



REPUBLIC OF KENYA



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In re Estate of Maritim arap Lelei Job (Deceased) (Succession Cause 451 of 2013) [2022] KEHC 11924 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 451 OF 2013**

WM MUSYOKA, J

MAY 13, 2022

JUDGMENT

1. This cause relates to the estate of Maritim arap Lelei Job, who died on July 13, 2011. A letter from the Chief of Mautuma Location, dated May 3, 2013, discloses that the deceased was survived by a widow, Ester Jeleti Maritim, and a son, John Kipserem Maritim. There is a list of ten individuals, who are described as buyers, being Abraham Macho, Francis Luyali Akala, Adriano Mutsotso, Charles Musuka, Sebentsia Malenya, Kwova Muluta Mbakaya, Daudi Otieno Nyanje, Peter Waswa Wakhisi, Rose Wekesa and Kefa Angasha. The deceased is said to have died possessed of Kakamega/Mautuma/2220, 2221 and 2222, which had originated from Kakamega/Mautuma/498.
2. Representation to the estate of the deceased was sought by John Kipserem Maritim and Johnah Kipkemboi Tarus, in their purported capacities as sons of the deceased, in a petition filed herein on June 28, 2013. They listed Ester Jeleti Maritim, as widow, and John Kipserem Maritim, as a son. Jonah Kipkemboi Tarus, Samuel Maritim Miselei, Daniel Kiprono Tarus, Simon Kiptoo Meto, Eliud Kimtai Kogo, Viola Chemteli Mutai and Monica Chepkur Maritim are also listed as survivors, but the nature of their relationship with the deceased is not disclosed. Kakamega/Mautuma/2220, 2221 and 2222 are listed as the assets of the estate. Charles Musuka, Sebentsia Malenya, Kwova Muluta Mbakaya, Daudi Otieno Nyanje, Peter Waswa Wakhisi, Tose Wekesa, Kefa Angasha, Abraham Macho, Francis Luyali Akala and Adriano Mutsotso are listed as liabilities.
3. To that petition, an objection was raised by Jonah Kipkemboi Tarusi and Ester Jeleti Maritim, dated November 26, 2013, on grounds that the widow had a prior right to administration over the son. Another objection had been filed earlier by Jonah Kipkemboi Tarusi, on August 22, 2013, of even date. Notice was given to Jonah Kipkemboi Tarusi, dated April 10, 2014, to file an answer to the petition, an affidavit, and a petition by way of cross application. John Kipserem Maritim and the Advocate for Ester Juleti Maritim filed a consent herein on April 8, 2014, dated, November 26, 2013, agreeing that the grant of representation be made to Ester Jueleti Maritim. That consent was adopted by the Deputy Registrar, by an order executed on April 28, 2014. However, when the matter was placed before the Judge on July 3, 2014, a consent was recorded that the grant be made to John Kipserem Maritim, and that the administrator proceed to file a summons for confirmation of grant, which he was serve upon



