In re Estate of Francis Omuzee Khasindu (Deceased) (Succession Cause 15 of 2010) [2024] KEHC 3534 (KLR) (22 March 2024) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 15 OF 2010

WM MUSYOKA, J

MARCH 22, 2024

IN THE MATTER OF THE ESTATE OF FRANCIS OMUZEE KHASINDU (DECEASED)

RULING

1. The certificate of death on record, serial number 172933, of a date that Is not clear, indicates that the deceased herein, Francis Omuzee Khasindu, died on 29th August 2001. I see a letter on record, dated 25th November 2003, by the Chief of Kotur Location. It indicates that the deceased died a polygamist, having married 2 wives, who had 11 children. The first wife is identified as Sarah Sauke Omuse, and her children are said to be Peter Churchill Omuse, Maximilla Omuse and Carolyne Omuse. The second wife is identified as Anjelina Juma Omuse, and her children are said to be Tom Edwin Omuse, Victor Etyang Omuse, Richard Omuse, Nelly Omuse, Eunice Omuse, Nancy Omuse, Christine Omuse and Ireen Omuse.

2. Representation to the estate was sought by Peter Churchill Lwakale, in his capacity as son of the deceased. She listed the survivors of the deceased as 12 individuals, being 2 widows, 3 sons and 7 daughters, namely Sarah Seuke Omuse, Anjeline Juma Omuse, Peter Churchill, Victor Etyang Omuse, Richard Omuse, Maxmilla Omuse, Carolyne Omuse, Nelly Omuse, Eunice Omuse, Nancy Omuse, Christine Omuse and Ireen Omuse. South Teso/Amukura/465 is listed as the property that the deceased died possessed of.

3. Objection proceedings were initiated by Margaret Ajode Oguwangi, through a notice she filed on 22nd April 2010, of even date, complaining that the petitioner had not disclosed all the facts, had not obtained the consents of all the beneficiaries who had equal right to representation, and was intermeddling with the estate. In her affidavit, sworn on 22nd April 2010, she identifies the deceased as her paternal uncle, being the brother of her father, Silvanus Oguwangi. She avers that the estate property, presumably South Teso/Amukura/465, had been bought by her father, but he died before the same was transferred to his name. She complains that her father died before he got his share of the ancestral land, and that the deceased herein had the entire ancestral land to himself. She further complains that she was unable to successfully get justice on that matter as she was a woman, whose claims were rubbished, and her only brother had been born outside wedlock, which gave him little

leverage. She states that her father had married 2 wives, now both dead, who gave him 4 children. The notice of objection was eventually withdrawn vide a notice filed herein on 28th February 2017, bearing an even date.

4. There was really no proper objection before the court, for an answer to the petition and cross-application for grant had not been filed, as required by sections 67, 68 and 69 of the *Law of Succession Act*, Cap 160, Laws of Kenya. However, although the notice of objection was withdrawn, some of the affidavits in that alleged objection are of some utility, going by their substance, for what is disclosed in them may have a bearing on distribution of the estate, and, therefore, I shall recite the contents of those affidavits, for whatever they are worth.

5. The first is by Margaret Ajode Oguwangi, sworn on 1st April 2011. She avers that the deceased and her father were siblings, being children of the late Khassindu . She states that her father had, in 1965, bought a property, measuring 10 acres, or thereabouts, from Papai Omoree and Pokeya Omoree, who surrendered vacant possession, and thereafter relocated to Uganda. Her father then moved to Tanzania, leaving the land in the hands of his father. Her father died on 22nd September 1969. Land adjudication happened in 1972, the land that her father had bought was registered as South Teso/Amukura/465, under the name of the father of her father. She explains that that happened because by then her father had died, and the property could not be registered in the name of a dead person. She states that the deceased herein had acquired registration of South Teso/Amukura/465 without due process, as it was not indicated whether he had purchased it, or he had acquired it by way of gift. She states that the property owned by her grandfather, that is the father of the deceased and her father, was South Teso/Amukura/867, and it was that piece of land which constituted the ancestral land, to which both her father and the deceased herein were entitled to inherit. She avers that her grandfather did in fact give to the deceased herein a portion out of South Teso/Amukura/867, and that that portion was very clearly demarcated on the ground. She further avers that her father was not given a share out of South Teso/Amukura/867, on grounds that he had already bought South Teso/Amukura/465. She further says that South Teso/Amukura/465 remained in the name of the deceased as it was believed that women could not inherit land. She states that the matter was before the Teso South District Land Disputes Tribunal, which had recommended that she was the right person to succeed South Teso/Amukura/465. She further avers that her sister, Jane Amoit, was in occupation of that property, after her marriage failed.

