the grant made on 7<sup>th</sup> December 2015. In the affidavit in support of the application, the applicant has identified Eggrey Injene, Wycliffe Shikanda, Young Litali, Josiah Andala, Phineas Ahamati and Paul Malingo as the surviving sons of the deceased. Damary Macho, Caroline Mulima, Bosiana Namakula, Margaret Makalu, Leonida Musungu, Rose Anyolo and Linah Akotsa are identified as the surviving daughters of the deceased; while Mercyline Nambiru and Damary Macho Loka are identified as surviving widows. Stanley Ominde Khainga is identified as a purchaser. Butso/323, Butso/326, Butso/Bukura/425, Butso/321, Idakho/Shiseso/279, Plot No. 19 Shimanyiro Market and Butso/383 are listed as the

assets that the deceased died possessed of. It is proposed that Butsotso/Shibeye/323 be shared out unevenly between Aggrey Injene, Wycliffe Shikanda, Rose Anyolo, Lina Akosa and Leonida Musungu; Butsotso/Shibeye/326 is proposed for sharing between Mercyline Nambiru Loka, Ambrose Jumba, Caroline Mulima, Bosiana Namakula, Margaret Makalu, Prudence Mapesa and Jennifer Mapesa equally; Butsotso/Bukura/425 is to go to Stanley Ominde Khainga absolutely; Butsotso/Shibeye/321 is proposed to be shared equally between Damary Machio, Young Litali, Josiah Andala, Phineas Ahamati and Paul Malingu; Idakho/Shiseso/279 is proposed to be shared equally between Damary Macho, Young Litali, Josiah Andala, Phineas Ahamati and Paul Malingu; Plot No. 19 Shimanyiro Market is proposed to go to Damary Macho, Young Litali, Josiah Andala, Phineas Ahamati and Paul Malingu in equal shares; and Butsotso/Shibeye/383 is proposed to devolve upon Damary Macho, Marciline Nambiru and Aggrey Injene in equal shares. Attached to the application is a consent to distribution, purported to be signed by Aggrey Injene, Wycliffe Shikanga, Rose Anyolo, Lona Akotsa, Leonida Musungu, Mercyline Nambiru, Ambrose Jumba, Caroline Mulima, Bosiana Namakula, Margaret Makalu, Prudence Mapesa and Jennifer Mapesa. Damary Machio, Young Litali, Josiah Andala, Phineas Ahamati and Paul Malingu did not sign the document. Notably, copies of the title documents in respect of the properties sought to be distributed are not attached to the affidavit sworn in support of the application.

8. An affidavit of protest was lodged at the registry on 2<sup>nd</sup> October 2017, by Young Litali Injene Loka, sworn on 2<sup>nd</sup> October 2017. I shall refer to him as the protestor. In his protest he says that the deceased had also been survived by a widow known as Jessica Andika who died in 2000 and a son known as Patrick Loka who later predeceased him and was survived by a daughter known as Prudence Mapesa. He states that as at the date of the deceased's demise, the assets that were in his name were Butsotso/Shibeye/323 and 326, and Butsotso/Shibeye/425. He further states that the deceased had also bought property which was yet to be transferred to his names. Butsotso/Shibeye/321 had been bought from Reuben Banka Chimaitisi and was still registered in the names of the seller's father Chimayisi Olusala. Butsotso/Shibeye/383 was said to have had been bought from Amukambwa Shilindwa and was still in the name of the said seller as at the date of the deceased's death. Idakho/Shiseso/279 was still in the name of the deceased's brother, Zakayo Amalindi Injene, and so was Plot No. 19 Shimanyiro Market. He averred that distribution could not be done with respect to property that was still in the names of other persons. He further avers that distribution of the estate should not be sought before the administrators have completed the exercise of identifying and collecting all the assets of the estate. He says that that exercise should include filing citations or filing suits to recover any parcels of land that the deceased had bought during his lifetime that had not yet been registered in his name. He asserts that as at the date of his death, there were debts or liabilities against the estate. He complains that Ambrose Jumbo had given part of the estate to Stanley Ominde Khayinga, yet that person was not entitled to any portion of the estate for the deceased never sold any land to him, if he did purchase any after the deceased's demise then the transaction amounted to intermeddling with the estate. He proposed that distribution of the estate be suspended to await recovery first of the assets that the deceased had bought from third parties and which had not yet been transferred to his name. He further proposes that the assets that are in the names of the deceased's brother, Zakayo Injene, should be inherited by the heirs of the said Zakayo Injene in succession proceedings initiated in the matter of the estate of the said Zakayo Injene.