- the objectors. That consent had been preceded by a notice to withdraw the objection, filed on July 1, 2014, of even date. A grant was made in those terms on July 15, 2014.
4. Jonah Kipkemboi Tarusi then filed a summons, on April 22, 2015, dated April 10, 2015, seeking revocation of the grant made on July 15, 2014, or, in alternative, the inclusion of his name as a co-administrator. His complaint was that he had been a co-petitioner with the administrator, but the grant was made to the administrator alone. Secondly, that the administrator had failed to apply for confirmation of his grant despite being directed to do so by the court on July 3, 2014. It would appear that that prompted the administrator to file his application for confirmation of grant, dated May 7, 2015. He identified the assets available for distribution as Kakamega/Mautuma/2220, 2221 and 2222. He also identified the persons entitled and their shares as John Kipserem Maritim 12.35 acres, Jonah Kipkemboi Tarusi 7.6 acres, Samuel Ngurisei Maritim 2.0 acres, William Kipruto Serem 0.5 acre, nelson Kiptoo Maritim 0.5 acre, Nicholas Kemboi 0.5 acre, Kwova Muluta Mbakaya 1.0 acre, Charles Vani Indasi 0.25 acre and Rossy Jaheda Lubanga 1.0 acre. He attached, to his application, a consent on distribution duly signed by the said individuals. Once again, Jonah Kipkemboi Tarusi withdrew his application, dated 10th April 2015, by a notice dated May 4, 2015. The application for confirmation of grant was placed before the Judge on 24th September 2015, the grant was confirmed as prayed, and an order was made confirming the withdrawal of the summons for revocation of grant, dated April 10, 2015.
 5. Shortly thereafter, another summons for revocation of grant, dated December 17, 2015, was filed, on December 7, 2015, by Abraham Macho and Daudi Otieno Nyanje. They averred to be beneficiaries of the estate, having entered into sale transactions in 1996 and 1998 with the deceased, for disposal of Kakamega/Mautuma/2220. They averred that their interest in the matter was not disclosed.
 6. The application dated December 17, 2015, was heard on October 3, 2016, when oral evidence was taken from the applicants, Abraham Macho and Daudi Otieno Nyanje. When the matter came up for further hearing on November 15, 2016, the administrator indicated to the court that he wished to give the applicants and all other buyers their share of the land, and he was directed to file an affidavit and a schedule showing distribution. The administrator filed an affidavit on distribution, sworn on November 14, 2016, in which he proposed distribution of Kakamega/Mautuma/2220 to a total of twenty-eight individuals. The twenty eight individuals were Daudi Otieno Nyanje, Abraham Wanjala Macho, Peter Waswa Wakhishi, Jesca Mmbone, Alex Sudi Obonyo, Albert Wafula, Rose Nasimiyu Wekesa, Kefa Adafi Angasha, John Babu, Andreano Mutsotso, Nicolas Lukati Asibwa, Timothy Lumumba Akivaga, Ezekiel Nditi, Joseph Karani Khanyanyitsa, John Ngacha Zacharia, David Kimande Kivisha, Sebentisia Malenya, Iddi Musa, Julius Lwangu Mbaya, Enos Kilongo Burali, Teresa Muhala Abukuse, Rodgers Mukwei Wekunda, Fronica Nafuna Ezekiel, Charles Fan Indasi, Alice Ombima, Wycliffe Onyino Okutoi, Zamzam Anzete and Rose Jahenda Lubanga. He identified himself as the sole survivor of the deceased. He proposed that the property be shared out exclusively amongst the buyers to the total exclusion of any of the children. He stated that there were proceedings before the Eldoret High Court in Eldoret HCSC No. 90 of 1996, in the estate of Francis Luyali Akala, where the subject land had been exchanged with another. That schedule was placed before the Judge on 15th November 2016, and was approved, and the grant was confirmed, for the estate to be distributed as per that schedule. A certificate of confirmation of grant in those terms was issued, dated December 24, 2016. That was curious, given that the grant had previously been confirmed on September 24, 2015, and the distribution proposed in the application dated April 10, 2019, was not set aside, or varied. That would mean that there would two sets of orders on confirmation of the grant.
 7. The orders of November 15, 2016, immediately provoked the filing of a summons for revocation of grant dated November 29, 2016. It was at the instance of Jonah Kipkemboi Tarus, Nicholas Kemboi,



Nelson Kiptoo and Samwel Ngusirei. They sought to be included in the cause as beneficiaries. They complained that they were family members and had been left out. The affidavit in support is sworn by Jonah Kipkemboi Tarus. He avers that the grant had been confirmed on September 24, 2015, and a certificate of confirmation was to be generated out of the orders of September 24, 2015, but the file went missing. Thereafter, another revocation application was filed, which culminated in the grant being confirmed for a second time, on November 15, 2016, in proceedings that left them out. He asserts that the administrator cannot be trusted at all. He would like the orders of November 15, 2016 reversed.

