



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 124 OF 1986

IN THE MATTER OF THE ESTATE OF WEPUKHULU WANAMBISI MAUNDENDE (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 111785 of 11th April 1983, the deceased herein died on 12th December 1980. Representation to his estate was sought by Evanson Wafula Wepukhulu, in his alleged capacity as son of the deceased. The survivors listed in the petition were Evanson Wepukhulu, Joseph Maundende, Pascal Wekesa, Maundende Wanambisi, M Wepukhulu, Mutambo Maundende, Juma Wepukhulu, Peter Wafula and Nyongesa Wanambisi. The deceased was said to have had died possessed of a property known as East Bukusu/N. Sangalo/661. Letters of administration intestate were made to the petitioner on 13th August 1986, and a grant was duly issued, dated 27th August 1986. The said grant was confirmed on 24th July 1987, on an application for confirmation of grant, dated 10th April 1987, which did not make a proposal on distribution, but merely sought for confirmation to the administrator and the other sons, unnamed in the affidavit in support.

2. On 13th May 1998, a summons was lodged at the registry, dated 13th May 1998, seeking revocation of the said grant. It was brought at the instance of Joseph Wanambisi Wepukhulu, one of the sons of the deceased. His case was that the administrator had not sought the consents of all the surviving children of the deceased. He identified several individuals that he said the deceased left alive. These were two widows, Brigid Nakhanu Wepukhulu and Beatrice Nanyama Wepukhulu; nine sons, being Joseph Wanambisi Wepukhulu, Amos P. Wepukhulu, David W. Wepukhulu, Maundende Wepukhulu, Mukangala Wepukhulu, Nyongesa Wepukhulu, Wilberforce Mutambo Wepukhulu, Evans Wepukhulu and Albert N. Wepukhulu; and four purchasers, being Bartholomew Juma Wafula, Eliud M. Bwire, Peter Khisa Wamukota and Fred W. Ngichabe. He stated that the four purchasers bought the land from the deceased before he died, and were living with them on the land. He averred that the administrator had concealed information from the court. He asserted that none of the sons had signed the requisite consents, saying that all the forms had been prepared in Mombasa and secretly filed at the Kakamega court.

3. Directions on the said application were given on 16th July 1998, for service on the respondent. When it came up on 23rd September 1998, it was stood over generally, and no further orders were made on it thereafter.

4. While that application was still pending, another application was lodged herein on 14th October 2011, dated 24th September 2011, brought at the instance of David Wafula Wepukhulu, seeking, principally revocation of the grant made on 27th August 1986, and other orders relating to the subdivision of Bukusu/N. Sangalo/661, and other suits that were pending before other courts relating to the said parcel of land. The grounds on the face of the application alleged that the grant was obtained fraudulently by the making of false statements or concealment of matter from the court, and by the use of untrue allegations of fact. It was also alleged that David Wafula Wepukhulu, Moses Maundende Wepukhulu, Amos Wanambisi Wepukhulu, Albert Ngutuku Wepukhulu, Frederick Nyongesa Wepukhulu, Francis Mukangala Wepukhulu, Wilberforce Mutambo Malotelo and Wanambisi Stephen Juma were beneficiaries of the estate, and had been excluded and disinherited.

5. The affidavit sworn in support of the application, on 24th September 2011, by David Wafula Wepukhulu, narrated that the deceased had died on 12th December 1980, and representation to his estate was granted on 27th August 1986, and confirmed on 24th July 1987. He explained that the deceased had died possessed of the property known as E. Bukusu/N. Sangalo/661, which measured 107 acres. The deceased was said to have had married three times, to Susan Wepukhulu, Brigit Nakhanu Wepukhulu and Beatrice Nanyama Wepukhulu. As at the time the affidavit was being sworn, the first wife, Susan Wepukhulu, was dead, while the other two were still alive. He identified the children in each of the three houses. Evans Wafula Wepukhulu, Wilberforce Mutambo Wepukhulu and Joseph Wanambisi came from the first house; while Albert Nguluku Wepukhulu, Amos Wanambisi Wepukhulu and David Wafula Wepukhulu came from the second house; and the third house had Moses Maundende Wepukhulu, Frederick Nyongesa Wepukhulu and Francis Mukangala Wepukhulu. It should be of some curiosity that out of three wives, the deceased did not have any female children, according to the deponent of the said affidavit. He averred that all the nine children were entitled to equal share of the land. He accused the administrator of not disclosing, in his petition, that he had brothers, who were beneficiaries of the estate. He averred that the first house was entitled to 35.67 acres out of Bukusu/N. Sangalo/661, to be shared as follows: Wilberforce Mutambo Wepukhulu 11.89 acres, Joseph Wanambisi 11.89 acres, Evans Wafula 5.89 acres and Wanambisi Stephen Juma 6 acres (which bought from Evans Wafula). The second house was said to be entitled to 35.67 acres to be shared equally between Albert Nguluku Wepukhulu, Amos Wanambisi Wepukhulu and David Wafula Wepukhulu. The third house was also entitled to 35.67 acres, according to the deponent, to be shared out equally between Moses Maundende Wepukhulu, Frederick Nyongesa Wepukhulu and Francis Mukangala Wepukhulu. He averred that he, and the other persons he referred to as the objectors, were all minors at the time representation was sought, and they were not involved in the proceedings. He accused the administrator of being uncooperative, pointing to the fact that he resided at Mombasa, which had made it difficult for him to distribute the estate. He referred to a number of suits

that were pending before the courts at Bungoma and Kakamega, being Bungoma SRMCCC No. 193 of 1988 and Kakamega HCCA No. 133 of 1989, but without disclosing what had transpired in those cases, which had been filed by Fredrick Wafula Ngicabe, Peter Khisa Wamukota, Bartholomayo Juma Wafula and Eliud Makokha Bwire. He averred that in Bungoma SRMCCC No. 193 of 1988 vesting orders were made in favour of Fredrick Wafula Ngicabe, Peter Khisa Wamukota, Bartholomayo Juma Wafula and Eliud Makokha Bwire, resulting in the subdivision of Bukusu/N. Sangalo/661 into Bukusu/N. Sangalo/1483, 1484 and 1485, and that subsequently Bukusu/N. Sangalo/1483 was subdivided into Bukusu/N. Sangalo/1702, 1703, 1704 and 1705, all of which he wanted cancelled and reverted to Bukusu/N. Sangalo/661. Although it would appear that certain documents were meant to be attached to the affidavit, none were attached to the copy that was lodged at the registry.

6. I have scrupulously perused through the file of papers before me, and I have not come across any document filed by the administrator by way of a response to the application dated 24th September 2011.