9. The protestor proposes that should it be impossible to recover the assets that the deceased bought but were not transferred to his name by the date of his death, then the available assets could be distributed in the manner that he has proposed. He proposes that Butsotso/Shibeye/323 be shared out equally between Wycliffe Shikanda, Rose Anyolo, Lina Akosa, Leonida Musungu, Caroline Nelima, Bosiana Loka, Josiah Andala, Pheonoas Akhamati, Margaret Loka, Young Litali Loka and Paul Malinga, making provision also for a road. It is proposed that Butsotso/Shibeye/326 be shared equally between Merceline Nambiri Loka and the children of the late Patrick Mutimba Loka, Prudence and Jennifer, with the two grandchildren taking equally the share that ought to have gone to their father, and after making due provisions for a road. Butsotso/Bukura/425 is proposed to be shared out equally between Damary Machio, Ambrose Loka and Aggrey Injene Loka, after making provision for a road. He concedes that those sharing Butsotso/Bukura/425 who take smaller shares, but adds that the land was the more valuable of the three for it touched the Bukura-Kakamega road. He has attached several documents to his affidavit. There is a copy of the official search certificate for Butsotso/Shibeye/321 which shows the same was in the name of Chimayisi Olusala as at 28<sup>th</sup> September 2017. The other official search certificate is in respect of Butsotso/Shibeye/383, which indicates that the property was registered in the name of Amukambwa Shilindwa as at 28<sup>th</sup> September 2017. The last official search certificate is in respect of Idakho/Shiseso/279 and it shows that as at 29<sup>th</sup> September 2017 the said property was registered in the name of Zakayo Amalindi Injene.

10. The oral hearing of the confirmation application happened on 2<sup>nd</sup> May 2019. The first on the witness stand was the applicant, Ambrose Jumbo Loka. He testified that that the deceased had married three wives, being Jesca Andika, Marisela Nambiru and Damary Machio. The first wife had eight children, three of whom died. The second wife had seven children, three of whom had died. A son known as Patrick Mutimba was survived by two daughters. The last wife had four children, all of whom were alive. He stated that the second and third widows were still alive, that is to say Marisela and Damary. He stated that the deceased left five farms and one plot. He stated that none of the members of his side of the family objected to his proposals. He said that Butsotso/Shibeye/321 had been bought by the deceased, and the family of the third widow lived there. He also said that Butsotso/Shibeye/383, Idakho/Shiseso/279 and Plot No. 19 Shimanyiro Market were utilized by the third house. He explained that the third wife was inherited by Zakayo Amalindi, who sired two children with her, who were not counted alongside the four children of the deceased in the third house. He alleged that Zakayo Amalindi had grabbed Idakho/Shiseso/279 and Plot No. 19 Shimanyiro Market from the estate and he was using them as he lived there with the third wife of the deceased. He explained that it was the first and second houses that decided to sell a portion of the estate of Stanley Ominde Khayinga to raise money for filing the succession cause. He asserted that the third house had not been oppressed.

