REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 600 OF 2010

IN THE MATTER OF THE ESTATE OF JOSEPH MUBWABI SABAYI also known as MBWABI SABAYI (DECEASED)

JUDGMENT

1. This matter relates to the intestate estate of the late Joseph Mbwabi Sabayi, who died on 13th April 1983, according to the certificate of death on record, serial number 358401, dated 1st April 2010. According to a letter, dated 26th November 2009, from the Chief of Bukhungu Location, the deceased was survived to have been survived by a daughter-in-law, 6 granddaughters, 2 individuals whose relationship with the deceased is not disclosed, and 4 interested parties. The daughter-in-law is said to be Enrieta Konzolo Michael; while the granddaughters are Beatrice Mary Tsisiche, Margaret Khabetsa, Marisiana Musabi, Adelaida M'mbone, Lilian Akhonya and Geraldine Musebe. The 2 individuals whose relationship with the deceased is not disclosed are Paul Likhaya Mbwabi and John Kisienya Mbwabi. The interested parties are named as Charles Nyuki, Solomon Musinya, Patrick Kusihilu and James Nagira Mutsoli. He was said to have died possessed of a property known as Isukha/Shirere/1251.

2. Representation was sought in this cause, vide a petition lodged herein on 12th August 2011, by Enrieta Kanzolo Michael, in in her capacity as daughter-in-law of the deceased. She expressed the deceased to have been survived by the individuals listed in the Chief's letter, and to have died possessed of Isukha/Shirere/1251. Letters of administration intestate were made to her on 12th March 2013, and a grant was duly issued, dated 15th March 2013. I shall refer to Enrieta Kanzolo Michael as the administratrix.

3. What is up for hearing is the summons for confirmation of grant filed by the administratrix on 26th August 2019, dated 19th August 2019. I shall hereafter refer to her as the applicant. She has identified the children of the deceased as her late husband Alfred Konzolo Mbwabi, the late Paul Likhaya Mbwabi surveyed by a widow known as Florence Onduro, and the late Kisienya Mbwabi survived by a widow known as Pamella Achitsa Chisienya. It is explained that as at the time of his death, the deceased had been survived by several grandchildren born of the said late sons of the deceased. The asset of the estate available for distribution is described as Isukha/Shirere/1251. It is averred that the deceased had shared out his land amongst his children during his lifetime, precisely in the 1970s, equally. The deceased is also said to have had sold a portion of the land he had reserved for himself, to the late Solomon Musinya, who was survived by one son, called Solomon Mbalasi, who resides on the land. Thereafter, the late sons of the deceased sold the portions of the land that was allocated to them. The late Paul Likhaya Mbwabi sold a portion of his share to Charles Nyuki, during the lifetime of the deceased. the late husband of the administratrix, Alfred Konzolo Mbwabi sold part of his alleged portion after the deceased died, to Patrick Lumumba Kusihilu. The administratrix also sold a portion of the land to one James Ngaira Mutsoli. The late John Kisienya Mbwabi also sold a portion of the land to Henry Simonyo and the late Damian Mutsami. After the late John Kitienya passed on his widows also sold land, to unnamed individuals except for one Tom Alukwe. The administratrix proposes that the land be shared between the 3 sons and Solomon Musinya, the buyer. According to her, the final distribution should work out as follows:

(a) 0.6 hectare, to Enrieta Kanzolo Michael on behalf of the estate of her late husband, Alfred Konzolo Mbwabi;

(b) 0.6 hectare, due to the estate of the late Paul Likhaya Mbwabi to Charles Nyuki;

(c) 0.6 hectare, due to estate of Solomon Musinya, to go to his son Alfred Mbalasi; and

(d) 0.6 hectare, due to estate of John Chisienya Mbwabi, to go to his widow Pamella Achitsa Chisienya, on her own behalf and that of beneficiaries and liabilities.