7. The application, dated 24th September 2011, was compromised by a consent that was recorded in court on 25th April 2012, whose effect was to revoke the grant made on 24th July 1986 and confirmed on 24th July 1987, to cancel the subdivisions made out of E. Bukusu/N Sangalo/661 ordered in Bungoma SRMCCC No. 93 of 1988 and to restore the original registration in the name of the deceased, to stay the proceedings in Bungoma HCCC No. 55 of 2010 and Bungoma HCCC No. 68 of 2010, to set aside the vesting orders made in Bungoma SRMCCC No. 193 of 1988, to appoint David Wafula Wepukhulu and Moses Maundende Wepukhulu administrators of the estate of the deceased and to direct the new administrators apply for confirmation of their grant.

8. An application dated 5th October 2012 was filed at the registry on 6th October 2012, seeking review and setting aside of the orders made on 25th April 2012, extracted from the record on 15th May 2012. The said application was brought at the instance of Fred Wafula Ngichabe. He averred that he had bought E Bukusu/N Sangalo/1845 from the deceased in 1974, and the same was excised from E Bukusu/N Sangalo/661. He alluded to land control proceeding of 1977 where consent was given to the deceased to subdivide the land and transfer portions to him and to Peter Khisa Wamukota. He attached copy of title deed for E. Bukusu/N. Sangalo/1845 showing that the same was registered in his name on 23rd November 2005, being a subdivision from E Bukusu/N Sangalo/661, and minutes and application for consent of the Land Control Board in respect of E. Bukusu/N. Sangalo/661.

9. The application was responded to by David Wafula Wepukhulu, one of the administrators appointed through the orders made on 25th April 2012, through an affidavit he swore on 17th September 2013. He averred that the applicant in the application, dated 5th October 2012, was party to Bungoma SPMCCC No.93 of 1988, which had awarded him, and his co-applicant, portions of E Bukusu/N Sangalo/661 on 19th October 1989. He pointed out that the judgement of 19th October 1989 was set aside on 29th April 1998, in a judgement in Kakamega HCCA No. 133 of 1989. The two applicants were then said to have had commenced proceedings in Bungoma HCCC No. 22 of 1998 and Bungoma HCCA No. 55 of 2010, which were still pending at the material time. He accused them of not making full disclosures to the court. He attached to his affidavit the judgment, in Bungoma SPMCCC No. 193 of 1988, dated 19th October 1989, where the trial magistrate had held in favour of the applicant and two others. He also attached copies of the judgement, in Kakamega HCCA No. 133 of 1989, dated 29th April 1998, which arose from the judgement of 19th October 1989, in Bungoma SPMCCC No. 193 of 1988, where the appellate Judge set aside the said orders of 19th October 1989.

10. The application, dated 5th October 2012, was argued on 27th November 2013, after which a ruling was delivered on 26th February 2014, dismissing it. An appeal, against the orders of 26th February 2014, in Kisumu CACA No. 22 of 2014, was dismissed, in a judgement delivered on 7th December 2017.

11. So much for the background. The application that I am tasked with determining is dated 27th September 2013, which was filed following the consent orders of 25th April 2012. It was made at the instance of Moses Maundende Wepukhulu, one of the administrators of the estate. In the affidavit in support, sworn on an unknown date in 2013, he explains that the deceased had been survived by two widows, Brigit Nakhanu Wepukhulu and Beatrice Nanyama. The surviving children are listed as Evanson Wafula Wepukhulu, Wilberforce Mutambo Malotelo, Joseph Wanambisi Wepukhulu, Albert Ngutuku Wepukhulu, Amos Wanambisi Wepukhulu, Moses Maundende Wepukhulu, David Wafula Wepukhulu, Frederick Nyongesa Wepukhulu and Francis Mukangala Wepukhulu. He has also listed other individuals who he has described as other dependants, but he has not stated how they related to the deceased. They are Wanambisi, Stephen Juma, Wilkister Nasimiyu Watti, Andrew Wafula Wamwaya, Benedict Wafula Kokonya, Amos Kumikina Marani, Charles Sifuna, Petronila Khasa Wati, Reuben Makokha Barasa, Mary Nelima Wanyama, George Makinda Nyongesa, Daniel Kweya Maili and Shadrack Waswa Wele. He proposes distribution to the nine sons, and excludes the surviving widows. He also proposes distribution to all the persons listed as other dependants. The distribution is not equal. The application is not supported by the consents in Form 37.

12. An affidavit of protest was lodged at the registry in response to the confirmation application, sworn by Fred Wafula Ngichabe, Bartholomew Wafula Juma and Petronila Nafula Makokha, on 22nd April 2015. They aver to be beneficiaries. They also aver that the persons listed as other dependants had not bought property from the deceased. They aver that their clan had arbitrated over the matter between Joseph Wanambisi Wepukhulu and Evans Wafula Wepukhulu, then administrator of the estate, where the clan found that the deceased had sold land to them, including another person identified as Peter Khisa Wamukota. What was sold was said to be 33 acres, which left a balance of 74 acres. They propose that each of the nine sons get 8 acres each, and the two widows 1 acre each. They further aver that the distribution proposed in the application did not conform with the findings and determination of the clan elders. They propose that the purchasers, Fred Wafula Ngichabe, Peter Khisa Wamukota, Bartholomew Juma Wafula and Eliud Makokha Bwire should get 9½ acres, 6½ acres, 8 acres and 9 acres, respectively. They aver that they have already gotten their titles, and ask that the court confirms the same as follows, Fred Wafula Ngichabe – East Bukusu/North Sang’alo/1484, Peter Khisa Wamukota – East Bukusu/North Sangalo/1485, Bartholomew Juma Wafula – East Bukusu/North Sangalo/1703 and 1705 and Eliud Makokha Bwire – East Bukusu/North Sangalo/1704. They have attached a copy of what they claim to be the decision of the elders.

13. There is an affidavit by David Wafula Wepukhulu, sworn on 4th March 2019. He adds to the list of dependants entitled to shares in the estate a list of individuals whose names were not in the applicant’s affidavit, although he has not indicated how these individuals were related

to the deceased. He swore another affidavit on 13th September 2019, where he proposes that the two widows get 1 acre each out of the estate, all the daughters of the deceased also get 1 acre each. He has also mentioned other dependants get diverse shares as follows: Petronilla Nafula Makokha 1 acre, Peter Khisa Wamukota 3 acres, Frederick Wafula Ngichabe 3 acres and Bartholomew Juma Wafula 1 acre. He also proposes that 3 acres be reserved for the road. After that whatever remains be shared equally between the sons.

14. The parties agreed by consent, on 1st July 2019, to dispose of the confirmation application, dated 27th September 2013, by way of oral evidence.

15. The oral hearing happened on 24th September 2019. The protestors were the first to take the stand, the first being Frederick Wafula Ngichabe. He did not go into the details of his case, for he merely referred to his affidavit of protest, his witness statement and his list of documents, and said that he adopted them as his evidence. He said that there was a sale agreement of 7th December 1979, and consents of the relevant land control board. He stated that the deceased, before he died, had already given him possession of the portions he had bought.