11. During cross-examination, the applicant conceded that the third house was entitled to a share in the estate of the deceased. He further conceded that Stanley Khayinga was not a member of the family of the deceased, and confirmed that he had not purchased any part of the estate from the deceased. He stated that it was himself, Aggrey Injene, Lina Akotsa, Wycliffe Shikanda, Rose Anyolo, Margaret Makalu, Caroline Loka and Mercyline Nambiru who had sold the land to him. He said that there was a sale agreement, but he did not have a copy in court. He said that they received a sum of Kshs. 700, 000.00 at first and Kshs. 300, 000.00 later, he said that the money was spent on administration of the estate, although he could not give a breakdown of the expenditure. He confirmed the proceeds of sale were not shared with the third house, and that they had not involved the third house in the process. He also said that the property was sold before the succession cause was initiated with the purpose of raising money for the initiation of the cause. He stated that they did not obtain leave of the court before selling the property. On Butsotso/Shibeye/321, he confirmed that the same was not registered in the name of the deceased, but was in the name of Chimayisi Lusala. He also confirmed that he had not listed the property in the schedule of the assets of the estate. Regarding Butsotso/Shibeye/383, he confirmed that it was registered in the name of Amukubwa Shilindwa, and that he had not listed it in the petition. Idakho/Shiseso/279, he confirmed was registered in the name of Zakayo Imalindi Injene, and that he had not listed the same in his petition. Plot No. 19 Shimanyiro Market, he similarly confirmed was property in the name of Zakayo Imalindi Injene, and the same was not listed in his petition. He confirmed that it was these assets that he was proposing should be given to the third house. He testified that it should

be up to the third house to have the titles to those assets processed or, put differently, to have the titles perfected. He said as administrator he was not aware that it was his responsibility to collect and gather the estate. He said that he did not file any suits against the persons who had sold the assets to the deceased. He asserted that it was the occupiers of the subject property who should sue, arguing that they had capacity to do so. He claimed that the third wife of the deceased had been inherited by his uncle, even though he had no evidence to prove it. He asserted that the deceased had bought property for the third house before he died, but unfortunately he passed on before the same could be transferred to his name.

12. The protestor took the witness stand next. He testified that all the assets proposed to be given to the third house were all registered in the names of other persons, and not the deceased. He said that Khainga was not a child of the deceased, and that he allegedly bought property from the deceased after the deceased's death. During cross-examination, he confirmed that the third house lived on Idakho/Shiseso/279, and utilized Butso/383. He denied that the third house utilized Plot No. 19 Shimanyiro Market. He said that the said property was being utilized by a child of Zakayo, which child he described as his cousin. He conceded that Zakayo had inherited his mother and that it was he who had educated them.

13. At the close of the oral hearing, the parties filed written submissions. I have perused them and noted the arguments advanced.

14. The deceased herein died in 1989, that was after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force on 1<sup>st</sup> July 1981. The effect of that is that the estate fell for distribution strictly in accordance with Part V of the Act.

15. The application that is up for determination is for confirmation of the grant that was made to the parties hereto on 7<sup>th</sup> December 2015. The law on confirmation of grants is section 71 of the Law of Succession Act, which provides as follows:

*“Confirmation of Grants*

*71. Confirmation of grants*

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

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

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; 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 ...”*

16. At confirmation of grant, the court does two things: first, it considers whether or not to confirm appointment of the administrator; and, two, makes orders on the distribution of the estate. I shall consider the two separately.

17. I shall start by looking at the issue of appointment of administrators. Under section 71(2)(a), the factors that the court takes into account with a view to confirming the administrator is to look at the process of his appointment to determine whether or not he was properly appointed. Secondly, once it is satisfied that the administrator was properly appointed, it considers next whether he or she has administered or will administer the estate in accordance with the law. On the process of appointment of the administrators, I do note that the applicant was the initial administrator, having been appointed in 2013. That appointment was challenged by way of a revocation application dated 7<sup>th</sup> October 2013. The said application was not heard on its merits. Instead, the same was resolved by consent of the parties. The grant was revoked, and the parties agreed on the appointment of the applicant and the protestor as joint administrators. I cannot, in the circumstances, find any reasons to fault the manner the grant sought to be confirmed was made to the administrators herein.

18. On the second issue, as to whether the administrators have administered the estate and will continue to do the same in accordance with the law, it will be noted that the joint administrators were appointed on 7<sup>th</sup> December 2015, and the application for confirmation of grant was lodged herein by the applicant on 31<sup>st</sup> October 2016, within the year of the making of the grant. It will also be noted that the applicant had been administrator since 17<sup>th</sup> June 2013, while the protestor only became an administrator on 7<sup>th</sup> December 2015. That would mean that the two of them cannot be assessed at the same at the same level, given that one of them has been in office for a much longer period of time than the other. It would appear from to me that the two, from the material that was placed before me, have not been able to do much with regard to the administration of the estate since their appointment on 7<sup>th</sup> December 2015.