6. There are affidavits by Christopher Omete Iriama and Reaphael Ondeto Igwoun, sworn on 4th April 2011 and 29th June 2011. Both reiterate the claims by Margaret, that her father had bought South Teso/Amukura/465 from individuals, who later relocated to Uganda. They claim that during land adjudication the property was registered in the name of the grandfather of Margaret, and that in 1976 the deceased forced himself into the property, and caused it to be registered in his name. They further aver that the grandfather of Margaret had given a portion of South Teso/Amukura/867 to the deceased herein.

7. Peter Churchill Lwakale swore an affidavit on 1st September 2011. He is a son of the deceased. He asserts that the deceased was the sole proprietor of South Teso/Amukura/465, having acquired it in 1981 from one Khasindu Inguni, the first registered proprietor thereof. He states that Margaret never asserted her interest in the property during the lifetime of the deceased. He describes her as a stranger to the estate, claiming that she was married elsewhere. He states that it was true that a sister of Margaret, Jane Amoit, had moved into the property after her marriage failed, but asserts that she was not entitled to it. He argues that his uncle, Silvanus Oguwanga, never owned the property, going by the register, and no title could pass to his successors. He asserts that the Teso South District Land Disputes Tribunal had no business to deliberate on title to land, and the determination by the Tribunal had no legal

consequence. He attaches a copy of green card for South Teso/Amukura/465, which indicates that Khasindu Inguni was the first registered proprietor, effective from 7th December 1972, the property then passed to Francis Omude Khasindu on 25th February 1981. There is a restriction lodged in the register on 29th April 2010, vide a Chief's letter of 10th January 2010, with respect to the determination by the Land Disputes Tribunal.

8. I have indicated above, that the notice of objection was withdrawn, by a notice filed in court on 28th February 2017, of even date. The objection proceedings were, therefore, never conducted. Simultaneous with the withdrawal of the notice of objection, Margaret Ajode Oguwangi filed a summons for revocation of grant, allegedly made to Peter Churchill Lwakale, on an undisclosed date. She also sought that she be appointed a co-administrator. Her revocation application was dated 28th February 2017. It was premised on the same grounds as the objection that she had withdrawn. I have not seen a reply to the revocation application, by the alleged administrator of the estate. Although, no grant had been made to Peter Churchill Lwakale, the court proceeded to entertain the said revocation application, and to revoke the non-existent grant, in a ruling dated 3rd December 2019, and proceeded to appoint Peter Churchill Lwakale and Margaret Ajode Oguwangi administrators. A grant of letters of administration intestate was issued to them, dated 12th October 2020. I shall refer to the 2 corporately as the administrators.

9. The appointment of new administrators paved way for the filing of the summons for confirmation of that grant, dated 26th July 2023, that I am called upon to determine. It is at the instance of Margaret Ajode Oguwangi . The persons entitled to a share in the estate have not been listed. She avers that the beneficiaries had agreed on a mode of distribution, but no consent on distribution is attached to the application. She proposes distribution of South Teso/Amukura/465, so that she, Margaret Ajode Oguwangi, gets 9 acres, to hold in trust for the estate of her late father, Silvanus Khasindu Oguwangi; Peter Churchill Lwakale to get 2 acres, to hold in trust for the estate of his late father, the deceased herein; and Morris Etyang 1 acre. I shall refer to Margaret Ajode Oguwangi as the applicant.

10. I have seen affidavits of service, relating to service of hearing notices on the Advocates for Peter Churchill Lwakale, but I have seen none alleging that the application itself was served on the said Advocates or on Peter Churchill Lwakale personally. There is no affidavit of protest on record, neither is there a response of any kind by the said Peter Churchill Lwakale, to the application.