4. To that application, Jenipher Musanga swore an affidavit on 2nd March 202, filed herein on 9th March 2021, in response to the confirmation application. I shall refer to her as the protestor. She is a granddaughter of the deceased, being a child of the late son of the deceased known as John Kisienya. She identifies the survivors of the deceased to be his 3 late sons of the deceased, being Alfred Konzolo, Paul Likhaya and john Kitienya, and a liability, the late Solomon Musinya. She avers that the deceased had distributed his property amongst his sons and the liability before he died. she states that the said distribution was not even on the ground, it varied from son to son, and boundaries had been fixed on the ground. It was done in such a way that Alfred Konzolo got 0.634 hectare, Paul Likhaya got 0.170 hectare and John Kisienya got 0.089 hectare, and the liability, Solomon Musinya, 0.41 hectare. She has attached a surveyor's report to support that position. She explains that the late Alfred Konzolo had 2 widows, while John Kisienya had 3 wives. It is further stated that Paul Likhaya had been gifted with another piece of land, whose details have not been disclosed. She proposes how the property should be distributed as

between the different houses of Alfred Konzolo and John Kisienya. She avers that Solomon Musinya is entitled to 0.41 hectare, which should devolve upon his son, Alfred Mbalesi. The annexed surveyor's report indicates how the land is occupied on the ground.

5. The protest attracted a response from the administratrix. She asserts that since the sons of the deceased are dead, it is their widows who should take their place, and that grandchildren like the protestor ought to take a back seat. She dismisses the surveyor's report, saying that the same was drawn in a manner that favours the protestor, and in any event even it was not done in the presence of all the beneficiaries. She avers that the distribution proposed by the proprietor only disposes of part of the property, and it is not indicated what ought to happen to the other portion. She also objects that the proposal seeks to benefit persons who did not buy land from the deceased. she avers that such buyers ought to be taken care of by those who sold the property to them, that is after the grant has been confirmed and the property distributed. She also argues that disputes about how the assets devolved to each of the sons, amongst their survivors is not a matter for handling in this cause but elsewhere.

6. Directions were given on 8th July 2018, for disposal of the summons for confirmation of grant by way of viva voce evidence.

7. The administratrix testified on 25th January 2021. She stated that she was proposing equal distribution of the property amongst the sons, with the portion that Solomon Musinya had bought being devolved to his son Alfred Mbalasi. She stated that the protestor ought to get her share of the estate from the portion due to her late father, John Kisienya. She explained that the deceased had only one wife, Lucia Matutui, who had 3 sons and 3 daughters. She explained that 2 daughters died, and 1 was surviving, called Frida Khaveza. She explained that out of all the 6 children only 1 was alive, Frida Khaveza. She stated that Frida Khaveza was not aware of the proceedings, as she had not been informed. She said she said that the deceased had given out his property to his children only. She said that her husband, Alfred Konzolo, had another wife, that she did not find when she married him. She gave her name as Josina Selebwa, who had a daughter called Margaret Khavesa, who she did not involve in the proceedings. She said that she had not allocated any shares to the members of that other house of Alfred Konzolo. She said that John Likhaya had two wives, one of which was dead. She said the one alive was Florence Onduru, who she said was aware of the proceedings. She said the other wife, Elizabeth Nerima was dead, and so were all her children. She stated that she did not know the grandchildren of Elizabeth Nerima, and she had not allocated them any shares. She also said that John Kitienya had 2 wives, although she had heard of a third one, known as Nora Lutta, but she had not seen her nor her children. She said that she allocated the share here to one of the widows, and conceded that the other 2 widows should also get their share. She said that there was a child of the deceased known as Rita Savayi, who was still alive, and at the home of the decease, and who had not filed nay papers in the proceedings.