19. The application that I am considering was filed by the applicant. In it he proposes distribution of property that did not belong to the deceased in the sense that the same was still registered in the names of other individuals. All the said assets are all proposed to be given to the third house. That means that whereas the other houses of the deceased are to share assets that were properly in the name of the deceased, the third house is being allocated property that was not in the name of the deceased. It is noteworthy that when the applicant initiated this cause for representation he was careful to omit the said assets from the schedule of the property of the estate, because he knew that the said property did not form part of the estate of the deceased, until such time that the titles to the property were perfected. Yet, while he knew that he proceeded to propose that the same be given to some of the survivors of the deceased.

20. At the oral hearing, the applicant said that he was not aware that it was his duty to collect and gather the estate in readiness for distribution amongst the survivors and others beneficially entitled to a share thereof. He went on to say that the assets in the names of third parties should be given to the third house, after which members of that house should be expected to perfect the titles and have them transferred to either their names or to the name of the deceased. He went on to say that the members of the third house had capacity to sue the persons who had sold the assets to the deceased, so as to perfect the titles, which implied that it was not his duty to do so, but that of the persons who were in occupation of the property in question.

21. That was a little surprising given the duties of an administrator are clearly spelt out by section 83 of the Law of Succession Act, which states as follows:

*“83. Duties of personal representatives*

*Personal representatives shall have the following duties—*

*(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;*

*(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;*

*(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);*

*(d) to ascertain and pay, out of the estate of the deceased, all his debts;*

*(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;*

*(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;*

*(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;*

*(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;*

*(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”*

22. It should be clear from the language of section 83(b) that an administrator has a duty to get in the assets of the estate. That means that he has to ascertain the assets that belong to the estate. He has to identify them, and once he does so he has a duty to take steps to collect them and gather them and bring them within the estate. That would mean that if there are debts owing to the estate, it should be the duty of the administrator to pursue them debts to ensure that they are recovered, and paid into the estate. Such debts would include property that the deceased had acquired during lifetime, but which was not transferred to his name before he died. That is party of the duty to collect, gather and get in the estate. To facilitate the exercise of getting in, collecting and gathering the estate, the law has granted to the administrator certain powers, which are spelt out in section 82 as follows:

*“82. Powers of personal representatives*

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

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

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

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

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

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required...

23. I would like to emphasize section 82(a). It gives the administrator the power to sue and be sued over estate property. The provision should be read together section 79, which provides that the property of the deceased vests in the personal representative, and the administrator represents the deceased for all purposes of the grant. The assets of the estate, therefore, vest only in the administrator, and it is only the administrator who can exercise the powers that are conferred by section 82 of the Act, and it is only him who has to shoulder the duties that are cast on administrators by section 83 of the Act. In the context of the instant cause, the estate of the deceased herein vested in the administrators, including the applicant. It was the administrators who had the responsibility of pursuing the transfer of the assets bought by the deceased before he died to ensure that they were brought within the ambit of the estate. It included having to sue the sellers of the said assets if they had to. That responsibility fell more squarely on the applicant. He was the administrator for the longest period. Upon his appointment in 2013, he should have immediately begun to have the exercise of perfecting the titles in readiness to distribute the estate. It is clear from these proceedings that the applicant had no clue what his duties as administrator were. He, therefore, did not do the right thing. His application to have the estate distributed was a rushed affair. Ideally, an administrator ought not apply for confirmation of his grant before he has completed gathering, collecting and getting in the estate.