16. During cross-examination, he stated that he was not a son of the deceased, neither was he a grandchild of the deceased. He confirmed that the deceased had been survived by sons and daughters, some of who were still alive. He asserted that he claimed a share of the estate as a buyer rather than as a child of the deceased. He alleged to have had bought the portion in 1974, and said that there was a sale agreement dated 24th April 1974, which he had not exhibited as evidence to any of the papers he had filed in court. He said that he took possession 1976. The deceased then sold another portion to another person in 1977, and took the two of them to the local land control board. He stated that the deceased had not completed transferring the property to him before his demise. He said that he and his co-protestor sued Evans Wafula, a son of the deceased, and the administrator of the estate at the time, at the Bungoma law courts, in Bungoma SRMCCC No. 193 of 1988. When shown the plaint, he conceded that the claim against Evans Wafula was that he had entered the land. He stated that the court, in Bungoma SRMCCC No. 193 of 1988, granted to them the orders that they had sought. An appeal was lodged in Kakamega HCCA No. 133 of 1989, which was successful, as it set aside the decision of the trial court in Bungoma SRMCCC No. 193 of 1988. He said that he was registered as proprietor of E. Bukusu/N. Sangalo/1485, and that he still had the title deed for that parcel. He conceded that the High Court had revoked his title, but ordered that he remain in possession until completion of administration. He conceded that he sought review of the orders that revoked his title, but his application was dismissed. He challenged the dismissal at the Court of Appeal in Kisumu CACA No. 82 of 2014, but the appeal was dismissed. He conceded too that the High Court cancelled his title and others, and reverted the property to E. Bukusu/N Sangalo/661. He said that he had bought 9½ acres, but he could not identify a consent of the relevant land control board authorizing transfer of that acreage to him. He said that he knew the children of the deceased, and the two surviving spouses, Beatrice Nanyama and Bricor Nakhanu.

17. During reexamination, he stated that he bought the land in 1974. He was then taken to the land control board on 10th August 1977. He stated that the consent form from the land control board was dated 9th August 1977, but the meeting happened on 10th August 1977. He stated that it was the deceased who took them to the land control board, with respect to E Bukusu/N. Sangalo/661. He said that it was the land control board that thereafter took the consent to the lands office, leading to the issuance of the three subtitles that were revoked by the court. Regarding the proceedings in Bungoma SRMCCC No. 193 of 1988, he stated that the High Court, in Kakamega HCCA No. 133 of 1989, held that the suit before the lower court should have been filed at the High Court. He said that he was in possession even as the case was being done in court. He conceded that the Court of Appeal dismissed his appeal, but added that the court directed that he and his co-protestor remain in occupation pending distribution of the estate. He stated that he sued in Bungoma SRMCCC No. 193 of 1989 after the then administrator destroyed a fence.

18. Frederick Wafula Ngichabe was stood down, to enable him avail original documents, and he testified again on 20th November 2019, when he produced the original title deed for E Bukusu/N Sangalo/1485, which was in his name. He also produced a copy of the consent that had been obtained from the land control board. During cross-examination, he conceded that the title in respect of E. Bukusu/N. Sangalo/1485 had been cancelled by the court, but added that the court had allowed him to continue holding on to the document. He stated that it was he and Peter Wamukota Khisa who had been taken to the land control board by the deceased.

19. Bartholomew G. Juma Wafula, national identity card number 5640182, was the next on the witness stand. He described himself as the second protestor. He largely adopted his witness statement and list of documents. He stated that the property he was claiming was East Bukusu/N Sangalo/1703, in respect of which he said he had the original title deed. He also said that he had an original sale agreement dated 7th December 1979. He stated that he went to the local land control board and obtained consent for the subdivision of the property to create E Bukusu/N Sangalo/1703 and 1705. He stated that he had gone there with Eliud Makokha Bwire, after buying a portion of the land from the deceased. He stated that he had minutes of the land control board of 19th November 2019, and a ruling by Karanja J from a case in Bungoma which he did not disclose. He stated that the said case, whose details were not disclosed, had been filed by the administrator of the estate then, Evans Wafula, who had sought to revoke the numbers held by the witness, but he failed, according to him, and subsequently withdrew the case. He said that he had a copy of the notice of withdrawal in his list of documents. He stated that he owned the land to date, and expressed his wish to retain the number.

20. During cross-examination, he stated that he wanted the court to confirm his two titles E. Bukusu/N. Sangalo/1703 and 1705, by declaring that was his land. He asserted that his sale agreement with the deceased was dated 7th December 1979, under which he bought 8 acres out of E. Bukusu/N. Sangalo/661. He stated that, in Bungoma SRMCCC No. 98 of 1988, he had informed the court that his agreement had gotten lost while he was on his way from Nairobi. He said that he had also informed the court that there were two agreements, one for 2 acres and the other for 6 acres. He bought 2 acres first and then 6 acres thereafter, after which they made a consolidated agreement for 8 acres. He stated that Bukusu/N. Sangalo/1703 and 1705 were subdivisions from Bukusu/N. Sangalo/1483. He conceded that the orders that they had obtained in Bungoma SRMCCC No. 193 of 1988, which had led to the titles in dispute, were set aside by the High Court on appeal. He insisted that the title deeds, even though cancelled by the High Court, were evidence that he owned the property. He said that he had not encroached on the land, since he had actually bought it.

21. During reexamination, he stated that when he went to the land control board, he was informed that E. Bukusu/N. Sangalo/661 had been subdivided into E. Bukusu/N. Sangalo/1483, 1484 and 1485, whereupon E. Bukusu/N. Sangalo/1483, which was in the name of the deceased, was further subdivided to create portions for him. He stated that he got his title deeds before the appeal in Kakamega HCCA No.

93 of 1989 was filed. He said that he wanted the court to recognize him and the other buyers as liabilities of the estate.

22. Petronella Nafula Makokha, national identity card number 7609756, testified next. She was the widow of Eliud Bwire, one of the alleged purchasers of land from the deceased. She said that she had taken out letters of administration intestate in respect of his estate. She stated that he had bought E. Bukusu/N. Sangalo/1704 from the deceased. She testified that he was with Bartholomew Juma, and they went to the land control board at the same time.

23. I usually do not review witness statements where the makers of those statements testify and are cross-examined on the contents of the said statements, but I will in this case, as the witnesses adopted the statements and did not go into the details of the same. The protestors lodged three statements, by Fred Wafula Ngichabe, Bartholomew Juma Wafula and Petronilla Nafula Makokha, all dated 17th September 2019, and filed as a bundle, curiously, on 16th September 2019. I shall recite them separately.

