REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 48 OF 2013

IN THE MATTER OF THE ESTATE OF FESTO LUGADIRU ABUKIRA (DECEASED)

JUDGMENT

1. The certificate of death serial number 967731, dated 6th October 2010, and filed herein on 23rd January 2013, indicates that the deceased person to whose estate this cause relates, was known as Festo Lugadilu Abukira, who died on 14th July 2010. There is a letter on record from the office of the Assistant Chief of Mukuyu Sub-Location, dated 28th August 2012. It indicates that the deceased had been survived by nine (9) individuals, sons, daughters, a grandson and a daughter-in-law. The sons are described as Eliud Imbisi Lugadiru, Herbert Ong'iya Lugadiru, Sosiness Livoyi Lugadiru, Fred Ambaka Lugadiru and Hudson Mugasu Lugadiru; while the daughters are said to be Emmy S. Lugadilu and Mary Lugadilu. The grandson is said to be Carlistus Kigalo Kavagi, a son of a late son of the deceased called Benson Kavagi; while the daughter-in-law is Milka Wangoi Kamau, the widow of a son of the deceased described simply as George. The deceased is said to have had died possessed of the property described in his will dated 25th November 2005.

2. Lodged in court simultaneously with the certificate of death and the Assistant Chief's letter, are the following documents:

(a) P&A 80, being a petition for letters of administration intestate, and its supporting documents which include an affidavit in support of petition (P&A 5) sworn on 21st January 2013 by Eliud Imbisi Lugadilu;

(b) a homemade petition for grant of probate of a will of the deceased, accompanied by a homemade affidavit in support of the said petition, sworn on 21st January 2013, by Eliud Imbisi Lugadilu;

(c) a deposit docket on lodging will, dated 21st January 2013; and

(d) a document in Kiswahili language, tituled "A Will", dated 25th November 2005

3. I have set out above the documents that were lodged in court on 23rd January 2013 because I find it curious that Eliud Imbisi Lugadilu simultaneously lodged herein two petitions for grant of representation in one cause relating to the estate of the same deceased person.

4. Be that as it may. The record indicates that the Deputy Registrar proceeded to process the petition for grant of letters of administration intestate, and appears to have had ignored the petition for probate of the will of the deceased. The notice that appears in the *Kenya Gazette* of 26th April 2013, as Gazette Notice No. 5556, is that of the petition of grant of letters of administration intestate. It is not clear what informed the decision of the Deputy Registrar in doing so, but I suppose it had something to do with the fact that the petition for grant of letters of administration intestate was in the prescribed form, P&A 80, while that of probate was not in the prescribed form, P&A 78. Anyhow, the grant of representation that was eventually made on 28th June 2013, was in the form of letters of administration intestate, which was signed by the Judge on 29th July 2013, in favour of Eliud Imbisi Lugadilu, who I shall hereafter refer to as the administrator. The record reflects that the said grant was collected from the court's registry on 16th August 2013 by the advocates for the administrator.

5. The administrator then lodged a summons herein on 28th August 2014, of even date, seeking confirmation of his grant. According to the affidavit that he swore in support of the application, he listed the seven (7) children of the deceased mentioned in the Assistant Chief's letter as the survivors of the deceased, but added the grandson and the daughter-in-law of the deceased mentioned in the same letter as other dependants of the deceased. He identified that property that the deceased died possessed of as Kakamega/Mautuma/188. He proposed that the said property be disposed of as per the will of the deceased, so that he, the administrator took 4.8 acres thereof, while the remainder was shared out equally between his siblings, his nephew and sister-in-law, at the rate of 1.8 acres each.

6. It would be appear that the filing of that summons, dated 26th August 2014, provoked the filing of the summons dated 10th October 2014, by Sosiness Livoyi Lugadilu, for revocation of the grant made to the administrator. I shall hereafter refer to Sosiness Livoyi Lugadilu as the applicant. The grounds on which he founded his application are that the process of obtaining the grant were defective, the grant had been obtained fraudulently, the beneficiaries had not consented to the grant being made to the administrator and were unaware of the contents of the will, and that he had not been adequately provided for. The affidavit he swore in support of the application makes further allegations –

that the administrator had gone ahead to subdivide the deceased's land in a process that excluded everybody else, he challenges the existence of the will, the administrator utilized the assets of the estate at his own discretion and to the exclusion of the other survivors, and that the administrator had inherited the lion's share of the assets.