24. Just so that doubts are cleared in the minds of the parties hereto, section 79 of the Law of Succession Act says:

“79. *Property of deceased to vest in personal representative*

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

25. Moreover, the applicant has conceded that prior to his initial appointment as administrator, he, together with others, disposed of part of the estate to Stanley Ominde Khayinga, ostensibly to raise money for administration of the estate. Huge amounts of money changed hands. At least a sum of Kshs. 1, 000, 000.00 was allegedly paid by the purported purchaser paid and received by the pretended vendors. Yet, despite that colossal amount of money having been paid, the applicant did not manage to get in the estate, by perfecting the titles of the assets that the deceased had bought. He did not take any steps to sue the sellers of the said assets, nor to have the relevant conveyances done, yet he claims that he sold estate property for administration purposes. Ideally, the proceeds of sale ought to have been expended in getting in, gathering and collecting the estate. At the trial, the applicant could not account for that money. He could not explain what he did with it in relation to the administration of the estate, which was the purported reason why he sold the property in the first place.

26. I have already alluded to section 79 of the Law of Succession Act. The estate of a dead person vests in the personal representatives. The vesting happens upon a grant of representation being made in favour of the person appointed as such. It is upon such appointment that the personal representative acquires the powers of a personal representative that are set out in section 82 of the Act, and incurs the duties that are set out in section 83 of the Act. The powers set out in section 82 include the power to sell estate property. Only the holder of a grant of representation has the power to sell estate property.

27. The facts of the matter before me are clear that the applicant herein purported to sell estate property to Stanley Ominde Khayinga before a grant had been made to him. That means that he sold the property before he had been appointed administrator of the estate. The effect of it is that the estate of the deceased had not yet vested in him in terms of section 79 of the Act. He did not, therefore, enjoy the powers granted by section 82 of the Act, which include the power to sell estate property. He had no property to sell and he could not possibly pass a good title to anyone, as he himself had no title in the property that he he purported to sell, for he could only acquire title to it upon his being appointed administrator to the estate or personal representative of the deceased. The alleged transaction between him and the said Stanley Ominde Khayinga, therefore, was null and void *ab initio*, and the buyer acquired no interest whatsoever in the estate of the deceased. He did not become a liability of the estate. He did not acquire any stake in the estate, and he has no claim of any colour against the estate. He should

not look up to the estate for anything. He can only look up to the individuals who purported to sell to him property in respect of which they had no title, and in respect of which they had no power or authority to sell.

28. The provisions that I have cited so far should be read together with section 45 of the Law of Succession Act, which provides:

*“Protection*

*45. No intermeddling with property of deceased person*

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

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

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

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

29. Section 45 of the Act is designed to protect estates of dead persons, by outlawing handling of estate property by persons who have no authority or power to handle or deal with it. The authority to handle estate property emanates from a grant of representation. Which would mean that a person who does not hold a grant should not deal with estate property as if it belonged to them, for it is the grant that vests the property in the grant holder by virtue of section 79 of the Act. Handling estate property without the requisite authority is a criminal act, for it is outlawed by section 45, and it attracts the sanctions prescribed by section 45(2) of the Law of Succession Act. It is that serious. Contravening section 45 of the Act is criminal. I should state that the mere fact that a person is a child or a spouse of the dead owner of the property does not give them any right or power to deal with the property as if the same belonged to them. The only person who can handle the property of a dead person as if that property belonged to them is the person who holds a grant of representation, for that is a personal representative of the deceased, whether as an administrator or an executor.

30. In the context of the matter before me, the applicant had not been appointed administrator of the estate of the deceased as at the time he purported to sell estate property. He had no authority by virtue of section 45 to sell the said property, as the same did not vest in him. What he, and all those involved, including the purported buyer, Stanley Ominde Khayinga, did was to intermeddle with estate property. They indulged in the criminal activity envisaged in section 45(2) of the Act. The transaction in question was not only an illegality but also criminal activity.

31. It should be pointed out that even with administrators, the law places certain restrictions with respect to handling of immovable property. Section 82(b)(ii) states that such property should not be sold before confirmation. So that even if the applicant were an administrator at the time of the alleged sale, which he was not, the same would still be invalid so long as the transaction happened before the grant was confirmed.

32. The applicant has moved the court for confirmation of his appointment. Am alive to section 83(e) of the Act, which requires the administrator to render an account within six months of his appointment. That duty coincides with the duty stated in section 71(1) which requires that the administrator applies for confirmation of grant after six months of the making of the grant. That would mean that at the point the administrator is seeking confirmation of grant, he should also render accounts in terms of section 83(e). I have looked through the confirmation application, and I have not seen any account rendered in terms of section 83(e). Failure to render accounts is a serious matter, and under section 76(d)(iii) of the Act, a court may revoke a grant on that account alone.