24. In his statement, Fred Wafula Ngichabe, says that he bought 2.6 hectares of E. Bukusu/N. Sangalo/661 from the deceased in 1974, by which time the deceased had also sold a portion of E. Bukusu/N. Sangalo/661 to Peter Khisa Wamukota. The deceased then, allegedly, took him, the maker of the statement, to the land control board on 10th August 1977, and a consent to subdivide E. Bukusu/N. Sangalo/661 was given, which culminated into the subdivision of E. Bukusu/N. Sangalo/661 into three portions, being E. Bukusu/N. Sangalo/1483, 1484 and 1486, which were registered in the names of the deceased, Peter Khisa Wamukota and Fred Wafula Ngichabe, respectively. He further states that the deceased was his clansman, and from that association he got to learn that he later sold other portions of his property, E. Bukusu/N. Sangalo/1483, to the late Eliud Makokha Bwire and Bartholomew Juma Wafula, which culminated in the creation of E. Bukusu/N. Sangalo/1702, 1703, 1704 and 1705, which were registered in the names of the deceased, Bartholomew Juma Wafula, Eliud Makokha Bwire and Bartholomew Juma Wafula, respectively. He states that this court, without clarifying whether in these or other proceedings, in 1998 requested the Bakangala clan elders to arbitrate a dispute between Joseph Wanambisi Wepukhulu and Evanson Wafula Wepukhulu. He states that he, Fred Wafula Ngichabe, was party to those proceedings as Vice-Chairman, and the clan presented a report to court on 17th October 1998, which proposed distribution of E. Bukusu/N. Sangalo/661 as between the buyers - Fred Wafula Ngichabe, Peter Khisa Wamukota, Bartholomew Juma Wafula and Eliud Makokha Bwire – on the one part, and the family of the deceased – surviving widows and sons – on the other part. He states that the confirmation proceedings should, in the circumstances, be confirmed to E. Bukusu/N. Sangalo/1702, and not E. Bukusu/N. Sangalo/661. He concludes by saying that he was aware that the court had made an order on 25th May 2012, canceling the numbers given to the buyers, but the court had also stated that since the buyers were in occupation, they were to raise their claims at the time of confirmation of grant, and it was on the basis of those orders that they had filed protests to the distribution proposed in the confirmation application.

25. In his statement, Bartholomew Juma Wafula, states that he bought two parcels of land, to be carved out of E. Bukusu/N. Sangalo/661, from the deceased in 1979. He states that on 21st November 1980, the deceased took him, and another buyer, Eliud Makokha Bwire, to the local land control board, for consents for their transactions, which were granted. When they sought to effect subdivision of E. Bukusu/N. Sangalo/661, they established that the same had been subdivided earlier and the title held by the deceased had mutated to E. Bukusu/N. Sangalo/1483, and it was the said E. Bukusu/N. Sangalo/1483 that was subdivided to create E. Bukusu/N. Sangalo/1702, 1703, 1704 and 1705, out of which he got E. Bukusu/N. Sangalo/1702 and 1705, the deceased retained E. Bukusu/N. Sangalo/1702 and Eliud Makokha Bwire was given E. Bukusu/N. Sangalo/1704. He states further that the deceased died before he transferred E. Bukusu/N. Sangalo/1703 and 1705 to his name. When representation was obtained to the estate of the deceased, the administrators, allegedly, refused to vest E. Bukusu/N. Sangalo/1703 and 1705 to his name, culminating in him filing a suit, where orders were made in his favour. He asserts that the confirmation proceedings should be confined to E. Bukusu/N. Sangalo/1702, and not E. Bukusu/N. Sangalo/661.

26. On her part, Petronella Nafula Makokha, identifies herself as widow of the late Eliud Makokha Bwire, who, between 1973 and 1977, had bought an aggregate of 9 acres of land from the deceased, to be excised from E. Bukusu/N. Sangalo/1483. She states that her late husband was taken to the land control board by the deceased on 21st November 1980, consent was granted, and her husband was ultimately given E. Bukusu/N. Sangalo/1704. She states further that her late husband took possession of the said parcel of land, and his family resides on it to date, and that when her husband died his remains were interred on the said parcel of land. She expresses surprise that orders were made reverting all the subtitles created out of E. Bukusu/N. Sangalo/661 to that original title in the name of the deceased. She is also surprised that the confirmation application was founded on E. Bukusu/N. Sangalo/661, which, in her view, does not exist, for it ceased to exist in 1977 when consents were given for its subdivision. She asserts that the confirmation proceedings ought to be confirmed to E. Bukusu/N. Sangalo/1702, the administrators ought to be bound by what the deceased did and the purchasers of land from the deceased ought to be treated or recognized as liabilities of the estate.

27. To support those statements, the protestors lodged in court their documents, through a filing dated 17th September 2019. The documents filed include a title deed for E. Bukusu/N. Sangalo/1485 in the name of Frederick Wafula Ngichabe dated 23rd November 2005, a title deed for E. Bukusu/N. Sangalo/1703 in the name of Bartholomew C. Juma Wafula dated 25th January 2006, a title deed for E. Bukusu/N. Sangalo/1704 in the name of Eliud Makokha dated 25th January 2006, a title deed for E. Bukusu/N. Sangalo/1705 in the name of Bartholomew C. Juma Wafula dated 25th January 2006, sale agreement between the deceased and Bartholomew Juma Wafula dated 7th December 1979, a consent for subdivision of E. Bukusu/N. Sangalo/661 dated 9th August 1977 and a consent for subdivision of E. Bukusu/N. Sangalo/1483. The protestors filed a supplementary bundle of documents, dated 18th November 2019, on even date. The documents in that bundle include minutes of a meeting of the Kavujai Land Control Board held on 10th August 1977, a ruling delivered on 11th March 2008 in Bungoma HCCC No. 66 of 2006, an order in Bungoma HCCC No. 66 of 2006 dated 5th February 2010 marking the said suit as discontinued, and a judgement delivered in Kisumu CACA No. 22 of 2014 on 7th December 2017.

28. I have closely and scrupulously perused through the filings by the administrators, and I have not come across any witness statements filed by them with respect to the confirmation application, nor any bundles of documents intended to support their case. I shall assume that none were filed.

29. At the close of the oral hearing on 20th November 2019, the parties agreed to file written submissions, and the matter was allocated a date

for compliance. There has been compliance for the protestors filed their written submissions, dated 18th December 2019, on even date; while the administrators filed theirs dated 5th February 2020, on 14th February 2020.

30. The written submissions by the protestors are not very helpful. They merely summarize the evidence, which should strictly be the province of the court, instead of pointing the court to the law on which they base their protest on. The only point close to a legal argument is that the application for confirmation of grant was defective to the extent that it was not signed by the two administrators and the affidavit supporting it was not signed and attested.