8. There is a replying affidavit that the administrator swore on July 16, 2018. He averred that some of the family members were meant to benefit from Uasin Gishu/Ndalat Settlement Scheme/454, which had allegedly been exchanged with Francis Akala Luyali, as he had been given a share of the Mautuma land. He avers that the alleged exchange arrangement with Francis Akala Luyali did not materialize, as his family opposed the idea. He proposes that the land that the land, which he does not identify, be shared out between Jonah Kipkemboi Tarus, Nancy Jemutai, Sarah Maritim, Jackson Kisorio, Samuel Ngisirei, Daudi Otieno Nyanje, Abraham Wanjala Macho, Peter Waswa Wakhisi, Jesca Mmbone, Albert Wafula, Rose Nasimiyu Wekesa, Kefa Adafi Angasha, Fronica Nafuna Ezekiel, Charles Fan Indasi, Alice Ombima, Wycliffe Onyino Okutoi, Zamzam Anzete, Rose Jahenda Lubanga, John Babu, Alex Sudi Obonyo and John Maritim.
9. Yet another replying affidavit, described as further, was sworn by administrator on August 17, 2020, saying the same things as those stated in the affidavit of July 16, 2018, save that it adds the names Belinda Jekkosgei and Henry Kiplimo Rotich to the list of the persons that he proposes should get a share in the estate.
10. Another affidavit was lodged in the registry, on an unknown date, by Abraham Wanjala Macho and David Otieno Nyanje, sworn on January 4, 2021. They aver that the deceased sold them a portion of the land, and they were given authority to move in and develop the land, by the deceased before he died, and that they had lived on the land peacefully as they awaited partitioning of the land. They aver that the Francis Luyali, Adriano Mutsotso and Sebentsia Malenya had exchanged their 7½ acres with the Jonah Kemboi Tarus and the administrator, with Uasin Gishu/Ndalat Settlement Scheme/454, where they settled and lived in peace, away from Kakamega/Mautuma/2220, which had been given to them by their father during the electoral clashes of 1992. They assert that the court should allow them to go ahead and partition the property amongst the twenty eight individuals as per the orders of December 14, 2016. They assert that they are opposed to a new mode of distribution of Kakamega/Mautuma/2220. They state that the administrator and his brother Jonah Kipkemboi Tarus appear to have personal issues, which they feel should not be transferred to them.
11. The said application was disposed of by way of viva voce evidence. That oral hearing happened on July 13, 2021. Jonah Kipkemboi Tarusi, the applicant, was the first on the witness box. He stated that the deceased had two wives, being Bot Kiptalai Lelei and Ester Jebet Lelei, both of who have since died. But Kiptalai had only one child, Moses Bechibei arap Maritim; while Ester Jebet Lelei had seven children being, John Kipserem, Lea Chelel, Sarah Jeruto, Samuel Maritim, Jonah Tarusi, Norah and Daniel Tarus. Moses Bechibei arap Maritim subsequently died, and was survived by a widow and children. Daniel Tarus and Norah had also passed on. The deceased died possessed of Kakamega/Mautuma/498, which measured 27 ½ acres. He explained that during the post-election violence clashes of 1992, the family of Akala Lutili, led by Francis Luyali Akala, met the deceased and they agreed to give him Uasin Gishu/Ndalat Scheme/454, which measured 12 acres, in exchange for 12 acres out of Kakamega/Mautuma/498. The said Akala Lutili passed on, and was buried on Kakamega/Mautuma/498. He was survived by five families, being Adrian Mutsotso, Sebentisia Kisiti, Malenya



Akala, Atonatos Musiomi, Francis Luyali Akala and Charles Musanga. He stated that the five families of Akala Lusiti ought to be given their 12 acres. He further stated that while alive, the deceased had sold some land to six individuals, being Rosemary Nasimiyu Wekesa ½ acre, Rose Chahenda Lubanga 1 acre, Charles Fani 0.25 acre, Fronica Nafula Ezekiel 0.25 acre, Wycliffe Onyino 0.5 acre and Jona Kipkemboi Tarus 0.5 acre. He stated further that after he exchanged the 12 acres and sold 3 acres, the deceased shared out the rest to his children as follows: Moses 3 acres, John Kipserem 3 acres, Samuel 3 acres, Jonah 3 acres and Daniel 1 acre. Some of the children subsequently sold the land given to them by the deceased. Moses sold 2 acres to John Kipserem, Jonah Kipkemboi sold an undisclosed acreage to the children of Maritim Lelei. Samuel Maritim sold 2.5 acres to David Inyanje Otieno, Daniel Tarus sold 0.75 acres to Kefa Andafi Angache. The Akala children also sold portions of their 12 acres to Stephen Ngureti 1 acre, African Divine Church 0.15 acre, Godfrey Juma Masinde 0.3 acre, Boniface Rumbu Munyasa 1.25 acre, Evans Kwayumbi Mbelesia 0.1 acre, Jackson Kavumba Kidusu 0.3 acre, Hudson Chimoto Matuga 0.3 acre, Deling Ndeva Chiruka 0.75 acre, Isaac Akala 0.25 acre, Everlyne Wafula 1 acre, Wycliffe Wanyonyi, 0.5 acre, John Babu 0.25 acre, Adriano Mutsotso, 0.45 acre, Nicholas Lukati Asibwa 1 acre, Timothy Luwambu Akivaga 0.3 acre, Ezekiel Nditi 0.15 acre, Joseph Karani Khanyingiba 0.1 acre, John Ngache Zacharia 0.25 acre, David Kimanda Kwisha 0.25 acre, Mohamed Murunga 0.6 acre, Iddi Musa 0.5 acre, Julius Lwangu Mbaya 0.25 acre, Enos Kilongi Burali 0.1 acre, Teresa Muhila Abukuse 0.25 acre, Rodgers Mukureli Werunga 0.8 acre and Alice Ombima 0.5 acre. He stated that after the family of the deceased moved out, following the exchange, and after the sales, there remained a portion, which he proposed ought to be shared out amongst the children. He testified that Kakamega/Mautuma/498 was subdivided into Kakamega/Mautuma/ Kakamega/Mautuma/2220, 2221, 2222 and 2223, after the family of the deceased moved out. He proposed that the four sub-parcels be collapsed, so that the original title, that is to say Kakamega/Mautuma/498, is what would be distributed. He stated that the Akala family should get their share out of Kakamega/Mautuma/498. He said that they got their share out of the Ndalat Scheme land.