33. If ever there was an administrator who needed to account, it is the applicant herein. As stated above, he is an intermeddler with the estate. He intermeddled before his appointment. Section 45(2)(b) requires such an intermeddler to account to the administrator to the extent to which they intermeddled, and to even make good. In this case, the intermeddler is the administrator and, therefore, he cannot possibly account to himself. If he was acting in good faith, the least he should have done is to account to the court for that act of intermeddling so as to cleanse and sanctify himself. He received money for sale of property he should not have sold. To sanitize that ill-advised transaction, he should have at least given an account, explained himself and sought to make good. Instead, he came out at the oral hearing as defiant and unrepentant.

34. In view of what I have stated above, it should be clear that the applicant herein has not demonstrated that he understood his duties as administrator of the estate of the deceased. This is clearly demonstrated by the fact of his rushing to apply for confirmation of grant before he had completed the preliminaries, gathering the estate, for confirmation of the grant and distribution should be sought only after the estate has been gathered and gotten in. Distribution should not be done piecemeal; the administrator must first ensure that the estate has been collected before he proposes distribution. Getting in the estate is critical, so critical that failure to do the same amounts to lack of diligence in administration, which is one of the grounds for revocation of a grant. Administrators ought not to trifle with it. Administration of estates is a serious responsibility. It places the property of another in the hands of the an individual to administer for the benefit of others. The office of administrator is, therefore, one of trust. The applicant, in my view, is not a trustworthy person. He sold estate property before he was appointed administrator, and he sought to distribute estate property that was not even in the name of the deceased. I do not believe that he is competent enough to be entrusted with administration of the estate of a deceased person.

35. Regarding the protestor, I do note that the confirmation application was lodged less than one year since his appointment as administrator. As stated elsewhere, it would appear that he has not done much regarding administration within that relatively short time. I would, therefore, give him the benefit of the doubt.

36. The second aspect of the confirmation of grant is distribution of the estate. The court, after it has disposed of the aspect of administration, considers the manner of disposal of the estate. The relevant provision is the proviso to section 71(2), which states that before it confirms the grant, the court ought to be satisfied that about the identities of all the persons beneficially entitled to a share in the estate and of their respective shares. That presupposes that the court has to be satisfied that the administrator has ascertained all the assets that are available for distribution and identified all the persons entitled to a share in the said assets, and it is also satisfied in the manner the estate is proposed to be distributed.

37. It would appear to me that the persons who are beneficially entitled to the estate have been properly ascertained, even though the applicant had concealed the existence of some, like Prudence, Rose Lina and Leonida. However, the applicant does not appear to have had properly ascertained the assets that make up the estate, or if he had, he had failed to get in all the assets in readiness for distribution of the estate. He has also proposed to distribute property that is not registered in the name of the deceased. The effect of it is that the estate is not ripe for distribution. I agree totally with the protestor that the confirmation application should be postponed to allow the administrators get in all the assets of the estate before proposing distribution. The power to postpone confirmation is granted under section 71(2)(d) of the Act.

38. In the end, the orders that I shall make in this matter are as follows:

**(a) That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) to allow the administrators to collect, gather and get in all the assets of the estate, especially by perfecting the titles of the assets that the deceased had bought before he died and which had not yet been transferred to his name as at the date of his death;**

**(b) That I remove the applicant, Ambrose Jumbo Loka, as administrator of the estate herein, and I hereby direct that his place as administrator shall be taken over by individuals to be nominated from the first and second houses of the deceased, and who shall not include the applicant;**

**(c) That the matter shall be mentioned after thirty (30) days on a date to be given at the delivery of this judgment for the purpose of receiving the two names of the persons referred to in (b) above and for further directions;**

**(d) That any person aggrieved by the orders I have made in this judgement has twenty-eight (28) days to move the Court of Appeal appropriately; and**

**(e) That each party shall bear their own costs.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2019**

**W. MUSYOKA**

**JUDGE**