31. On their part, the administrators advance the legal argument that the High Court has no jurisdiction to address the issue as to whether the protestors had actually purchased portions of the estate land from the deceased. They point the court to Article 162(2) of the Constitution, section 13 of the Environment and Land Court Act, No. 19 of 2011, the Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2012. They assert that the protestors hold no decree of any court awarding to them the portions they claim, to warrant the administrators acceding to their claim. They then go ahead to urge distribution as per their application – the widows to share 1 acre equally, the daughters to share 1 acre equally, the sons to share the remaining property equally, and the purchasers to pursue their claims against those that had sold property to them. The submissions are silent on the law upon which the proposals are founded, noting that the deceased died on 12th December 1980, before the Law of Succession Act, Cap 160, Laws of Kenya, came into force. On the technicalities raised in the written submissions filed by the protestors, the administrators point the court to Article 159 of the Constitution and Rule 73, presumably of the Probate and Administration Rules, with regard to courts eschewing technicalities of procedure and doing substantial justice.

32. The application for determination is a summons for confirmation of grant. Grants are confirmed under section 71 of the Law of Succession Act, which states as follows:

“Confirmation of Grants

71. Confirmation of grants

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

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

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

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

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

34. Before considering appointment of administrators and distribution of the assets, that is before the confirmation application is considered on its merits, it is important that I address the proviso to section 71(2) (d) of the Law of Succession Act, which requires that the court be satisfied that the administrators have ascertained all the persons beneficially entitled to a share in the estate, and have identified their respective shares. The proviso goes on to say that the court should not confirm the grant before it is so satisfied. That would make it a sort of condition precedent to confirmation, that the court is satisfied that all the persons beneficially entitled have been ascertained and their shares identified, failing which the court should not consider the application on its merits. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules, at Rule 40(4), as follows:

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

35. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with in this case?

36. The affidavit, sworn in support of the application for confirmation of grant, dated 27th September 2013, has listed the names of two surviving spouses of the deceased, and nine other individuals whose relationship with the deceased is not disclosed. One may presume that

the named persons were sons of the deceased. It is not indicated whether they were alive or dead. The deceased died a polygamist, no doubt, but it is not disclosed, if these nine individuals were indeed sons of the deceased, and who their mothers were. I raise this issue because where the intestate, the subject of the probate proceedings, died a polygamist, whether before or after the Law of Succession Act came into force, distribution of his estate would be according to the houses, invariably taking into account the number of children in each house. Each house should comprise of a wife, whether dead or alive, and her children, and, therefore, each wife, whether dead or alive, should be grouped together with her children, whether those children are alive or dead. That has not been done, and that will, no doubt, present difficulty in applying the law on distribution.

37. The Law of Succession Act deals with distribution of the intestate estate of a polygamist in section 40, which provides as follows:

“40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

38. The deceased hailed from what is now Bungoma County. The parties did not address me on his ethnicity, which is important, given that he died before the Law of Succession Act came into force on 1st July 1981. His estate, by virtue of section 2(2) of the Law of Succession Act, should be distributed in accordance with the law or custom that governed the estate as at the date of his death, that is to say 12th December 1980. The law applying to succession to the intestate estate of an African as at that date was the African customary law of the community from which that person hailed. That then makes the ethnicity of the deceased person critical in this case. It behooved the administrators to disclose that ethnicity. The fact that Bungoma County is inhabited by persons of various ethnicities, such as the Bukusu, Tachoni, Sabaot, among others, makes it even more critical to make that disclosure.

39. For avoidance of doubt, on when to apply customary law, I shall cite section 2(1) of the Law of Succession Act, which provides that the Act shall apply to estates of persons who die after it has into force, and section 2(2) of the Law of Succession Act, which applies customary law to estates of intestates dying before the 1st July 1981. The two provisions say as follows:

“2. Application of Act

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

40. From the names of the parties, it would appear to me, and I am not taking any judicial notice here, meaning that the administrators will still have to do the right thing, that the deceased died a Luhya, presumably of the Bukusu sub-tribe, and, therefore, an effort should have been made to demonstrate what the Luhya or Bukusu customs, as at 12th December 1980, said, on the matter of distribution of estate of a dead polygamist intestate. The administrator did not place any material on the record on the purport of Luhya or Bukusu customs in that regard. In the absence of such evidence, I can only advert to Eugene Cotran, *Restatement of African Law: 2 Kenya II Law of Succession*, Sweet & Maxwell, London, 1969, dated as it is, to guide me on the purport of Luhya or Bukusu customs with respect to distribution of the estate of a Bukusu polygamist intestate. This is what Cotran wrote at pages 45 and 46:

“1. Estate of a married man with one wife, sons and daughters

(a) LAND. The land is shared among the sons so that each son receives a slightly larger share than his immediate junior. The widow is entitled to use or cultivate a portion of the youngest son. Daughters receive no share.

(b) LIVESTOCK. ...

2. Estate of a married man with two or more wives, sons and daughters

(a) LAND.

(i) Each house keeps that land which was allocated to it during the husband’s lifetime.

(ii) Land, which has not been allocated to any house, is divided among the houses with reference to the number of sons in each house.

Local variation. Among the Idakho, Isukha, Tiriki and Maragoli, the land is divided among the sons irrespective of the number of sons in each house.

The rules of distribution within each house are the same as in 1(a) above.

(b) LIVESTOCK ...”

41. In the same affidavit, the administrators have listed other individuals, at paragraph 3, who are described as dependants. The relationship between the deceased and these individuals is not disclosed. They are twelve in number. In paragraph 5 of the said affidavit, the twelve individuals are allocated shares in the estate. The basis upon which these allocations have been proposed is not disclosed. Under the law of intestacy, entitlement to a share in the estate of the intestate is dependent on the relationship between the deceased and the alleged beneficiary. It is critical, therefore, in the confirmation application, for the relationship between any individual, who is listed in the application as either a person who survived the deceased or a dependant, and the deceased, to be disclosed, for entitlement to a share in the estate is dependent on that relationship. An application that merely lists names without disclosing the relationship is no doubt deficient, and it cannot be said that it provides a proper basis for distribution of the estate in intestacy. The question that remains unanswered is who exactly are the persons beneficially entitled to a share in the estate of the deceased, going by the relationship between him and them?

42. The affidavit in support of the application was sworn by one of the administrators, Moses Maundende Wepukhulu. The other administrator, David Wafula Wepukhulu, has sworn his own affidavits, one on 4th March 2019 and the other on 13th September 2019. The affidavit he swore on 4th March 2019 agrees with that by Moses Maundende Wepukhulu, in terms of who the surviving spouses and children and dependants of the deceased were, but differ on the persons who were to get a share out of the estate, since David Wafula Wepukhulu introduces other individuals to the list of those sharing the estate, which individuals are neither in the list of surviving spouses, children and dependants. He has introduced names that are not in the affidavit of Moses Maundende Wepukhulu, and he has also dropped names of individuals who are in the affidavit of Moses Maundende Wepukhulu. He has made no attempt to explain how these individuals, that he has introduced into the matter, are related to the deceased. In the affidavit of 13th September 2019, he introduces a mode of distribution which differs radically from that made in the affidavit of Moses Maundende Wepukhulu, filed on 27th September, and that of his own, sworn on 4th March 2019. He has dropped all the individuals listed in the earlier affidavits as dependants. He now proposes distribution of the estate to the surviving widows, daughters, sons and the four protestors. This is the first time the daughters of the deceased are being mentioned, yet neither their names nor their number are given. The proposals made in the written submissions are apparently based on this latter affidavit, yet no names are given of the daughters. The question that would arise is whether the court should blindly award shares to daughters whose names and number is unknown? Ascertainment of beneficiaries envisages identification of those beneficiaries by way of name and number, and allocation of shares to them based on their names and their numbers. Without such particulars, a fair distribution that conforms with the law cannot be possible.