11. When the matter came up for hearing on 26th October 2023, it was adjourned, at the request of the applicant, as only one beneficiary, the applicant herself, was in court. It came up again on 15th November 2023, and was put off, at the request of the applicant, as the Advocates for Peter Churchill Lwakale had not been served.

12. On 19th December 2023, Ms Mukana held brief for Ms. Masengeli, for the applicant. She had attended court with the applicant and Morris Etyang. Ms. Mukana asked me to confirm the grant, as she had served the hearing notice. I took unsworn statements from Margaret Ajode Oguwangi and Morris Etyang. Margaret Ajode Oguwangi stated that the deceased person was her uncle, a brother of her father. She said that the deceased had his own wife and children, and they had their own assets. She stated that South Teso/Amukura/465 was meant for her father. Morris Etyang stated that the deceased was a brother of his mother. He said that the deceased had his own property, apart from South Teso/Amukura/465, although his family resided on South Teso/Amukura/465. At the end of it, Ms. Mukana submitted that South Teso/Amukura/465 belonged to the family of the applicant. I ruled that that was a case that required oral evidence, and Ms. Mukana stated that she was not ready with such evidence. I then fixed the matter for hearing on 7th February 2024.

13. When the matter came up on 7th February 2024, Ms. Masengeli was in attendance, and she initially resisted having the applicant give oral testimony on the confirmation application. Her case was that the application was unopposed, and, for that reason, she did not understand why the court would require oral testimony, instead of simply granting the application as prayed. She only placed the applicant on the witness stand after the court indicated that it would proceed as per the directions given on 19th December 2023. This is not on record, but I advert to it as it is critical to understand why confirmation applications ought not be allowed as prayed, when no filings are placed on record to oppose them. So, before I consider what the applicant told the court on oath, let me clear the air, for the benefit of Ms. Masengeli, regarding my directions of 19th December 2023.

14. Succession proceedings are unique. They are not initiated by one party against another. They are not suits in the ordinary sense of one person suing another, so that when the other person fails to attend court the other party would have a walkover, and would have the orders that they seek without a sweat. The succession cause is initiated by the person who, when appointed by the court, becomes the personal representative. The objective behind the succession cause is administration of the estate. Administration entails collection and preservation of the assets of the estate prior to distribution, ascertainment and settlement of debts and liabilities of the estate, ascertainment of the beneficiaries of the estate, making proposals on distribution for approval by the court, and eventually distribution of the estate following the said approval. Of course, objections of one kind or other may be brought by persons who have an interest in the estate, whether creditors, or survivors of the deceased, or persons who have an interest of one sort or other. Where no opposition of any sort is mounted, the court would still have to be vigilant, to ensure that the administration is conducted strictly in accordance with the law, to avoid disadvantaging any person who might have an interest in the estate. For that reason, a court has to exercise care, before it pronounces that some application is allowed as prayed.

15. What I have said above is particularly important with respect to confirmation of grants. The process of confirmation of grant is the most critical part of the succession or administration of estates process. It is at this stage that the assets are distributed. After distribution, the process comes to an end. In the scheme of things, under the *Law of Succession Act* and the Probate and Administration Rules, where the process is seamless, without challenges of any kind, there should be only 1 court appearance, before a Judge or Magistrate, and that is only at confirmation. The rest of the processes are meant to be administrative, undertaken at the court registry. The confirmation process should be at the tail end, the final stage, and where it is done correctly, that would spell an end to the succession process. Where it is not handled properly, the process would not end, for post-confirmation applications of all sorts are likely to arise. Such post-confirmation applications would include review, revocation of grant, rectification, among others. There is a duty, therefore, on the part of the courts to ensure that the confirmation process is handled properly, and the courts should, particularly, eschew granting summonses for confirmation of grant merely because they are not opposed.

16. Is there legal basis for what I am talking about? Yes, there is. I will start with section 71 of the *Law of Succession Act*, which provides for confirmation of grants. Section 71(1) is about who may apply, and when may that application be done, and why the application should be done. According to section 71(1), only the holder of a grant may apply for its confirmation, confirmation should be sought within 6 months of the making of the grant, and the objective is to pave way for distribution of capital assets. Section 71(2) of the *Law of Succession Act* should be the more critical for the purpose of this matter. It envisages 2 critical aspects of confirmation, the first is about the administrators, while the second is about distribution of the assets.