7. To the summons for revocation of his grant, the administrator swore a lengthy replying affidavit on 13th November 2014. He averred that the asset of the estate had been acquired by the deceased through a loan facility. The deceased thereafter experienced difficulties in servicing the loan, exposing the said property to foreclosure. Whereupon, he approach him with a request that he assists him clear the loan. The administrator avers that he paid a sum of Kshs. 210, 000.00 in that behalf. After that the deceased subdivided his property and demarcated the same amongst his sons and executed the relevant mutation forms. He also applied for and obtained the consent of the relevant land authorities for the purpose of subdivision and transfer of the said land. He further avers that at about the same time, the deceased made a will, he explains that the deceased had set apart a portion of the for his daughters, and that he had allocated him a larger portion since he had helped in securing the property from foreclosure. He has attached several documents to his affidavit to support his contentions.

8. Directions were taken on 19th November 2014, that the confirmation application and the summons for revocation be disposed of by way of oral evidence, and that witness statements be filed. The parties complied with the direction as to the filing of witness statements, for they did place several such statements on record.

9. The oral hearing commenced on 3rd June 2015, with the applicant, Sosiness Luvoyi Lugadiru – holder of national identity card number 1448875, being the first to take the witness stand. He stated that the administrator had initiated the succession cause without involving the other family members. He accused him of refusing to sit with his siblings and to answer summonses from the authorities; asserting that he came to court stealthily. He claimed that some of the children of the deceased had been omitted from the distribution proposed by the administrator, and he proposed that the estate be shared equally amongst all the children. He complained that the administrator wanted to use the entire land, and thereby render the rest of the family squatters. He said that the deceased had seven sons and two daughters. He named the sons as Eliud Lugadiru, Habil Musoga Lugadiru, Fred Mbaka Lugadiru, Hudson Mugasu Lugadiru, Benson Lugadiru, George Lugadiru and himself. He named the sister as Emily Makungu and Hellen Musivogi.

10. At cross-examination, he explained that the deceased had sold ancestral land to raise money to buy Kakamega/Mautuma/188. He conceded that the deceased had also taken a loan to help him buy the land. He conceded that the deceased had challenges repaying the loan, and as the date of his death there was still an outstanding balance on the loan account. He stated that there was no threat from the financier to sell the land, since the family continued to repay the loan. He said that family members, including himself and the administrator, helped in repaying the loan. He asserted that he had receipts which indicated that he had made payments. He stated that he did not know how much the administrator paid, saying that he began to contribute to that loan at the tail end. He asserted that the deceased had not shared out the land before he died, adding that he was unaware that the land control authorities had consented to the subdivision and transfer of the land. He stated that he was opposed to the will. He said he had heard about it only after the matter came to court, but he was yet to see it. He stated that his sisters, Emily Makungu and Hellen Musivogi, had not been allocated any shares in the distribution proposed by the administrator. .

11. He was followed to the stand by Habby Musoga Lugadiru – holder of national identity card number 1889151. He confirmed that the deceased had seven sons and two daughters. He stated that the deceased was unwell between 1998 and 2010 when he died. He testified that the family had had problems with succession to the deceased's estate, narrating how they had approached the Chief to help them sort out their problems but he chased them away. He stated that when they sought to come to court they established that there was mention of a will. He complained that it was only the administrator who was aware of the existence of the alleged will. He explained that the reason behind their opposing the process was because ithad been fraudulent and that some members of the family had been excluded from benefit. He said that one of the sisters, Hellen Musivogi, had nowhere to stay, and the other sister had not been allocated anything. He stated that he wished that the process started afresh for fairness in distribution, taking into account any loan repayments that may have been made by any of the survivors.

12. During cross-examination, he conceded that the deceased had taken a loan on the land in question. He asserted that he, the applicant and Emily had repaid the loan, although he could not state the amounts that they paid in total. He stated that the administrator only began to repay the loan at the very tail end after he retired. He put the date at 1999. It was his evidence that he, the applicant and Emily began to repay the loan right after the same was taken. He conceded that the administrator might have paid more than they paid, but said that he did not know whether he paid Kshs. 210, 000.00. He stated that he was unaware that the deceased had obtained the consent of the land control authorities to facilitate subdivision and transfer of the property. On the will, he said that he only came to know of the same after the matter came to court. He stated that according to him, Herbert Ong'iya Lugadiru was not one of the survivors of the deceased. He proposed equal distribution of the property amongst all the children of the deceased. He stated that whoever repaid the loan could be given additional land or refunded the amount of money that he had spent. He complained that the administrator had taken seven (7) acres out of the land.