43. I have alluded to both to intestacy, both under statute and under customary law. The deceased died in 1980, before the Law of Succession Act came into force. That would suggest that the intestate estate ought to be distributed, going by the provisions of section 2(2) of the Law of Succession Act, in accordance with customary law. However, the proceedings herein commenced after the Law of Succession Act came into force, and, more crucially, distribution is proposed after the Constitution, 2010, was promulgated. The said Constitution has robust provisions on equal treatment of both gender in all spheres of life. That could mean that the estate may not be available for distribution wholly in accordance with customary law. This raises serious conflict of law or choice of law issues. These are issues that I expected the parties to address in their written submissions. Which law is to be applied, as between the Law of Succession Act and the Luhya customary succession law?

44. Overall, I am not satisfied that the administrators have properly ascertained or identified the persons who are beneficially entitled to a share in the estate of the deceased, and I am equally not satisfied that they have properly or sufficiently identified the shares that those individuals are entitled to.

45. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2) (g), which state as follows:

“Application for Grant

51. (1) ...

(2) *Every application shall include information as to—*

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) *in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*

(h)..."

46. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. Representation herein was obtained on the basis that the deceased was survived only by the sons, there was no mention of the surviving spouse nor the daughters. I appreciate that the current administrators were not the petitioners for representation. They came on board much later. Section 71 envisages that upon their being appointed they would ascertain or determine who the beneficiaries of the estate were, and list such people in their confirmation application. The administrators knew about the daughters of the deceased. They knew that for a fact, as they were their siblings, born amongst them and raised together with them, and there was nothing for them to ascertain so far as the daughters were concerned. That no doubt reinforces that fact that the proviso to section 71(2) and the provision in Rule 40(4) of the Probate and Administration Rules were not complied with, and, therefore, the confirmation application was fundamentally flawed.

47. Rule 40(8) of the Probate and Administration Rules, is also relevant. It requires administrators, when applying for confirmation of their grants, to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Such survivors or dependants include daughters of the deceased. It says as follows:

“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit.”

48. Rule 40(8) envisages that a consent, in Form 17, be signed by all the persons beneficially entitled to the estate of the deceased. All such persons include the surviving spouses and all the surviving children of the deceased, be they sons or daughters, whether they would be taking a share in the property or not. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased. In this case the application for confirmation of grant was not supported by the consents in Form 17.

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

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

“At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall hear the applicant and each protestor and any other person interested, whether such person appear personally or by advocate or by a representative.”

51. Looking at the application dated 27th September 2013, it is clear that none of the persons beneficially interested in the estate executed a consent in Form 17 as envisaged in Rule 40(8). Rule 40(8) of the Probate and Administration Rules is in mandatory language. The provisions in Rule 40(8) were not observed in these proceedings. It was only democratic, just and fair that all the persons beneficially entitled to a share in the estate of the deceased got to participate and have a say in the distribution of the assets of the estate of their late father. To that extent the application dated 27th September 2013 did not meet the standards set for such applications by the Probate and Administration Rules.

52. As the provisions of the proviso to section 71(2) of the Law of Succession Act were not complied with, I need not consider the application on its merits. The merits are set out in section 71(2), where the court decides whether to confirm the administrators and whether to confirm the mode of distribution proposed by the administrators. As said elsewhere, those two are to be considered only after the administrators have demonstrated compliance with the proviso to section 71(2) of the Law of Succession Act. Regarding the administrators, the court considers whether the grant was properly made; and if it finds that it was properly made, whether the administrators had administered the estate in accordance with the law. There is also the consideration as to whether, upon being confirmed, the administrators would administer the estate in accordance with the law. These are, no doubt, competence issues. Regarding distribution, the court would look at what the law requires. Where customary law applies, the court would look at the proposed distribution as against the applicable customary law. Where the Law of Succession Act applies, the court will consider the proposals as against the provisions in Part V of the Law of Succession Act. I shall not consider the application before me along those lines as the proviso to section 71(2) has not been complied with.

53. Having disposed of the issue as to compliance with the proviso to section 71(2) of the Law of Succession Act, I now turn to the claim by the alleged buyers of portions of the estate land. Their case was articulated in these proceedings by the protestors. They have invited the court to consider them to be a liabilities of the estate, in other words creditors, in the sense that the estate was indebted to them. Courts faced with confirmation applications often treat persons who are creditors of the estate as persons who are beneficially entitled to a share in the estate. I argue that should not be the case, for distribution of an intestate estate that should be of the net estate. It is envisaged that debts and liabilities are settled first before the estate is distributed. It is expected that administrators identify the debts and liabilities of the estate first, settle them and thereafter move on to distribute the net estate. For that reason, therefore, creditors and purchasers of estate of property ought not to be entertained at confirmation, for confirmation of the grant should arise only after debts and liabilities have been settled. Creditors ought to be sorted out first before the administrators file the application for confirmation of grant. A practice has evolved, however, where administrators

provide for them, if they had not been settled in advance, within the distribution proposed in the confirmation application, and thereby treat them as if they were persons beneficially entitled to a share in the net intestate estate.

54. The proper way to deal with creditors should be that once a personal representative is appointed, be he an administrator or executor, he or she should invite claims by persons who might have any against the estate. The creditors then place such claims with the personal representative, who would be expected to consider them, and if they find them genuine settle them. If they do not find them genuine they would decline to settle them, whereupon the claimant would be expected to then move to court in a suit against the personal representative to prove their claim against the estate. The creditors need not forward their claims only on invitation of the personal representative, they can move on their own motion, so long as a personal representative has been appointed.

55. A creditor who has already proved their case in court as against the estate, and holds a decree against the deceased or the personal representatives or the estate, should place it before the personal representative for settlement. Where the decree or order of the court is not honoured by the personal representative, then they can have it enforced, against the personal representatives or the estate, through the channels set out in the Civil Procedure Act, Cap 21, Laws of Kenya and the rules made under that law, or any other law that makes provision for enforcement of court orders and decrees. A person holding a court decree or award or order need not wait for the personal representatives to mount a confirmation application, the decree or order or award need not be enforced through confirmation or await confirmation. If it is an award of land, the decree or award holder should simply approach the lands registrar to enforce the decree or award, meaning that the decree-holder need not approach the personal representative to have the decree enforced or executed.