17. Section 71(1)(2) states as follows:

> "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
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> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
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> (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
>
> (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: ..."

18. Let me start by considering confirmation of administrators. It is handled in section 71(2)(a)(b) of the *Law of Succession Act*. Under these provisions, the court has to confirm the administrators, to pave way for them to go on and distribute the estate, following confirmation of the proposals that they would have placed before the court. Confirmation of administrators is about whether they were properly appointed, that is through a process that was not defective or attended by the ills of fraud, concealment of matter and misrepresentation. I guess that it should also be about whether the administrators had sufficient interest in the estate, to justify their appointment. Where their appointment was proper, the next consideration is whether they administered the estate in accordance with the law. This, no doubt, would require an account, by the administrators, of the steps they took, upon their appointment, with respect to the administration of the estate, leading up to the application for their confirmation and distribution of the assets. The next consideration should be whether, on account of their previous handling of the estate, and their personal circumstances, they would administer the estate in accordance with the law, were they to be appointed. This is an aspect of the confirmation process that administrators do not pay much attention to.

19. Section 71(2)(a)(b) gives pointers on how the court should handle the situation, in case it is satisfied that the appointment was proper, and the administration was in accordance with the law, and the administrators appeared like they would administer the estate in accordance with the law after confirmation, and also where the court appears not to be satisfied. Section 71(2)(a) addresses the case where the court is satisfied of the 3 items, it may go ahead and confirm the administrators. Section 71(2)(b) deals with whether there is no satisfaction, the court would not confirm the administrators. Indeed, what should happen is that the grant would be revoked, and the administration committed to someone else, so that where the proposals on distribution appears reasonable, but the court is not

satisfied of either all 3 of the items in section 71(2)(a), the court may confirm the proposals, but decline to confirm the administrator, revoke his grant, and appoint another administrator to proceed with the distribution of the estate, based on the approved proposals. This is one of those incidences were the court revokes a grant on its own motion, under section 76 of the *Law of Succession Act*.

20. The mere fact that the application is not opposed does not mean that the court is not obliged to consider the 3 items in section 71(2)(a). Succession proceedings are not adversarial, they are more of inquisitorial. The court would still have a duty to ensure that the right thing has been done by the administrators, in terms of section 71(2)(a). The satisfaction, mentioned in section 71(2)(a), must come from the filings by the administrator, who has applied for confirmation. There is duty to demonstrate that the administrator applicant was properly appointed, had sufficient interest in the estate, has administered the estate in accordance with the law, and that he would administer the estate in accordance with the law if confirmed. There is a duty to account, as to whether, upon being appointed, that the administrator seeking confirmation has collected and preserved the assets of the estate, has ascertained the debts and liabilities of the estate, has settled those debts and liabilities of the estate, has ascertained the persons beneficially entitled to a share in the estate, and their respective shares.

21. Looking at the application before me, I am not satisfied that the applicant herein addressed those issues in her supporting affidavit. The estate herein is that of her uncle. Her uncle had his own family, with 2 wives and children. The immediate family of the uncle had prior right to administration, by dint of section 66 of the *law of Succession Act*, as that family had prior entitlement to inheritance of the estate of the deceased, going by Part V, sections 35 and 38, of the *Law of Succession Act*. The question would be, was there justification for the applicant to be appointed administratrix of the estate of her uncle. She has not address that in her affidavit. She alleges that her father had bought the property, which was then registered in the name of her grandfather, which her uncle then got transferred to his name. No paper trail was exhibited to support these contentions. In view of this, the court could not just grant the orders as sought, just because the family of her uncle did not contest her application. The court was obliged to scrutinise the record, but before doing so, the administratrix had to be given an opportunity to explain herself. She could only do so in an oral hearing. She is asking the court to give her 9 acres out of 12 acres of a property registered in the estate of her uncle. That cannot happen without a hearing to justify it. That hearing should provide the evidence to support the justification. She did not exhibit any court order where it had been declared that her father was entitled to the entire estate asset or the 9 acres that she claims in the summons for confirmation. The court does not leap into the dark. It does not act blindly. It acts on evidence, to depart from the norm. The norm here is that the intestate estate of a dead person devolves upon his immediate family, the court can only depart from that position upon some evidence being tabled. Such evidence is tabled in a hearing.