12. During cross-examination by Abraham Wanjala Macho, he stated that Abraham had moved into Kakamega/Mautuma/498, after January 2021, asserting that he was not in occupation of the land before the deceased died. He challenged him to produce sale of land agreements executed between him and the deceased. During cross-examination by the administrator, he prevaricated on whether there was any agreement relating to the exchange of the 12 acres between the deceased and the Akala family, but he appeared to state in the end that there was no such written agreement. He eventually said that it was him who entered into that exchange arrangement on March 15, 2016. He stated that Kakamega/Mautuma/2223 was sold. When shown mutations relating to Kakamega/Mautuma/498, dated 25th February 1999, he stated that he was unaware of those mutations. He said that Daniel Kiprono had been given land by the deceased, and there was no way they could stop the deceased from doing so. He stated that he had not signed any sale agreement disposing of any land. When shown one dated August 10, 1996, he denied signing it, but he conceded to signing one dated September 3, 1999. He said that in the succession process, that the administrator carried out, some of the survivors of the deceased were left out. He mentioned Moses Maritim and his family as an example. During cross-examination by Henry Rotich, a son of Moses Kiprotich, he stated that the name of Moses Kiprotich did not appear in the list because he had sold his share.
13. At re-examination, the applicant stated that the exchange of 12 acres was done verbally, but after both sides moved out and settled on the exchanged lands, they entered into a written agreement, which he described as a recitation of the verbal agreement. He said that after the 12 acres, there remained 7.5 acres, which they also exchanged with the Akalas, in their agreement of 2016.
14. Samuel Maritim Ngesirey followed. He was also a child of the deceased. He supported the position taken in the matter by Jonah Kipkemboi Tarus, and objected to what John Kipserem had done. When



cross-examined by Abraham Wanjala Macho, he stated that the latter had not entered into any sale agreement with the deceased, and that he had forced himself into the land. When cross-examined by John Kipserem, he stated that he was involved in all the sales of land, and had signed all the sale agreements.