8. The protestor, whose identity documents indicated her name as Jenifa Musanga Nabwayo, testified next. She confirmed that the deceased had only one wife, who she identified as Lucia Matulu. She died not identify the children of the deceased, but said they had all died save for one daughter. She stated that her father, the late John Kisienya, had 3 wives, being Norah, Rose and Pamela. She explained that Nora was still alive, but she had remarried. She said that Norah had one son with her father, called Asman, who had been allocated a share in the estate by the family, which he subsequently sold. She stated that Margret Khavesa from the family of Alfred Konzolo should get her share from her father's share. She said that she was generally not opposed to the distribution proposed as between the sons of the deceased. she insisted that the deceased had shared out his property amongst his sons, as evidence by the surveyor's report annexed to her affidavit. She said that her stepmother, Pamela, was aware of the proceedings, but she had sold her share. She stated that she was staking a claim to the share due to her late father, John Kisienya.

9. At the close of the oral hearing, the parties filed written summons, which I have read through and noted the arguments made.

10. What is before me is a summons for confirmation of grant. The deceased died in 1996, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation. Her estate therefore fell for distribution in accordance with the intestate provisions of the said Act. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which provides as follows:

> "*Confirmation of Grants*
>
> *71. Confirmation of grants*
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> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
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> *(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."

14. The principal purpose of confirmation of a grant is distribution of the assets. The proviso to section 71(2) requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate, and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. 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), which governs applications for confirmation of grant, 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."

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? It has not. It has emerged that the deceased had 6 children, 3 sons and 3 daughters. The sons were disclosed in the Chief's letter and the petition, but the daughters were not. The issue of existence of the daughters only arose at the oral hearing of the matter. The deceased died in 1983, after the Law of Succession Act had come into force. The Act treats sons and daughters equally, and references to children in the Act are gender neutral, children are not clarified into sons and daughters, or male and female. The deceased died intestate, and, therefore his estate is for distribution in terms of Part V. since there was no surviving spouse, the estate is for equal distribution amongst the children, by dint of section 38. The reference to children in section 38 includes daughters. So, if the law anticipates equal distribution amongst all the children, male and female, sons and daughters, it follows that anyone applying for representation to the estate of an intestate after 1 st July 1981, when the Act came into force, must ensure that there is a full disclosure of both sons and daughters of the deceased. section 51(2)(g) of the Act, on applications for grants of representation in intestacy, require disclosure of the children of the deceased, both male and female, sons and daughters. These are mandatory requirements of the law. In view of that, it is my conclusion that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules has not been complied with. I should not proceed to consider the confirmation application, before there has been full disclosure of the daughters of the deceased, and their involvement in these proceedings. Where any daughter has since died, her survivors should be disclosed, and involved in the matter.

16. It would appear that the reason why the daughters of the deceased were suppressed was because of customary law, that daughters are not entitled to a share of their father's estate. I reiterate that the deceased died after the Law of Succession Act had come into force. The effect of section 2(1) of the Law of Succession Act, which applies the Act to the estates of persons dying after the Act had come into force, is to outlaw the application of customary law. See . Section 2(1) ought to be read together with section 2(2) of the Act, which provides that for persons who died before the effective date of the Act, the applicable law on distribution was the law and customs in application then. That is to say the law and custom that applied before 1st July 1981. For estates of Africans intestates, it was African customary law, depending on the tribe or community from which the African intestate hailed from. Either way, most Kenyan African tribes are patrilineal, and the mode of succession is, therefore, patrilineal. Property passes from male dead persons to their male successors or survivors. There was no room for succession by female survivors, unless they were unmarried, even then their entitlement was limited to a life interest. Probably, that is what has informed the exclusion of daughters here, but it must be clarified that customary law, which is applied through section 2(2), is of no application to the estate of the deceased herein since the law applied to his estate by section 2(1), which disapplies customary law, is the Law of Succession Act. The daughters of the deceased, or their successors or survivors, ought to have been disclosed and provided for, as that is what is envisaged in the law. See *Rono vs. Rono and another* [2005] 1 EA 363 (Waki JA), *In Re Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu J), *In the Matter of the Estate of Mwangi Giture (Deceased)* [2004] (Koome J), *In Re Estate of Juma Shiro – Deceased* [2016] (Mwita J), *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau J) and *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J). The Law of Succession Act does not allow such discrimination, and female children have the same rights as their male counterparts, and the fact of marriage means nothing in succession.