13. The applicant's third witness was Emily Makungu Shibutse – holder of national identity card number 143744. She described herself as the eldest of the children of the deceased, saying that she had retired as a teacher. She explained that the deceased had a big loan, which he was unable to repay. She stated that she and the other elder children of the deceased sat and worked out ways of repaying the loan. She said they approached the administrator, who then worked in Nairobi, but he did not join them in the effort, so she, the applicant and Habby started to repay the loan. They repaid for five years, the administrator retired and came home and paid off the balance that had remained. She complained that the administrator was alleging that he had paid off the whole balance and wanted to take a bigger portion of the estate. She stated that they wanted the estate shared out fairly amongst all the children. She stated that their younger sister had not been allocated anything, saying that she also wanted a share.

14. During cross-examination, she stated that she could not tell how much they repaid of the loan, nor could she say how much she paid individually. She said that they would put the money together and sent Habby to make the payment. She asserted that the administrator did not pay the bigger chunk of the loan. She denied that the deceased had distributed the property before he denied. She said that if the deceased had obtained the consents of the land control authorities as alleged, he would have told her. She also testified that she was unaware of any will made by the deceased, adding that if had written one she would have been aware. She stated that she did not accept the will, even if the witnesses were to be called to court to testify on its validity. She took the view that if any of them had repaid more money than the rest then the court could consider a refund, adding that the court should also consider the period that such a person had benefited from the land.

15. The case for the administrator opened on 29th June 2016, only the administrator, Eliud Imbisi Lugadiru – holder of national identity card number 8964764, testified. He conceded that the deceased had seven sons and two daughters. He urged the court not to revoke the grant but to allow distribution. He asserted that the deceased had distributed his property before he died, affixed boundaries and each of them had set up homes. He pointed out that the deceased had obtained mutations and consents for the purpose of subdivision and transfer of the property. He produced several documents which comprised such mutations, consents and transfers. He explained why he proposed that he should get a larger share of the estate compared with his siblings. He said that he helped the deceased to clear the debt that threatened the property. He produced several documents to support the payments that he was asserting. He stated that the deceased trusted him and that was why he had asked him to repay the loan.

16. At the close of the oral hearings, the parties were directed to file and exchange written submissions. There has been compliance, for both sides have filed their respective written submissions. I have read through them and noted the arguments made therein.

17. For the purpose of this judgment, I am required to determine two applications simultaneously, one for confirmation and the other for revocation. However, I need to point out that where a confirmation application pends, there is really no need for parties to file a revocation application. The issues that arise in a revocation application also arise in a confirmation application. Indeed, the issues in the revocation application are subsumed in a confirmation application, which then makes the revocation application superfluous.

18. A revocation application is grounded and its determination pegged on the three general grounds set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The first general ground is captured in section 76(a) (b) (c) of the Law of Succession Act. It focuses on the process of obtaining a grant. If the process is found to be tainted by defects or improprieties, fraud, misrepresentation and concealment of material facts from the court, then the grant would be liable to revocation. Representation ought to be obtained in a clean and open process that is defined by integrity and propriety. The office of administrator is one of trust. It is an office in equity. It should be underpinned by fairness and confidence. The process of appointing any person to that office must itself not be undermined by lack of integrity and fairness. Where these qualities lack at these very initial steps of obtaining appointment to office, then the trust and confidence that the persons beneficially entitled to the assets to be managed by the person seeking that office showed in the administrator would be lost.

19. The second general ground, captured in section 76(d) of the Law of Succession Act, moves away from the process of obtaining the grant and centres on the administration of the estate. At this point the court would be dealing with a situation where the process of obtaining the grant is adjudged to have been proper and above board, but the administrator faced challenges with the administration process itself. Such would be the case where an administrator fails to apply for confirmation of their grant within the period prescribed by the law, see sections 71(1), 73 and 76(d) (i). The law envisages that confirmation ought to be sought six months after the grant is made, and at any rate within the year of its making. Anything beyond that period would invite revocation. Distribution of the estate, which comes with the confirmation of the grant, is a critical responsibility of the administrator. Indeed, it is the only other important duty after collection and preservation of the estate and payment of debts and liabilities. An administrator who fails to apply for confirmation of grant would have totally failed in his duties as administrator. The other case would be where the administrator fails to proceed diligently with administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased, including pursuing debts owing to the estate and moneys payable to the estate by reason of the deceased's death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the timeframes set out by the Law of Succession Act. The *raison detre* of being an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required in law. The office of a personal representative is one trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason that he court appointed the personal representatives through the grants of representation.