15. Abraham Wanjala Macho testified next. He had been a former Chief of the area. He testified that he was the one who supervised the exchange of land between the deceased and the Akala family, before the deceased moved his family to Uasin Gishu. He stated that a rocky patch of land had remained, measuring six acres, which he bought from the deceased. He said he had the sale agreements. He stated that he did not force himself into the land. He said he put up a house on the land, and bought an additional acre from an adjoining piece of land. He invited the court to validate the transaction between him and the deceased. He said he bought his piece out of Kakamega/Mautuma/498, before it was subdivided into Kakamega/Mautuma/2220, 2221, 2222 and 2223. He stated that the widow of the deceased conducted succession to the estate of the deceased, and he got his title, but thereafter the sons of the deceased came into the picture and caused trouble. He stated that the lands office held title deeds for twenty-eight individuals. He stated that those who got land at Uasin Gishu, after the exchange, should go there in peace. During cross-examination, he stated that he entered into the sale agreement through his wife, in 1996. He stated that he had agreed with the proposal by the administrator.
16. The administrator followed. He stated that the dispute was only on Kakamega/Mautuma/2220, and that there were no issues with Kakamega/Mautuma/2221, 2222 and 2223. He asserted that the three belonged to other people, who had bought them. He stated that Kakamega/Mautuma/2221 was registered in his name, and measured 0.08 hectare or two acres. Kakamega/Mautuma/2222 was also registered in his name, and measured in 0.02 hectare. The deceased had eight children, being five boys and three daughters. He testified that before the widow of the deceased died, she had said that 1.05 acres Kericho were meant for the daughters of the deceased. He stated that the sons were in Kakamega/Mautuma/2220. He stated that Jona Kipkemboi had 2.8 acres, and sold 2.5 acres, and was left with 0.3 acres. Musa had 2.3 acres, which he divided amongst his children. Daniel had 2.5 acres, and sold part of it, leaving him with 0.3 acres. He said that he, himself, had 2.5 acres. He said that he, the administrator, also had Kakamega/Mautuma/2221, which was 2 acres and Kakamega/Mautuma/2223 which had 3 acres. He said that he had bought 5 acres and inherited 2.5 acres. He asserted that the other sons were given their shares, which they sold. He asserted that if the sons wanted title deeds they would have gotten them, adding that it was now that the sons were seeking to get their title deeds. He stated that Kakamega/Mautuma/ Kakamega/Mautuma/2220 belonged to the deceased, and that was where his siblings should have been seeking shares. He said Kakamega/Mautuma/2220 was 21 acres. He asserted that Kakamega/Mautuma/2221 and 2223. .
17. At the close of the oral hearing, the parties indicated that they would file written submissions. Only one set of written submissions was filed, by Jonah Kipkemboi and those who supported him. It is submitted that the administrator had not disclosed all the survivors of the deceased. Similarly, it the administrator did not disclose all the assets of the estate. It is further submitted that the deceased had exchanged part of the estate land with the family of Akala, which then denied that family its share of the estate. It is further submitted that the administrator had also not disclosed that he had benefited from the estate of the late Akala Liliti Mukhasi, which the court would have taken into account. It is also submitted that the administrator gave himself the largest share of the estate, and he left out the daughters of the deceased. It is asserted that the distribution by the administrator would result in the disinheritance of a large section of the family. It is also submitted that the subdivisions proposed were not done by a surveyor, and overlapped with each other on the ground, creating boundary disputes amongst the beneficiaries. It is submitted that the subdivision of Kakamega/Mautuma/498 should be



cancelled, and the land reverted to the original title in the name of the deceased. The court is invited to adopt the mode of distribution proposed by the applicant and his supporters.

18. The application for determination is premised on section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The said provision states as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

19. Under section 76, a court may revoke a grant so long as the case is brought within the grounds listed above, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. In the first place, it would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation were not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator thereafter got into problems with the exercise of administration, such as where



he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, unqualified to hold any office of trust.

20. In the instant case, the applicant anchors his case on the first general ground, that there were issues with the manner the grant was obtained. He has raised arguments about the process of obtaining the grant having had challenges. He states that the administrator had not disclosed all the survivors of the deceased and beneficiaries of the estate. It is also stated that the administrator left out some assets of the estate, and did not disclose that he benefitted from a share due to the estate of the deceased herein from the estate of the late Akala Liliti Mukhasi.
21. 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) ...”

22. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased, and any grandchild of the deceased whose own parent is dead. The provision is in mandatory terms.
23. In the petition filed herein, the administrator disclosed the widow of the deceased and himself as son. He has then listed seven individuals, without disclosing how they were related to the deceased. These are Jonah Kipkemboi Tarus, Samuel Maritim Miselei, Daniel Kiprono Tarus, Simon Kiptoo Meto, Eliud Kimtai Kogo, Viola Chemteli Mutai and Monica Chepkur Maritim. In the consent to the petition filed simultaneously with the petition, the said individuals are listed as sons and daughters



of the deceased. Curiously the letter from the Chief of Mautuma Location, dated 3rd May 2013, filed simultaneously with the petition did not list the seven individuals, but listed only the widow and the administrator, described as first son, and then ten individuals identified as buyers. At the oral hearing, it was disclosed that the deceased had been a polygamist, having married two wives. The first wife was said to have had only one child, Moses Bechibei arap Maritim. Moses subsequently died and was survived by a widow and children. The said Moses was not listed in the petition, nor in the Chief's letter, and neither were his widows or his children. From this narrative, it should be clear that the disclosure of the actual survivors of the deceased was not properly handled.