17. Related to that is the fact that most of the children of the deceased are dead, save for that one daughter who has not been involved in these proceedings. A close reading of the Part V would disclose that the estate of an intestate is distributed amongst survivors, that is to say the persons who have survived him. That is a reference to living persons as opposed to the dead. Part V talks of surviving spouses and children and parents and siblings. Section 51(2)(g) is in similar terms. The persons disclosed as survivors, in the papers filed herein, are, in, all dead. So, they cannot possibly be survivors. Where the children of the deceased are themselves dead, they do not qualify to be listed as survivors, instead it is their children who should be listed as the survivors of the deceased, by dint of section 39 of the Law of Succession Act. The administratrix has purported to list herself and other daughters-in-law of the deceased as survivors in the place of their dead husbands, who were the children of the deceased. Part V does not talk about in-laws being survivors of deceased persons. Intestate succession is to kindred, that is to say blood or biological relatives of the deceased, except for surviving spouses of the deceased whose estate is the subject of the proceedings. That is what consanguinity is about. Daughters-in-law do not fall into that category, and that is why they do not feature in Part V of the Act, which is limited to surviving spouses, surviving children, surviving parents, surviving siblings, among other relatives of the deceased, up to the sixth degree of consanguinity. The administratrix and her co-daughters-in-law are not survivors of the deceased, and should not have been listed as such in the petition and the confirmation application. The actual survivors of the deceased are their own children, being the grandchildren of the children of the deceased. Since the daughters-in-law are rank outsiders, since they are not survivors of the deceased, they would only access the estate of their deceased father-in-law on behalf of the estates of their late husbands, which they could only do upon obtaining representation to the estates of their respective dead husbands. Only a grant of representation in the estates of their dead husbands would give them standing to claim from the estate of the deceased herein. There is no evidence that that was done, and it would mean that the said daughters-in-law, the administratrix included, are wrongly listed in the confirmation application as survivors, since in law they do not qualify to be such survivors, and it would mean that the actual survivors of the deceased, being his grandchildren, where his children are dead, have been suppressed. That would be another non-compliance with the proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules.

18. I have alluded to the daughters-in-law obtaining representation to the estates of their respective late husbands before they intervene in the estate of their father-in-law, as it is such grant that would give them standing to make the intervention. The tendency is for parties to obtain a grant of letters of administration *ad litem*. A grant of *ad litem* is not suitable for that purpose. It only empowers a party to sue or be sued with respect to the estate of another, it does not enable collection and gathering of estate assets, for purpose of preservation and distribution. The daughters-in-law, therefore, ought to obtain either a full grant, that would enable them to gather the assets, preserve them and eventually

distribute them; or a grant *ad colligenda bona*, which would enable them to collect the assets and preserve them, pending the making of a full grant, which would enable them to distribute the estate. The daughters-in-law would then use the full grant or grant limited *ad colligenda bona* to claim from the estate of their father-in-law what would be due to their late husband, so that they can receive the share, preserve it and eventually distribute the property amongst the persons entitled from their late husbands' estate.

19. I would also like to point out that the estate of a dead child of the deceased ought not be distributed within the estate of their dead father. It is a convenient way of ensuring that multiple succession causes are not filed, but the danger with it would be that that the court would end up distributing two or more estates in one succession cause, with the potential of disadvantaging persons who may have claims against the estates of some of eth children of the deceased. There could be some women out there who could be entitled to claim to be surviving spouses of such children, or children who are entitled to a share on grounds of having been sired by the late child of the deceased outside wedlock, or even creditors against the estate of the son, who would otherwise not claim in the estate of the father. So, where a child of the deceased is himself deceased, his share ought to be devolved to his estate for administration, instead of being distributed directly to his children, in the estate of his father, for that has the potential of disinheriting or inconveniencing other individuals who may have a claim to the estate of the dead child.

20. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. Shares are about the property being distributed. Before I look at the shares ascertained, it would be critical to consider whether the property forming part of the estate was properly ascertained, before shares were allotted to the survivors and heirs. It would appear that the deceased died possessed of a property known as Isukha/Shirere/1251. There is common ground on that. However, from the affidavit of the protestor, at paragraph 10, it would appear that the deceased had another piece of land, which has not been disclosed. It is alleged to have been allocated to have been given to the late Paul Likhaya by the deceased at a time which has not been disclosed. It is not disclosed whether the said property was, at the time it was given to the late Likhaya registered in the name of the deceased, nor whether, upon its being given, it was transferred to the name of the late Likhaya. If it was in the name of the deceased, at the time of the alleged gifting, but was never transferred to the name of the beneficiary of the alleged gift, the late Likhaya, then it still formed part of the estate of the deceased, and was available for distribution as part of the estate of the deceased. It was transferred to the name of the late Likhaya, then it formed part of the estate of the late Likhaya, and was not available for distribution as part of the estate of the deceased herein, but the said property, even after the transfer, would still be relevant for the purpose of distribution in the instant estate, by dint of section 42 of the Law of Succession Act. Section 42 requires the bringing of any assets previously distributed or gifted *inter vivos* to be brought into the hotchpotch, to be taken into account for the purposes of fair distribution. It is not enough to merely talk of such gifts without giving details of the assets in question, as that would not assist the court in any way. The averment by the protestor was not controverted by the administratrix. It would mean that there is no full disclosure of all the assets of the deceased, including what he had distributed *inter vivos*, and what has been disclosed so far may not be sufficient for the purpose of doing a just and fair distribution.

21. For avoidance of doubt, section 42 of the Law of Succession Act, says as follows:

> "*42. Previous benefits to be brought into account*
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> *Where—*
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> (a) *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*
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> (b) *property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."*

22. The other aspect of the proviso to section 71(2) and Rule 40(4) is with regard to distribution, the court must be satisfied as to the distribution proposed, in terms of being satisfied that the shares of all the persons beneficially entitled had been ascertained. The administratrix has proposed distribution of the estate to the widows of the late sons of the deceased, yet the said widows are not survivors, and have not obtained representation to the estates of their late husbands. Secondly, the distribution is limited to the sons only, yet the deceased had daughters, one of whom is alive. The said surviving daughter was not disclosed in the pleadings, was not involved in the process, has not been allocated any share in the estate, yet she has not renounced nor waived her share in her father's estate. The survivors of the dead daughters of the deceased have not been disclosed, have not been allocated anything in the estate, to take the share that would have devolved to their mothers, by dint of section 41, and have not waived or renounced their interest in the estate. consequently, the proviso to section 71(2) of the Act and Rule 40(4) have not been complied with.

23. The matter of the purchaser is fairly straightforward. There is common ground that the deceased had sold part of his land to Solomon Muisinya, who has also since died. Technically, the administratrix ought to have applied for excision of what was sold to him, before proposing distribution of the estate. Solomon Musinya is a not a member of the family of the deceased. He cannot possibly be a survivor of the deceased. He is a creditor or a liability. What was due to him from the deceased ought to be dealt with before distribution is proposed, because what should be placed before the court at confirmation, for distribution, is the net intestate estate. See sections 3, 71 and 83(f)(g) of the Law of Succession Act.