22. Sections 35, 38 and 66 state as follows:

> 35. Where intestate has left one surviving spouse and child or children
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> (1) Subject to the provisions of *section 40*, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
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> (a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(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."

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."

Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

23. Regarding distribution, the most relevant provision, in section 71 of the *Law of Succession Act*, is the proviso to section 71(2) of the Act. This provision in the proviso is also re-stated in Rule 40(4) of the Probate and Administration Rules. It requires the court not to confirm a grant unless it is satisfied that the administrator applicant has ascertained all the persons beneficially entitled to a share in the estate, and has identified or ascertained the shares due to such persons. The proviso goes on to state that, upon

confirmation of the grant, the certificate of confirmation of grant, generated from the confirmation orders, captures the shares allocated to every person that is beneficially entitled to a share in the estate. The proviso to section 71(2) and Rule 40(4) state as follows:

> "71(2). 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 the grant shall specify all such persons and their respective shares."
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> 40(4). Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined."

24. Has there been compliance with the proviso to section 71(2) of the Act and Rule 40(4) of the Rules? I have seen no compliance. The affidavit by the administratrix applicant has not purported to identify the persons that she has ascertained as beneficially entitled to a share in the estate of the deceased. The estate herein is of the deceased person identified as Francis Omuzee Khasindu. The persons who survived this individual should have been identified. All his widows and all his sons and daughters, and for those of them who are dead, their offspring. There is no such ascertainment of these individuals, and neither were their respective shares ascertained. It is alleged that the asset, which makes up the estate, actually belonged to her father, yet she has not identified the members of the family of her father in the affidavit in support of her application. I have seen earlier filings indicating that the administratrix applicant has siblings, but these individuals are not disclosed in the supporting affidavit, and the shares due to them are equally not indicated. There is a proposal to give some 1 acre to a Morris Etyang out of the estate. There is no explanation as to who this Morris Etyang was to the deceased, and why he should be allocated a share in the estate. These are the gaps that I was giving the administratrix applicant a chance to fill in by way of oral hearing.

25. Section 83 of the *Law of Succession Act* sets out the duties of administrators. I have alluded to them above. They include ascertainment of debts and liabilities, settlement of such debts and liabilities prior to distribution of the estate. There is also a duty to account for the administration of the estate, which should coincide with confirmation. These issues have not been addressed in the affidavit that the applicant swore in support of her application. An oral hearing would have given her a chance to address them.

26. Section 83 of the Act states as follows:

> Duties of personal representatives
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> Personal representatives shall have the following duties—
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> (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;
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> (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;
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> (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);
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> (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."

27. The Probate and Administration Rules also have requirements, which the applicant had not met. I have already dealt with Rule 40(4) and I shall not go back to it. Instead, I shall focus on Rule 40(6)(8).

28. Rule 40(6) is about the filing of affidavits of protests, by whoever may be interested in the estate. Such individuals can only be the persons who have a beneficial interest in the estate, that would be the survivors of the deceased, creditors and any other person who may have a beneficial interest in the estate. Survivors of the deceased would be his spouse and children. The applicant has not disclosed these individuals. Such survivors can only file affidavits of protest if they are aware of the confirmation application. The only individual that the applicant claims to have served is her co-administrator, Peter Churchill Lwakale, yet the deceased was survived by 2 widows, and 10 other children, according to the letter from the Chief and the petition. Were these 2 surviving spouses and the 10 children served with the application, for them to either support it, or file a protest to it in accordance with Rule 40(6)? The applicant alleges, in her previous filing, that she had 4 siblings. Were these 4 served, to enable them support her application, or file affidavits of protests to it?

29. Rule 40(6) states:

> "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."

30. Rule 40(8) enables the court to allow a summons for confirmation of grant as filed. That is what Ms. Mukana was asking me to do on 19th December 2023, but I declined. According to Rule 40(8), the court can allow the summons for confirmation of grant without hearing the parties, where a consent, in Forms 37 or 38, has been filed. Such a consent would be executed by all the persons beneficially entitled to a share in the estate. According to the applicant, the persons beneficially entitled to this estate would

be her siblings and members of the immediate family of her uncle, the deceased herein. It would be those individuals signing such a consent. If all those individuals had signed and filed a consent in court, then under Rule 40(8), I would have allowed the confirmation without hearing anyone. Was there such a consent? I have not seen any. Although paragraph 8 of the affidavit by the applicant, in support of her confirmation application, alludes to agreement between the beneficiaries on distribution, and refers to a schedule of distribution, allegedly marked as MAO-1, there is no such distribution schedule attached, to the affidavit that was filed in court. So, there was no compliance with Rule 40(8), and that being the case, there was no way I was going to allow the application as prayed. The applicant was bound to testify, and that was why I gave her the chance.