20. The third general ground is where the grant has become useless or inoperative on account of subsequent events, that is subsequent to the making of the grant. It would arise where a sole personal representative has died. There would be no person to carry on administration under his grant, rendering the document useless and inoperative. It would also be the case where the administrator suffers disability, whether physically or mentally, rendering him incapable of discharging his duties, such as where he becomes senile or of unsound mind or lapses into a coma from which he does not recover or suffers such debilitating physical injuries that make it practically impossible for him to do anything for himself. An administrator who is adjudged bankrupt would also fall under this net for he would lose capacity, by virtue of section 56 of the Law of Succession Act, and he cannot possibly act as administrator, and the grant he holds would become a useless piece of paper.

21. For avoidance of doubt, section 76 of the Law of Succession Act provides as follows:

> *"76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

22. In a confirmation application, on the other hand, the court is called upon to confirm two issues – the appointment of the administrator and the distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act 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."

23. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law. I suppose that with regard to the third limb, the court will be guided chiefly by the material before it that points to whether the grant had been obtained properly and whether the administrators had administered the estate properly and in accordance with the law up to the point of the filing of the confirmation application.

24. The provisions of section 71 of the Law of Succession Act, and in particular section 71(2) (a) (b)(c), should be read together with section 76 of the Act. For the purpose of determining whether, under section 71(2) (a), the administrator had been properly appointed, the court would find the criteria in section 76(a) (b) (c) useful, that is to say the court will look at the integrity of the process of obtaining the grant, in terms of its propriety. It will consider whether the process was proper or was attended by defects or by fraud or misrepresentation or by concealment of matter from the court. If it turns out to have been proper, the grant would be confirmed, meaning that the administrator would be confirmed or approved to carry on with the administration with a view to complete it through distribution of the assets, as envisaged by section 71(2)(a). Where the process of appointment of administrators is found wanting, then section 71(2) (b) (c) would kick in. The court may go ahead and confirm the grant but entrust the administration of the estate on someone else. That effectively means that the grant sought to be confirmed would be revoked, and a fresh one made appointing someone else as administrator and the fresh grant confirmed on the spot.

25. For a court dealing with the second component of section 71(2)(a), whether the administrator had been administering the estate in accordance with the law, section 76(d) would be relevant, for it captures what would go wrong where an administrator does not administer the estate in accordance with the law, by failing to apply for confirmation of his grant within the statutory timelines or to proceed diligently with the administration of the estate or to render accounts as and when required by the law. An administrator who fails to meet the tests set out in section 76(2) (d) cannot be trusted to continue with his duties. He would have failed totally as an administrator, and his duties ought to be handed over to someone else, as envisaged under section 71(2) (b) (c).

26. When it comes to assessing, under the third component of section 71(2) (a) of the Act, whether the administrator would continue to administer the estate in accordance with the law, section 76(e) of the Act would be relevant. An administrator whose grant has become

useless or inoperative would not merit being confirmed to continue acting as such to complete administration of the estate. Infirmity of body or mind, which renders a person totally incapable, has the effect of making a grant, held by such a person, useless and inoperative, since such a person would be unable to exercise the powers vested in him under the grant, or to enjoy the rights that emanate therefrom, or to discharge the duties imposed thereby. Persons who are afflicted by senile dementia or persons who become of unsound mind or who lapse into an irreversible coma, fall within the category of the persons envisaged herein. Their grants would be virtually useless and inoperative. Being declared bankrupt is another. The grant of such a person equally becomes useless and inoperative, for a bankrupt cannot hold property and, therefore, estate property cannot vest in them under section 79 of the Law of Succession Act. A bankrupt cannot exercise the powers envisaged in section 82 of the Law of Succession Act, by transacting any sort of business on behalf of the estate.

27. What is of interest to me at this stage is whether the administrator herein was properly appointed. With regard to that it will be noted that the court will confirm the administrator to continue with administration to completion, once it is satisfied that the administrator was properly appointed. In this case, the appointment of the administrator is contested. The applicant, and his witnesses, at the oral hearing, took the view that they were sidelined or not involved or not consulted when the administrator applied for appointment as administrator.