24. I have been old that practically each of the late sons of the deceased sold portions of what was due to them as inheritance. I note that the administratrix has wisely avoided proposing distribution to those alleged purchasers. I say wisely because of several reasons. Firstly, at the time of the alleged sales the late sons of the deceased did not have capacity to sell the land. For one, it was not registered in their names. Two, they were not the administrators of the estate of the deceased. Three, the property had not yet been vested in them after confirmation of a grant of representation to the estate of their father. Secondly, there is no evidence that the deceased had done any *inter vivos* distribution of his estate to the sons. If that had been done, then these succession proceedings would not have been initiated. If there had been any *inter vivos* distribution, the deceased would have had obtained consent of the relevant Land Control Board to subdivide and transfer the land to the sons, yet no evidence of any such consents and transfers was placed before me. So, there cannot have been any form of *inter vivos* transfers

or distribution of the estate. The estate is available for distribution, for that is the mandate of the probate court, to distribute the property, not to sanction *inter vivos* distributions. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J), and *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J).

25. The administratrix appears to have an issue with a granddaughter of the deceased filing papers in this cause, and asserts that as a daughter-in-law of the deceased she has a greater standing in the matter than that the granddaughter. With respect, this is a misconception. I have alluded to the matter above, where I have said that daughters-in-law have no legal standing with respect to estates of their parents-in-law, unless they first obtain representation to the estates of their late husband/sons of the deceased, so that they approach the court, not as daughters-in-law, but administrators of the estates of their late husbands. Daughters-in-law do not rank anywhere in Part V of the Law of Succession Act as survivors or heirs of their deceased parents-in-law. The reference in sections 35, 36, 37 and 40 to widows is limited to widows of the deceased, and does not extend to widows of sons of the deceased. widows of a deceased have a prior right to a share of the estate of their deceased husband, over everybody else, but that does not include any widows of a son of the deceased. The widow of a dead son of the deceased is not within the category of survivors envisaged in Part V, and, therefore, she has no claim whatsoever to the estate of her parent-in-law, except where she has obtained representation to the estate of her own late husband, and she claims the share that accrues to such estate. Granddaughters are survivors of their dead grandparent. It must be made clear, that granddaughters have no direct claim to such an estate, so long as their own parents, the children of the deceased, are alive. They only access the estate directly where their own parents, the children of the deceased, are dead, by virtue of section 41 of the Law of Succession Act. In this case, the protestor, as a granddaughter of the deceased, whose own parent, the son of the deceased, is also dead, has a direct access to the estate of the deceased. She is a survivor of the deceased, while the administratrix is not. The definition of a survivor of the deceased is to be gathered from Part V, that is to say from sections 35, 36, 37, 38, 39, 40, 41 and 42 of the Law of Succession Act. The protestor, therefore, has a valid claim to the estate herein, but the administratrix does not. The administratrix would only have a claim to the estate if she holds a grant of representation to the estate of her own late husband, who is also the father of the protestor. Without such grant she has no claim whatsoever over the estate herein. If she does hold such a grant, then she would have a greater claim to the estate over the protestor, on the basis that she would be wearing the shoes of a child of the deceased as against the protestor, who is a grandchild, and a grandchild ought not claim, where her own parent is claiming and is entitled to direct access. There is no evidence that the administratrix ever obtained representation to the estate of her late husband, so she cannot claim to have any superior right over her late father-in-law's estate as against the protestor.

26. Of course, related to that is the whole question as to whether the administratrix was properly appointed as such, that is as a personal representative of the intestate herein. Section 66 sets out the guide on who qualifies and has priority on appointment as administrator in intestacy. That list of preference is dependent on Part V of the Law of Succession Act. I have stated above that daughters-in-law do not feature in Part V, consequently, they also do not feature in section 66. They have no prior right or entitlement to administration in intestacy of the estate of their parents-in-law, over the biological children and grandchildren of the said parents-in-law. They would only be entitled if they obtained representation to the estates of their own husbands, and, in addition, if they have complied with Rules 7(7) and 26 of the Probate and Administration Rules, by obtaining the consents of those with prior right, or gotten to waive their right to administration, or to file an affidavit to explain the circumstances under which they have applied for representation their lack of qualification notwithstanding. I have perused the file herein, and noted that the administratrix was not qualified under section 66 to apply for administration in the first place, she had not obtained representation to her late husband's estate before she sought that of her father-in-law, and she did not comply with Rules 7(7) and 26. Under section 71(2)(a), one of the things to be confirmed is the administrator, whether he or she was properly appointed, and clearly, in this case, the administratrix was not so properly appointed. However, since the proviso to section 71(2) and Rule 40(4) have not been complied with, I shall pend the issue as to whether the administratrix ought to be confirmed at all as administratrix, to await the said compliance.