24. As I stated above, the grant herein has been confirmed twice. The first confirmation orders were made on September 24, 2015, based on an application dated May 7, 2015. A certificate of confirmation of grant was processed. What is of interest for the purpose of these proceedings is the fact that the persons who survived the deceased are not disclosed. There is a proposed allocation to individuals, whose relationship with the deceased is not disclosed. Of the nine individuals listed in the petition as widow, sons and daughters of the deceased, only three have been allocated shares, being John, Jonah and Samuel. It is not explained why the rest were left out, yet they have not filed any consents on distribution of the estate waiving their entitlement to a share in the estate. There are allocations to persons identified as William, Nelson, Nicholas, Kwova, Charles and Rosy. Some of them were listed in the petition as buyers or liabilities, some were not. Some of those listed in the petition are not in the list in the confirmation application, and no explanations are given as to why they were left out. What is critical at this stage is that a large number of the children of the deceased were left out of the distribution, and no explanations were offered. While the confirmation orders of September 24, 2015 were still substituting, another round of confirmation orders were made on 14th November 2016, without first of all setting aside the orders of September 24, 2015. That then means that there are two sets of orders on distribution of the estate in force. One set made on September 24, 2015 and another on November 14, 2016. No express orders were made on November 14, 2016 setting aside the orders of September 24, 2015, and no orders were made at any time vacating the orders of 24th September 2015. It could be presumed that the latter orders set aside the earlier orders, but that is not how court orders are dealt with. Courts act on basis of certainty, so that when fresh orders have to be made, where other orders were already in force relating to the same matter, then the neat and tidy way round it would be to set aside the earlier orders, to make room for the subsequent orders. As it is, the grant herein has been confirmed twice, on September 24, 2015 and November 14, 2016. The orders of September 24, 2015 are not specific on which land was distributed, as between Kakamega/Mautuma/2220, 2221, 2222 and 2223, for paragraph 6 of the relevant affidavit of 7th May 2015 merely sets out the acreages distributed between nine individuals, without indicating which of the four parcels of land was being distributed. The distribution of 14th November 2016 was of Kakamega/Mautuma/2220, to a total of twenty-eight individuals. Out of that list of twenty-eight, none of the children of the deceased benefit, and none of them have filed consents to waive or renounce their shares. Secondly, there is no narrative of who the additional beneficiaries are, and no explanation, supported by documents, of the nature of their beneficial interest.
25. The fact that the children of the deceased are all not provided for in both distributions, and no explanations are given for their exclusion, and the fact that their exclusion is not supported by any documents, showing that they had renounced or waived their interest, would mean that the administrator did not comply with the proviso to section 71(2)(d) of the Law of Succession and Rule 40(4) of the Probate and Administration Rules, which require the administrator to satisfy the court that he had properly ascertained the persons beneficially entitled to a share in the estate and their respective shares. Such persons include the survivors identified in Part V of the Law of Succession Act, that is to say widows or widowers, children, parents, siblings and grandchildren of the deceased, among



others. These would be the immediate survivors of the deceased, and they would have priority over anyone else. The administrator has a duty to ascertain how many spouses or children or siblings or grandchildren survived the deceased, and after ascertaining individuals and placing their names before the court, indicate how each one of them should get a share in the estate. Where anyone of them is left out or omitted from distribution, then there should be explanations, supported by documents, where possible. Such could be where the survivors benefited from lifetime gifts from the deceased, or where they are not interested in a share and have documents saying so. Just leaving out surviving members of the family of the deceased from benefit, in favour of buyers, will not do. There must be explanations, supported by evidence, where surviving immediate family members of the deceased have to be excluded from benefit.