56. The protestors, and other alleged buyers, claim to have had bought a portion of the property from the deceased. They have exhibited documents as proof of the sale transactions, taking the form of sale agreements, consents from the relevant land control boards and title deeds that were in their names. The transfers appear to have been effected after the deceased died. There is evidence that there was litigation over the sales. The dispute was lodged in court after the deceased died, in Bungoma SPMCCC No. 193 of 1989, between the administrator of the estate of the deceased and four buyers, being Frederick Wafula Gichabe, Bartholomew Juma Wafula, Eliud Makokha Bwire and Peter Wafula Wamukota. The dispute was resolved in favour of the buyers, in the judgment that was delivered on 19th October 1989. The trial court found that the buyers had proved that they had bought the property in dispute from the deceased, and directed that the same be transferred to their respective names by the then administrator of the estate. The administrator was aggrieved by the decree in Bungoma SPMCCC No. 193 of 1989, and appealed against it in Kakamega HCCA No. 133 of 1989. That appeal was determined in a judgement that was delivered on 29th April 1998, where the orders made in Bungoma SPMCCC No. 193 of 1989 were set aside. The protestors have been careful to omit page 3 of the appellate judgement, which, no doubt, carries the reasons for or *ratio descendendi* of the judgement. I say so because they continue to agitate that they were entitled to the portions of land in question, when there is evidence that their claim to the land was thrown out by the High Court in Kakamega HCCA No. 133 of 1989. They never appealed against that decision, and I doubt whether a contradictory determination, if any, by any other court can erase the decision in Kakamega HCCA No. 133 of 1989.

57. To be satisfied of the *ratio descendendi* in Kakamega HCCA No. 133 of 1989 from the page suppressed by the protestors, I took the liberty of calling for the original court record in Kakamega HCCA No. 133 of 1989 from the court registry. The original records were retrieved and placed before me, and I have perused the same. I herebelow reproduce, verbatim, the portion of that judgement with the reasons for the decision and the decision itself. The Judge wrote:

“As indicated above the respondents had come to the lower court seeking to enforce performance of the contracts each entered into with the deceased. This is an equitable remedy but conditions laid down in law must be complied with before specific performance can be enforced. The respondents have shown they had taken possession of the parcels of land sold to them by the deceased. It was however incumbent upon them to establish that the contracts entered by each was in compliance with the law of contract and that consents of land control board had been procured. Section 3(3) of the Law of Contract requires that a note or memorandum in writing which contains essential terms of the contract and signed by the party to be charged must be shown. The first and second respondents put in copies of agreements which would qualify as such memorandum as laid down by section 3(3) of the Law of the Contract as then existed. The other two respondents did not produce any such notes.

The other essential requirement of such contracts would be the consent of the appropriate land control board. All the respondents put in two copies of the consent of the land control board. In respect of the first respondent the consent is the one dated 9th August 1977. This respondent admitted that the consent was given well after 3 months. The second respondent’s consent was also granted over one half years later as shown by exhibit 1. The other respondents also indicated that they had consents of the land control board but they could not also have been granted within 3 months as they were granted on 24th November 1980.

In my view the respondents did not satisfactorily establish the conditions necessary to obtain orders of specific performance of their contracts. I therefore do not agree with the learned magistrate.

In the result I would allow this appeal and would set aside the orders of the lower court. The appellant to have costs of this court and those of the lower court ...”

58. My understanding of the judgement in Kakamega HCCA No. 133 of 1989 is that the appellate court found the transactions invalid on account of lack of memoranda of agreement, at least for some of them, and for lack of the consents of the land control board since the consents placed before the court had been obtained way out of the time stipulations specified in the Land Control Act, Cap 302, Laws of Kenya. In essence, the contracts of sale of land relied on by the protestors and the other alleged buyers were invalid, and could not form basis for orders of specific performance.

59. The protestors hang on subsequent orders to advance their case, essentially ignoring the effect of the decision in Kakamega HCCA No. 133 of 1989. The first is a ruling that this court delivered on 26th February 2014, on an application for review of orders that it had made on 25th May 2012, cancelling the titles created in their favour from E. Bukusu/N. Sangalo/661, and restoring the property to the original land reference number in the name of the deceased. The order had been made by consent, and the cancellation was in line with the judgment in

Kakamega HCCA No. 133 of 1989. The court counselled the buyers to raise their claim at confirmation of the grant. The buyers challenged the determination of 26th February 2014 in Kisumu CACA No. 22 of 2014, but the Court of Appeal agreed with the High Court, and dismissed the appeal. The buyers have referred to a ruling in Bungoma HCCC No. 66 of 2006, delivered on 11th March 2008, however, I see nothing in that ruling that undoes the determination in Kakamega HCCA No. 133 of 1989.

60. The issue as to the validity of the sales that the buyers are relying has been conclusively dealt with by the courts. It was the crucial issue before the trial court in Bungoma SPMCCC No. 193 of 1989, which found in their favour, essentially upholding the sales. However, when the matter went on appeal, in Kakamega HCCA No. 133 of 1989, the High Court disagreed with the trial court, and found the sales invalid, and set aside the decree that had validated them. The buyers did not appeal, and the finding in Kakamega HCCA No. 133 of 1989 remains intact. The subsequent orders of the High Court in this cause and in Bungoma HCCC No. 66 of 2006, and of the Court of Appeal in Kisumu CACA No. 22 of 2014, have not chipped away at the judgement in Kakamega HCCA No. 133 of 1989. So long as the finding in Kakamega HCCA No. 133 of 1989 remains intact, the protestors and the other alleged buyers would have no legal basis upon which to assert their claim against the estate, except, perhaps for a refund of the purchase price.

61. The protestors have waved to my face copies of title deeds that were issued in their names on 23rd November 2005 and 25th January 2006, on the basis of the orders that had been made in their favour in Bungoma SPMCCC No. 193 of 1989. It is my holding that the registration of the protestors and the other alleged buyers as proprietors of the subject titles was not tenable, following the orders made in Kakamega HCCA No. 133 of 1989, on 29th April 1998. The setting aside of the orders made in Bungoma SPMCCC No. 193 of 1989, by the court in Kakamega HCCA No. 133 of 1989, meant that those orders were not available for execution by the lands office. There was no legal basis, therefore, for the issuance of the said title deeds in 2005 and 2006, and the deeds issued were worthless.

62. I note that the administrators have taken inconsistent positions regarding the alleged sales of land. They appear to blow both hot and cold, to approbate and reprobate, over the validity of the alleged sales. On the one hand, they appear to challenge the validity of the sales, while on the other they appear to be considering allocating to the alleged buyers portions of the subject land. Whatever the case, I do not have before me a valid order of a court of law awarding the subject parcels of land to the protestors and the other alleged buyers, or validating the said sales. To cut the chase, the administrators ought to be clear in their minds on whether or not they would honour the said sales, the decision in Kakamega HCCA No. 133 of 1989 notwithstanding.