28. The persons who qualify for appointment as administrators in intestacy, for this matter has proceeded so far as if the deceased had died intestate, are stated in section 66 of the Law of Succession Act. Priority is given to the surviving spouse, if there is one, followed by the children, and thereafter all the other persons entitled in intestacy, as set out in Part V of the Law of Succession Act. Section 66 states as follows:

> *"Preference to be given to certain persons to administer where deceased died intestate*
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> *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."*

29. Section 66 is operationalized through Rules 7(7) and 26(1)(2) of the Probate and Administration Rules, which state as follows:

> *"7(7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that very person having a prior preference to a grant by virtue of that section has –*
>
> *(a) renounced his right generally to apply for a grant; or*
>
> *(b) consented in writing to the making of the grant to the applicant; or*
>
> *(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.*
>
> *26(1). Letters of administration shall not be granted to any applicant without notice to very other person entitled in the same degree as or in priority to the applicant.*
>
> *(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled equally or in priority, be supported by an affidavit of the applicant and such other evidence as the court may require."*

30. Rule 7(7) is restricted to the case where, for example, there is a surviving spouse, for he or she would have a right or entitlement to administration that would be superior to that of the children. It would be envisaged in that case that where a person with a lesser right, such as a child or grandchild of the deceased, seeks representation, the court ought not grant the same until and unless the petitioner gets the person with prior right to renounce probate, or consent in writing to the grant being made to the person with lesser right, or causes citations to be issued for service on the persons with prior right. That is not the case here. The contest here is between and amongst children of the deceased, meaning that it is not a dispute pitting prior right against lesser entitlement, but rather between persons of equal right or entitlement to administration.

31. Rule 26(1) (2) is more relevant to a case where representation is sought by a person with equal write to others who have not petitioned like him. In such case, the petitioner is expected to notify such person with equal entitlement with notice. That is the effect of Rule 26(1). It would appear that evidence that the individuals with equal right to entitlement who have not applied for representation would signify that they had been notified of the petition by either their renunciation of their right to administration or by signing consents in Forms 38 or 39,

depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

32. In the context of the instant proceedings, the contest herein is between the applicant and the administrator, who are siblings. Rule 26 should apply. That would mean that the administrator was bound to comply with the Rule 26 by notifying all his siblings, as they were equally entitled to administration just like him, of his application for representation. The provision in Rule 26, just as that in Rule 7(7), is in mandatory terms. I have closely perused through the record before me, and it is clear to my mind that the administrator did not comply with section 26(1) (2) of the Probate and Administration Rules. He did not notify his siblings of his application, for they neither filed deeds of renunciation nor written consents in Form 38 or 39. Neither did he file the affidavit envisaged in Rule 26(2). He filed affidavits alright but the affidavits he filed were those envisaged in Rule 7(1) of the Probate and Administration Rules, which are in Forms 3 to 6, and not those envisaged in Rule 26(2). The process of obtaining the grant was, therefore, defective to that extent.

33. Before I venture to consider the other issues, there is still the question of the administrator having filed twin petitions for grants of representation in one cause relating to the same estate. Should anything be read into that?

34. Ideally, only one petition should be filed in one cause relating to the same estate. Where a person died partially testate and partially intestate, two petitions ought not to be filed in the same cause in his estate. Two causes ought to be initiated, one in testacy and the other in intestacy. It would be unacceptable that the two estates, one intestate and the other testate, be handled in one cause. It would be akin to a suit where a plaintiff files two plaints, or two originating summonses. It is unprocedural. It amounts to abuse of court process, and reeks of mischief.

35. In the instant cause, the administrator appears to assert quite firmly that the deceased died testate. That should beggar the question, if then he believes so strongly that the deceased had died testate why did he also petition for representation in his estate in intestacy? Looking at the material before me, the deceased died possessed of only one asset, Kakamega/Mautuma/188. That being the case, if he had wholly disposed of that property by will, it meant that he died wholly testate and there was no room for administration of his estate in intestacy, and therefore there was no need for the administrator to have had also sought to administer the estate in intestacy. I find it quite curious that when the Deputy Registrar sought to proceed as if the deceased had died intestate, by gazetting the cause in intestacy, the administrator did not complain to the Deputy Registrar that the deceased had died testate and the gazette notice ought to have referred to the petition for probate. Equally, when a grant of letters of administration intestate was made to him, he did not object. Indeed, he happily went along with it by seeking confirmation of the said grant issued in intestacy. What is more curious is that he has sought distribution of the estate in terms of the will. Certainly, an estate of a person who had died wholly testate cannot be disposed of on the basis of a grant of letters of administration intestate, in much the same way that the estate of a person who died wholly intestate cannot be disposed of on the basis of a grant of probate. The two processes are diametrically opposed to each other. The fact that an administrator can seek confirmation in those terms means that the entire process is fundamentally and incurably flawed.