31. 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 in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit."

32. Rule 41 of the Probate and Administration Rules is also relevant. It deals with the hearing of a summons for confirmation of grant. The most relevant sub-rules, for the purpose of this ruling, would be (1) and (3).

33. Rule 41(1) identifies the persons that the court should hear. These are the applicant administrator, the protestor, and any other person beneficially entitled. A hearing would be necessary where a protest has been filed under Rule 40(6) and where there is no consensus on distribution, signified by a consent on distribution, in Forms 37 or 38, as prescribed by Rule 40(8), signed by all the persons beneficially entitled. There was no protest under Rule 40(6), and there was no consensus on the proposed distribution either. The absence of the consensus envisaged under Rule 40(8) meant that a hearing had to be conducted under Rule 41(1). It must be emphasised that there is no requirement that the confirmation application must be opposed, for an oral hearing to be conducted. Absence of consensus, in Forms 37 or 38, is all what is needed. In this case there was no consensus, in the manner envisaged by Rule 40(8), and an oral hearing, under Rule 41(1), was unavoidable, inevitable.

34. Rule 41(1) states 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 then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative."

35. Rule 41(3) is about what happens where the asset proposed for distribution is contested or its ownership clouded in mystery. The court only distributes the free property of the deceased. Free property would mean an asset that is in the name of the deceased, whose title is not contested, or subject to an encumbrance of one sort or other. South Teso/Amukura/465 is registered in the name of the deceased. Ideally, only the immediate family of the deceased would be entitled to it in intestacy. In this case, the administratrix applicant claims that South Teso/Amukura/465 was an asset bought by his father before land registration, and at registration it was registered in the name of her grandfather,

and at some point it was transferred to the name of the deceased. It is on that basis that she has been installed in these proceedings as a beneficiary. South Teso/Amukura/465 is not free property, so long as it is contested as between the estate of the deceased herein, and that of the father of the applicant administratrix. That is underlined by the fact that a restriction has been lodged in the register, and no dealings can be had in that register prior to that restriction being lifted. South Teso/Amukura/465 cannot be available for distribution, before the issue is resolved. That resolution cannot happen in these confirmation proceedings, nor in this succession cause. Rule 41(3) requires that that resolution be sought in separate proceedings, and that, in the meantime, the said property be appropriated, or set aside from the schedule of the assets to be distributed. See In re Estate of Kimani Kinuthia (Deceased) [2008] eKLR (Ibrahim J) and in re Estate of Julius Ndubi Javan (Deceased) (2018] eKLR (Gikonyo J). That is an issue that I could not ignore or overlook, and it is something which the administratrix applicant needed to address, at oral hearings.

36. Rule 41(3) provides as follows:

> "Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant."

37. Let me go back to what the administratrix applicant told the court when she testified, on 7th February 2024. She stated that the property was registered in the name of the deceased, but had been bought by her father in 1965. Her father then died in 1969, before the same had been registered to his name. It was eventually registered in the name of her grandfather, Khasindu. She said that she witnessed as her grandfather and the deceased quarrelled about why the deceased caused the land to be transferred to his name, that is that of the deceased. She said that they were young then, and their mother had died in 1963, and, therefore, there was little they could do. When she was of age she raised the issue, and the matter was escalated to the local administration. The family of the deceased did not attend the meeting, and the issue was referred to the Tribunal, which ruled that she was qualified to initiate succession proceedings in the estate herein, and she was referred to court. She asserted that the deceased was entitled to land elsewhere. She explained that the mother of Morris Etyang took care of them, after their own mother died, and that was why she was gifting him with the 1 acre. No documents were produced, at the oral hearing, to support the narrative.