26. The same principle would apply to buyers of estate assets or purchasers or liabilities. Such persons are not, strictly speaking, survivors of the deceased. If they bought property from the deceased, during his lifetime, they would acquire a beneficial interest in the estate, should the deceased die before transferring their interest to them. The court should allocate such individuals shares in the estate where proof is provided that such persons bought the assets from the deceased. The assets belong to the deceased, and the documents presented should show transactions with the deceased, and not with the spouse or child of the deceased, unless there was a power of attorney. Proof of such transactions would be by way of copies of sale agreements; documents relating to obtaining consents of the land control board; transfer papers, signed by the deceased, that had not been lodged at the lands registry as at the date of the deceased's death; among others. It is not enough to list individuals in the petition or confirmation application, and describe them as buyers or purchasers or liabilities, without attaching supporting documents, showing the beneficial interests in question. The estate of an intestate should not be devolved to outsiders or non-family claimants, who have provided no proof of their interest, and in proceedings where the immediate surviving family members are left out or whose opinion on the distribution is not sought.
27. There is the question of assets not disclosed. The deceased died on July 13, 2011. The petition lists three assets, being Kakamega/Mautuma/2220, 2221 and 2222. I was told that the original title was Kakamega/Mautuma/498, which was subsequently subdivided into Kakamega/Mautuma/2220, 2221, 2222 and 2223. It was not disclosed to me when these subdivisions were done, but I have seen a copy of a certificate of official search for Kakamega/Mautuma/2221, dated 28th June 2013, showing that the same was registered in the name of the deceased on May 11, 1999, and was still in his name as at June 28, 2013. Another search certificate on Kakamega/Mautuma/2220, whose date is unclear, shows that on 30th December 2016 the property was transferred to Daudi Otieno Nyanje – 2.9 acres, Abraham Wanjala Macho – 1¾ acres, Peter Wabwa Wakhisi – 3 acres, Jesca Mmbone - 0.25 acres, Rose Nasimiyu Wekesa – 1 acre, Kefa Adafi Angasha ¾ acres and 20 others. It would appear that these transfers followed the confirmation orders of November 15, 2016. Curiously, there is an application, dated January 3, 2017, seeking transfer of Kakamega/Mautuma/2220 to the twenty-eight individuals as per the orders of November 15, 2016. There is a letter of consent from the Lugari Land Control Board, dated 3rd January 2017, allowing the same. One would wonder how the property was transferred to the twenty-eight on December 30, 2016, if the consent to subdivide the property and transfer it to those persons was granted on January 3, 2017. I have scrupulously perused through the record before me, and I have not seen search certificates on Kakamega/Mautuma/2221, 2222 and 2223. I have no information, therefore, on whether the same are in the names of the deceased or not, and whether they would be available for distribution.
28. One thing that has emerged is that during the politically instigated clashes of 1992, the deceased entered into an arrangement to exchange his land, said to be a portion of Kakamega/Mautuma/498, with land situate at Uasin Gishu belonging to the Akala family. It would appear that that was done



prior to the creation of Kakamega/Mautuma/2220, 2221, 2222 and 2223, possibly in 1999, out of Kakamega/Mautuma/498. The parties made no effort to show to me when Kakamega/Mautuma/498 was subdivided and ceased to exist, to whom the sub-divisions, Kakamega/Mautuma/2220, 2221, 2222 and 2223, were transferred. That was critical, so as to disclose whether the subdivisions were all in the name of the deceased, or whether they were transferred to other persons. The exchange was said to have been with a property known as Uasin Gishu/Ndalat Scheme/454 belonging to the Akala family. No documents were placed before me, to demonstrate that that property existed, and was registered in the name of the late Akala at the time of the alleged exchange, and whether, upon the exchange, it was transferred to the deceased. The administrator is accused of having benefitted from a share of the estate of the late Akala, in proceedings in Eldoret HCSC No. 90 of 1996. No court papers relating to Eldoret HCSC No. 90 of 1996 were placed before me, and I have no way of establishing whether the administrator got a share of Uasin Gishu/Ndalat Scheme/454 that was due to the estate from the estate of the late Akala. If there was an exchange agreement, but the twelve acres were not transferred to the deceased before his death, his estate was entitled to it, and if the administrator got it from Eldoret HCSC No. 90 of 1996, then the property, that is to say Uasin Gishu/Ndalat Scheme/454, should have been placed before this court for distribution. The deceased's share in Uasin Gishu/Ndalat Scheme/454 forms part of the estate, and the administrator should have disclosed it, and distributed it. If it was distributed prior to the death of the deceased, then the administrator should have led evidence on that distribution, to assist the court decide on a fair distribution of the Kakamega property, as required by section 42 of the *Law of Succession Act*.