36. The other thing to note is that a petition in succession matters is disposed of, technically, when the grant is made, for it is a petition for the making of such grant. In this case the petition for grant letters was disposed of when letters of administration were made to the administrator. Unfortunately, the other petition, for grant of probate, was not dealt with and it is still technically pending. As stated elsewhere, the two petitions ought not to have been filed in the same cause, and, therefore, the petition for probate is suplusage. It is an irrelevant appendage to the proceedings. I have perused the record very closely, and it is clear to me that no directions were ever given on the fate of the said petition. The same ought to have been declared to have been filed in abuse of court process, and ordered to be expunged from the record, for the deceased could not possibly have died wholly testate and at the same time wholly intestate.

37. I have alluded above to mischief on the part of the administrator. The reason for this is that the administrator herein seeks to get out of the estate a share larger than that of his siblings. Indeed, he allocates to himself more than double what he proposes to allocate to his siblings. Some of the siblings, the daughters, have been left out altogether from the proposed distribution. He explains that he is entitled to that larger share because he helped save the property from the auctioneer's hammer. That may well be so. But it should raise eyebrows that he who seeks to get the largest share in the estate sought representation in the estate rather stealthily by moving the court without involving any of the other siblings, even when the law required him to involve them, by either getting them to renounce their right to administration or to consent to his applying. The process is expected to be open, democratic and representative. Yet he ploughed through all alone, without the consent of his siblings. Secondly, he advances the argument that the deceased had sought to distribute the asset during his lifetime, principally by getting consents to subdivide the property and to transfer it to his sons. That was said to have had happened in 2000 and 2005. The deceased died in 2010. No explanation has been given as to why he was unable to effect the subdivisions and transfers for ten and five years, respectively, after he had obtained consent to subdivide and transfer. Curiously, even as he was subdividing his property and obtaining consents to transfer it, the deceased is said, in the same year, 2005, in November to be precise, to have had made a will where he distributed the same property as per the proposed subdivision of August 2005. It would appear that it is only the administrator, the sole beneficiary of these schemes, who was aware of what was happening. And it would appear to be in furtherance of that scheme that he fumbled all over in trying to have his way, by initiating a succession cause where he did not involve his siblings. A process in which he could not decide whether the deceased had died testate or intestate, or, put differently, where he could not decide whether he should seek representation in intestacy or testacy, hence ending up with a process so fundamentally flawed, that it can only be concluded that the same was contrived to deceive and confound rather than to get the estate of the deceased distributed in a manner that was sensitive to the rights of all involved.

38. The other consideration is whether the administrators, upon their being properly appointed, went about the business of administering the estate in accordance with the law. No one has raised issue with the manner in which the administrator has administered the estate, in terms of either not collecting assets or rendering accounts. However, in view of what I have stated above, it cannot be said that the administrator properly administered the estate. He has not demonstrated compliance with section 83(e) of the Law of Succession Act, concerning rendering of accounts six months after the making of the grant, which should coincide with section 71 (1) of the Act which requires the filing of the application for confirmation of grant six months after its making. An account is particularly critical where the manner of appointment of administrator is called to question, and challenges are raised with regard to the handling of the assets. Is he likely to continue administering the estate in accordance with the law upon their being confirmed as administrator? I am of the persuasion that he would not do so given the manner in which he caused himself to be appointed administrator without complying with Rule 26 of the Probate and Administration Rules.

It is expected that these processes be done democratically, where all the beneficiaries are carried along, by being notified and kept abreast of goings on in the estate. I doubt whether the administrator, left alone to administer the estate, would do so in accordance with the law. This is rendered more critical by the fact that at this stage the cause has entered the all-important point of distribution of the assets, which requires transparency, openness, accountability, integrity and fairness. I am not persuaded that the administrator has so far demonstrated any of these qualities.

39. Distribution of assets raises two issues. The first, and the more critical, is about the assets that make up the estate. Succession is all about property, and without property there is no estate for distribution, and the question of succession would not even arise. Secondly, is the matter of the persons who are entitled to a share of the property. The two critical aspects of confirmation are brought out in the proviso to section 71(2). That proviso requires that the court be satisfied, before distribution, that the administrator has ascertained all the persons who are beneficially entitled to the estate and has determined the shares of each one of them to the assets. That presupposes that all the assets available for distribution should have also been ascertained before distribution can be proposed, for distribution should be of the assets that are available for that purpose.