63. Were the protestors and the other alleged buyers *bona fide* purchasers of the subject property from the deceased, to warrant being treated as a creditors of the estate, who ought to be catered for from the estate? Documents were placed on record, to demonstrate that there were agreements of sale, consents to subdivide property, among others. However, I have no jurisdiction to make a finding one way or the other with regard to whether the alleged sales were valid and resulted in the protestors, and the other alleged buyers, acquiring a stake in the estate, that is if I were to hold the view that the court in Kakamega HCCA No. 133 of 1989 had set aside the orders in Bungoma SPMCCC No. 193 of 1989 on technical grounds, as argued by the protestors, which I do not find to have been the case. The issue of the validity of the sales is a matter which revolves around title to land. Under Articles 162(2) and 165(5) of the Constitution, I have no jurisdiction over that question. The parties are better of placing the matter before another forum for determination, if they insist that they still have a valid claim against the estate despite the decision in Kakamega HCCA No. 133 of 1989. I shall not pronounce as to whether the protestors and the other alleged buyers were *bona fide* creditors of the estate, entitled to be allocated shares in the estate. They will have to prove their entitlement to the property by commencing suits against the estate at the appropriate forum, if at all that is possible, unless the administrators herein unequivocally concede to their claim in these proceedings.

64. The primary source of jurisdiction of the courts is the Constitution. With respect to matters touching on title to land, and occupation of land, the relevant provisions are in Article 162(2) and 165(5). Article 162 of the Constitution essentially establishes the superior courts in Kenya. It identifies them as the Supreme Court, the Court of Appeal and the High Court and the courts established under Article 162(2). Article 162(2) envisages the establishment of courts to be of equal status with the High Court, to exercise jurisdiction over, among others, occupation of and title to land. The relevant provisions say:

“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.”

65. Article 165 of the Constitution sets out the jurisdiction of the High Court, and it is emphatic that that jurisdiction does not cover the matters that have been isolated for the courts envisaged in Article 162(2). Article 165(5) states as follows:

“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).”

66. Parliament has complied with Article 162(2)(3) of the Constitution, by passing the Environment and Land Court Act, No. 19 of 2011, to establish the Environment and Land Court, the jurisdiction of which is set out in section 13 of the Act. The court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution, relating to environment and land. Section 13 states as follows:

“13. Jurisdiction of the Court

(1) *The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.*

(2) *In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*

(a) *relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

(b) *relating to compulsory acquisition of land;*

(c) *relating to land administration and management;*

(d) *relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

(e) *any other dispute relating to environment and land.”*

67. The protestors and other alleged buyers lay claim to portions of E. Bukusu/N. Sangalo/661, not as inheritors from the estate of the deceased herein, but by alleging that portions of that property were sold to them by the deceased. The administrators are largely ambivalent about the validity of the sales. That would mean the court has to decide a question of ownership of the said property as between the estate and the protestors and the other alleged buyers. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution.

68. The property in question is registered land. Registration of property and transfers of land are governed by land legislation, to be specific the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The two pieces of land legislation have elaborate provisions on sale of registered land, and transfer and registration thereof. A determination of the question as to whether there was a valid sale of the registered land in accordance with the relevant land legislation is an issue that is well outside the jurisdiction of the High Court. Both statutes carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

69. The provisions in the Land Registration Act state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011:
...

Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

70. The Land Act carries similar provisions; which state as follows:

“2. Interpretation

In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011);
...

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

71. My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to court is meant to refer to the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter that the protestors have placed before me.

72. Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR stated:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

73. The protestors claimed that their Bakangala clan had arbitrated over the matter, and proposed a mode of distribution. They stated that the clan did so on orders of the court, and prepared a report which was presented in court on 17th October 1998. There is a document that was placed on record from the Bakangala clan, dated 17th October 1998, addressed to the Judge. I have looked at the record before me, and I have not seen any minute which solicited the involvement of the clan in this matter. The record before me shows that the grant herein was made on 27th August 1986 by Aganyanya J, and was confirmed on 24th July 1978 by Mbogholi J. The next events followed in 1998, when on 16th July 1998 Tanui J. gave directions on service of an application, and 23rd September 1998 when the same Judge marked the matter as stood over generally. Nothing happened thereafter until 23rd October 2011. There is nothing that shows that the court had allowed the clan to intervene in the matter, and I, therefore, do not see any basis for the argument that the Bakangala clan had arbitrated the matter. If it did carry out any arbitration, then it did so without the sanction of the court, and the outcome of that arbitration was not placed before the court, and was not made an order of the court.

74. I believe that I have said enough. The orders that I am inclined to make, at this stage, on the application, dated 27th September 2013, are as follows:

- (a) That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) of the Law of Succession Act;**
- (b) That the administrators are hereby directed to file a further affidavit detailing the following:**
 - (i) the names of the wives of the deceased, indicating whether they are alive or dead;**
 - (ii) the names of the children of each of the wives disclosed in (i) above, indicating whether the children are alive or dead, and whether the children are male or female, whether married or unmarried; and**
 - (iii) where any of the children of the deceased are themselves dead, list all the children of such dead children of the deceased, who would be grandchildren of the deceased, indicating whether they are male or female;**
- (c) That in addition to the affidavit to be filed under (b), above, the administrators shall cause the persons beneficially entitled to a share in the estate to sign a consent in Form 17 as required by Rule 40(8) of the Probate and Administration Rules, and any person who shall decline to sign Form 17, shall be at liberty to express his views on the proposed distribution through an affidavit to be sworn and filed by him or her;**
- (d) That in the affidavit to be filed under (b), above, the administrators shall state their final position on the fate of the impugned sales of land by the deceased to the protestors, and other alleged buyers, to pave the way for the court to make final orders on that issue;**
- (e) That the other persons beneficially entitled to a share in the estate shall have liberty to lodge their own affidavits on the issues in (d), should they be in disagreement with the position to be taken by the administrators:**
- (f) That the affidavits referred to in orders (b), (c), (d) and (e) shall be filed in court within thirty (30) days of the date of this judgment:**
- (g) That the administrators shall file supplementary submissions addressing the issue as to which law applies to the distribution of the estate herein, whether it is the Law of Succession Act or Luhya customary law, if the deceased died a Luhya, indicating the particular Luhya sub-tribe that he hailed from;**
- (h) That the matter shall be mentioned after thirty (30), days for compliance and further directions; and**
- (i) That the final orders on the summons for confirmation of grant, dated 27th September 2013, shall be made only after compliance with the orders made and directions given above.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS...26TH.....DAY OFJUNE.....
2020

W. MUSYOKA

JUDGE