38. The deceased herein died in 2001, after the *Law of Succession Act* had come into force. The property in question is situate within Busia County, which is not one of the areas exempted from the intestacy provisions of the *Law of Succession Act*. The deceased died intestate, and so his estate has to be distributed in terms of the intestate provisions of the Act. The intestate provisions are in Part V of the Act, where property at distribution is given to the surviving spouses of the deceased, and their children. If there are no such relatives, then the parents of the deceased follow. If such parents are dead, then the estate would devolve upon the siblings of the deceased. In the event the siblings are dead, the property should devolve upon their children. That is the purport of sections 35, 36, 38 and 39 of the *Law of Succession Act*. The material on record indicates that the deceased was survived by 2 spouses and 11 children. These are the persons entitled to the estate. The applicant herein is a niece of the deceased. She is not entitled to take a share in the estate. That is the law currently.

39. The applicant administratrix stakes her claim not as a niece, and, therefore, the scenario above, according to her, does not apply. She claims on behalf of the estate of her father, who she claims had bought the property. There is a document on record, showing that she had been appointed administratrix of his estate, and therefore, she has locus to stake a claim in the estate herein on behalf of the estate of her father. However, the question is not so much whether she has the locus standi to lay a claim herein for her father, but whether there is material before me showing that the property had been bought by her father, and that his estate herein was entitled to it exclusively. I do not have such evidence before me.

40. Even if I had such evidence, I would have no jurisdiction, in these proceedings, to determine whether or not the property belonged to the estate herein or to the father of the applicant. Firstly, these are probate proceedings, not land proceedings. In probate proceedings, the court seized can only distribute the property proved to belong to the deceased, but not decide, if ownership is contested, the said ownership. The property herein is proved, going by the documents availed, to belong to the deceased. Going by that, I can only devolve it to the persons entitled, and that would be the surviving spouses and children of the deceased herein, and not the estate of his late brother, Silvanus Oguwangi. Secondly, I do not, sitting as High Court, have jurisdiction to determine questions around ownership or title to land. Articles 162(2) and 165(5) of *the Constitution* have taken that jurisdiction away, and vested it in the Environment and Land Court and the enabled subordinate courts. I cannot, even if I had the evidence, determine whether the real owner was the deceased herein or Silvanus Oguwangi. That has to be placed before the Environment and Land Court or the enabled subordinate courts. The applicant administratrix should have placed the question of the ownership of South Teso/Amukura/465, as between the estate of her father and that of her uncle, before either of the 2 courts, before she intervened in these proceedings, or mounted the instant confirmation application.

41. Articles 162(2) and 165(5) of *the Constitution* state as follows:

> " 162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to -
>
> a) ...
>
> b) The environment and the use and occupation of, and title to, land."
>
> 165(5) The High Court shall not have jurisdiction in respect of matters —
>
> a) ...
>
> b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."

42. So, what should I do with her summons for confirmation application, given what I have stated above? Section 71(2)(d) of the *Law of Succession Act* allows a court seized of a summons for confirmation of grant, to postpone it to allow the parties address whatever is deficient about it. The deficiency, in this case, is that the property proposed for distribution is not available for distribution, so long as the question of its ownership, between the father of the applicant and her uncle, is not resolved. Rule 41(3) of the Probate and Administration Rules allows the court seized of a confirmation application, to set aside and appropriate a contested asset, to allow the parties obtain determination on its ownership in separate proceedings. That would mean having the instant application adjourned, and to avoid distributing South/Teso/Amukura/465, to allow the 2 combatants move the Environment and Land Court or the enabled subordinate courts, for determination of whether the property belonged to the

estate of the deceased herein or that of Silvanus Oguwangi, and after that determination, the summons for confirmation would be determined on its merits, based on that determination.

43. In view of the above, I hereby postpone the summons, dated 26th July 2023, to abide determination of the question of ownership, in the manner proposed in paragraph 32 above. The matter shall be mentioned after 6 months, to monitor progress. It shall be mentioned on a date to be allocated at delivery of this ruling. Should the administratrix applicant be aggrieved or unhappy with the findings, holdings and orders made in this ruling, I hereby grant leave, of 30 days, to move the Court of Appeal, appropriately. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND DAY OF MARCH 2024.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Masengeli, instructed by JO Makali & Associates, for Margaret Ajode Oguwangi.