40. In the instant case, there is no dispute, that the deceased died possessed of only one property, Kakamega/Mautuma/188. Therefore, the matter of the assets of the estate being ascertained should not be an issue. However, an issue arises as to whether the property should be distributed in intestacy or as per the alleged will of the deceased. I believe that I have exhaustively addressed this matter. When the Deputy Registrar decided to treat the matter as one of intestacy as opposed to testacy, and the administrator acquiesced to that by not raising any protest, collecting the grant issued in intestacy and seeking confirmation of it: that effectively brought the matter to a close. I have already found that the pendency of the petition for grant of probate is an aberration. These proceedings are being conducted as if the deceased died intestate. The property of the estate should, therefore, be distributed in intestacy. The issue as to whether the will is valid or not is not before me. I shall not venture to attempt to address it. After all, the administrator made no effort to prove or propound the alleged will.

41. The only other issue relates to the survivors of the deceased. Have they been ascertained? There is no dispute that the deceased had seven sons and two daughters. The sons have been identified as Eliud Lugadiru, Habil Musoga Lugadiru, Fred Mbaka Lugadiru, Hudson Mugasu Lugadiru, Benson Kavaga Lugadiru, George Lugadiru and Sosiness Luvoyi Lugadiru. The daughters are identified as Emily Makungu Shibutse and Hellen Musivogi Lugadiru. Two sons have been ascertained to have had died, that is to say Benson Kavagi Lugadiru and George Lugadiru; and the administrator chose a son of Benson Kavagi Lugadiru and the widow of George Lugadiru to take the shares due to the estates of the two. No reasons were given for the selection of the two, for it was not disclosed whether or not the two had obtained representation to the estates of the two dead sons of the deceased. But the applicant and his witnesses did not raise any objection to the two representing the two estates for the purposes of these proceedings. What is more important, and by dint of sections 39 and 41 of the Law of Succession Act, where grandchildren of the any dead children of the deceased are stated to be entitled to the share that would have gone to their dead parents, the administrator did not disclose the children who might have survived the two dead sons of the deceased, who would be grandchildren of the deceased, and who would ultimately be entitled to a share of the assets that would devolve to the estates of their dead parents. The administrator listed Herbert Ong'iya Lugadiru as one of the sons of the deceased. That has been contested by the applicant. At the oral hearing none of the parties properly addressed themselves to the matter. I have no material upon which I can decide one way or the other whether indeed the said Hebert Ong'iya Lugadiru was or was not a child of the deceased. That remains moot.

42. Having dealt with the matter of the assets and the survivors, the next step should be distribution, for the proviso to section 71(2) requires that the shares of each of the survivors be ascertained. The administrator herein has proposed a mode of distribution, in which he has allocated to himself a disproportionately larger share of the estate compared with his siblings. He has explained that he did so because he had participated in the salvaging of the asset from the hands of financiers who wanted to dispose of it after the deceased failed to meet his obligations to the financiers, and because the deceased had distributed his property before death and had even made a will in which he gave him that larger share. The other notable proposal is that the estate is proposed to be shared out amongst the sons of the deceased, so that for the two who are dead their shares are taken upon by their widow and son, respectively. The two daughters of the deceased are not catered for at all, despite one of them not being married.

43. Let me start with the proposal to exclude the daughters from benefit. The deceased died in 2010, long after the Law of Succession Act had come into force in 1981. The Act does not discriminate between sons and daughters of the deceased, whether they are married or not. It treats all the children of the deceased equally. There is nothing in that law that suggests that the estate of an intestate should be shared out only amongst the surviving sons to the total exclusion of the surviving daughters. Indeed, there is nothing in that law which suggests that reference to child and children means or should be interpreted to mean male children. Under the provisions of the Law of Succession Act, no distinction is made between male and female children, nor between married and unmarried children. Succession law envisages equal distribution of the estate amongst all the children, regardless of their gender or marital status or age. That position comes out clearly in sections 35(5) and 38 of the Law of Succession Act, which state as follows:

> *"35. Where intestate has left one surviving spouse and child or children*
>
> *(1)* …
>
> *(2)* …
>
> *(3)* …
>
> *(4)* …
>
> *(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*
>
> *36* …

37 …

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."