27. For avoidance of doubt, section 66 and Rules 7(7) and 26 of the Probate and Administration Rules state as follows:

> *"66. 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—*
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> *(a) surviving spouse or spouses, with or without association of other beneficiaries;*
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> *(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
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> *(c) the Public Trustee; and*
>
> *(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect."*
>
> *"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 every person having a prior preference to a grant by virtue of that section has –*
>
> *(a) renounced his right generally to apply for 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 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 every 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 in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

28. Compliance with the Act and Rules 40 and 41 of the Probate and Administration Rules, specifically with what ought to be addressed in an application for confirmation of grant, was underlined, in *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)* Kakamega HCSC No. 249 of 1992 (unreported) (Waweru J), where the court said:

"What is immediately obvious is that the court (Hon. Tanui J.) did not enquire into or satisfy himself as to the persons beneficially entitled and their respective shares to the estate of the Deceased as required by the proviso to subsection (2A) of section 71 of the Law of Succession Act, Cap 160 before making the order for confirmation of the grant. The proviso is in mandatory terms, and from its wording, failure of the court to so satisfy itself, in my judgment, renders the order of confirmation (and the resulting confirmed grant) illegal. Contrary to what might be thought, confirmation of grant in intestate succession is a not a mere formality. It is probably the most important aspect of intestate succession, as it is at that stage that the court determines who are beneficially entitled to the estate of the deceased and their respective shares therein. In this station and in my previous station (Kisii) I have come across hundreds of disputes which would have been avoided if the court concerned had performed its statutory duty. The present dispute is one such."

29. I would emphasize on the need to comply with the statutory requirements. The law has set out what ought to be disclosed or addressed in these applications. The parties ought to comply to the letter with those requirements. The disclosure required is intended to serve a purpose, and the failure to do what is necessary means that the matter is not resolved with finality. Let the parties do the right thing. Let them give the matter the seriousness it deserves. Let confirmation applications not be filed for the sake of it. Let the parties ensure that the time is ripe for mounting such an application, after they have satisfied themselves that they have done all what is required of them before filing the same. They must make sure that the application satisfies all the requirements of the law, most of which are mandatory. The provisions are not for decorative value, they are for compliance, and compliance is a must. The court is not to confirm a grant merely because one has been filed and placed before it, the same must satisfy everything that the law requires to be satisfied.

30. I believe I have said enough to demonstrate that the application for confirmation of grant that has been placed before me for consideration is premature. The orders that I shall make are as follows:

a) That much as I am inclined to strike out the said application, dated 19th August 2019, instead, I shall postpone it, and require the administratrix to take certain steps to bring the application within compliance with the proviso to section 71(2) and Rule 40(4);

b) That the administratrix shall file a further affidavit in which she shall do the following:

(i) Disclose all the children of the deceased herein, whether alive or dead, male or female, married or single,

(ii) For any of the sons or daughters of the deceased who might have since died, she shall disclose all their children, whether male or female, married or single, and

(iii) All the assets of the deceased, including any that he might have gifted and transferred to any of his children during his lifetime, supported by relevant documentation;

c) That the matter shall be mentioned thereafter, after 45 days, for compliance, on a date to be given at the registry on priority; and

d) That the grant herein shall be considered for confirmation only after the administratrix has fully complied with the directions in (b) above.

31. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER 2021

W. MUSYOKA

JUDGE