44. These provisions should be read together with Article 27 of the Constitution, 2010, which envisages equal treatment of both men and women before the law in all spheres of life, including succession. For avoidance of doubt, Article 27 states:

"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

45. The failure to provide for the daughters in the distribution proposed by the administrator in his summons for confirmation of his grant means that there has been non-compliance with the provisions of the Constitution of Kenya, which is the supreme law of the Kenya, with regard to discrimination based on gender. There is also no full compliance with the provisions of the Law of Succession Act, which envisage equal sharing of the estate of an intestate amongst all his children, unless any of the children expressly excludes themselves from benefit by waiving or renouncing their right to inherit. I have noted from the record that the two daughters of the deceased did not file any consents to support the proposed distribution, neither are there any documents on record evidencing that the two had waived or renounced their right to inherit their father estate.

46. On the question of the administrator allocating himself a larger share of the estate for the reasons that he has given, let me say this. Firstly, I have already held that the matter of the alleged will is neither here nor there as the same has not been proved in these proceedings, and certainly it cannot be proved here. There is no basis upon which I can give effect to it in these proceedings. It cannot provide the administrator with a lawful excuse to award himself a bigger share of the estate that his siblings. Secondly, I am not aware of any law, and no such law has been pointed to me, to the effect that where a child assists a parent to settle debts and liabilities encumbering a property, then, upon the parent's death, the said child is entitled to a bigger share of the estate. Put differently, am unaware of any legal basis that such assistance would amount to the said child acquiring a right to the property that they have assisted to salvage. The property in question still remains part of the estate of the deceased, and the child can only claim reimbursement from the estate of the expense incurred in saving the property. Thirdly, the fact that the deceased tried to subdivide his property and share out amongst his sons during lifetime does not mean that he had distributed his property *inter vivos*. It would only amount to *inter vivos* distribution if he had actually succeeded in transferring the property to the sons' names during his lifetime. As it is there was no *inter vivos* distribution and, therefore, the entire piece of land is available for distribution. I find it curious that the deceased tried to make those transfers in 2005, but died in 2010, five years later without having completed the transactions. It was not explained why the said transfers stalled. As I have said elsewhere, I find it even more curious that it is in the same year, 2005, that he was making the impugned will giving a larger part of the property to the administrator.

47. The deceased died intestate according to the instant process. His estate, therefore, falls for distribution in accordance with Part V of the Law of Succession Act. Section 38 provides that the estate of a person who is survived by children but no spouse should be distributed equally amongst the children, including the daughters. That is how the estate of the deceased herein ought to be shared out.

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

(a) That I hereby decline to confirm the appointment of Eliud Imbisi Lugadilu as the sole administrator of the estate of the deceased, instead I hereby revoke the grant made to him on 28th June 2013;

(b) That I declare that the deceased herein died intestate for the purpose of these proceedings and that his estate shall be distributed strictly in accordance with Part V of the Law of Succession Act;

(c) That I declare that Eliud Imbisi Lugadiru, Sosiness Livoyi Lugadiru, Fred Ambaka Lugadiru, Hudson Mugasu Lugadilu, Emily Makungu Shibutse and Hellen Musivogi Lugadilu, Carlistus Kigalo Kavagi. a child of a son of the deceased known as Benson Kavagi Lugadiru, and a daughter-in-law – Milka Wangoi Kamau, a widow of a son of the deceased known as George

Lugadiru, are survivors of the deceased for the purpose of distribution of his estate;

(d) That that I hereby appoint Eliud Imbisi Lugadiru, Sosiness Livoyi Lugadiru and Emily Makungu Shibutse administrators of the estate of the deceased, and direct that a grant of letters of administration intestate be made to them;

(e) That I hereby direct the administrators appointed in (d), above, to apply, whether jointly or severally, for confirmation of the grant made to them in (d), above, in the next forty-five (45) days, in proceedings where all the survivors of the deceased listed in (c), above, are provided for equally, and where provision shall be made for the reimbursement of Eliud Imbisi Lugadiru of any expenses that he shall prove to have had incurred in salvaging or saving the estate property from foreclosure;

(f) That Carlistus Kigalo Kavagi shall take on his own behalf and that of all the other children of his deceased father, Benson Kavagi Lugadiru, while Milka Wangoi Kamau shall take on her own behalf and that of all the children of her late husband, George Lugadiru;

(g) That any survivor, and any other person for that matter, who shall not agree with the proposals to be made in the application to be filed in (e), above, shall be at liberty to file and serve an affidavit or affidavits of protest to the said application in accordance with Rule 40(6) of the Probate and Administration Rules;

(h) That the matter shall thereafter be mentioned, on a date to be assigned at the delivery of this judgment, for compliance and further directions;

(i) That each party shall bear their own costs; and

(j) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF OCTOBER. 2019

W. MUSYOKA

JUDGE