29. Apart from Uasin Gishu/Ndalat Scheme/454 and the Lugari lands, the administrator alluded to a property owned by the deceased in Kericho, and which he claimed the widow had said the deceased wished that the same be given to the daughters. He did not give details of that property. If such a property exists, it would form a part of the estate of the deceased, and should have been disclosed in these proceedings, and proposed for distribution to the daughters. A copy of the title document or a certificate of official search ought to have been placed on record.
30. Let me conclude this discussion by underlining the importance of the confirmation process and the duty of the court with respect to it. I can do no better than refer to In the Matter of the Estate of Ephraim Brian Kawai (Deceased) Kakamega HCSC No. 249 of 1992 ((Waweru J), where the court asserted that the requirements of the proviso to section 71(2) of the *Law of Succession Act* are in mandatory terms, and that failure by the court to satisfy itself, that the persons beneficially entitled to a share in the estate and their shares had been properly ascertained by the administrators applying for confirmation, renders any orders made on the confirmation of the grant, and the resulting certificate of confirmation of grant, illegal. The court stated that the confirmation process in intestacy is not a mere formality, where a grant is simply confirmed because the six months timeline stated in the law has expired, rather it is the most important aspect of intestate succession. It was observed that most of the disputes in succession proceedings would be avoided where the court properly handles the confirmation process. (See also In the Matter of the Estate of Benjamin Ng'ono Mbatia alias Ng'ono Mbatia (Deceased) Kakamega HCSC No. 77 of 2014 (Musyoka J) and In the Matter of Mutialo Silwale (Deceased) Kakamega HCSC No. 258B of 2011 (Musyoka J).
31. What the court ought to be satisfied about, which places a corresponding duty on the administrator to place material before the court so as to satisfy it, is as to whether all the persons who are beneficially entitled to a share in the estate have been ascertained, and that the shares due to them have also been ascertained. Persons beneficially entitled, in the context of intestate succession, refers to two categories. The first is that of the immediate surviving members of the family of the deceased, often referred to as survivors. These are set out in sections 35 to 39, in Part V, of the *Law of Succession Act*. These include the surviving spouse, children, parents, siblings, grandchildren, and so forth, of the deceased, to the



sixth degree of consanguinity. The court should be satisfied that these have been ascertained properly, in terms of the administrator properly identifying the persons who have survived the deceased. The second category is that of creditors, mentioned in sections 39 and 66 of the *Law of Succession Act*, whether they take the form or character of pure creditors or buyers of the assets of the estate from the deceased. They could be described as liabilities or purchasers also. The general term for both groups is beneficiaries, that is persons who have a beneficial interest in the estate. The beneficial interest of the surviving family members arises naturally from their filial relationship with the deceased, while that of creditors or liabilities has something to do with the transactions that they had with the deceased. For the first group, where there are doubts, proof that they were members of the family of the deceased would suffice. For the second group, in case of a contest, proof of the transactions they had with the deceased would suffice. In allocating shares, what is available for distribution is the net intestate estate, and it would mean that the liabilities and creditors have to be settled first, and the surviving members shall then share the net intestate estate thereafter.

32. The estate herein has complex issues, and, therefore, the confirmation process should have been handled with a lot more care. Firstly, either the whole or a portion of the property had been exchanged. It would appear that that was done merely between the parties, and no effort was made to have the exchange endorsed and implemented by the relevant authorities, that is the State agencies responsible for land registration. The principal players in the exchange died before that could be done, and their successors appear to expect to sort out the issue through this succession process, which then made the confirmation process very critical. That issue of exchange did not feature at all at the two confirmation processes, and has been raised only in the revocation application. Secondly, the children of the deceased claim that the deceased had distributed the assets to them before he died. That would suggest that there was inter vivos distribution. The question should be whether this court should go ahead to distribute the estate in accordance with the Part V of the *Law of Succession Act*, or should it merely endorse the alleged inter vivos distribution by the deceased. If there was inter vivos distribution, then it would mean that there is no estate to be distributed through succession. The principles on inter vivos distribution, and how the court should deal with such distribution, were addressed in *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), *In re Estate of Phylis Muthoni M'Inoti (Deceased)* [2019] eKLR (Gikonyo J) *In re Estate of Nyachio Osindi (Deceased)* [2019] eKLR (Ougo J) and *Lucia Karimi Mwamba v Chomba Mwamba* [2020] eKLR (Gitari J). If there was inter vivos distribution then the question of succession should not even arise. The parties ought to table evidence of such inter vivos distribution before the court at confirmation, so that the court can decide on whether the affected assets would, in the circumstances, be available for distribution in intestacy or whether the parties should not be pursuing transfer of those assets directly with the lands authorities, without having to pass through the succession process. Thirdly, the bulk of the land has been allegedly sold to diverse individuals. It is claimed that some of the sales were undertaken by the deceased himself before he died, and some by his wife and sons during his lifetime. Some of the land was allegedly sold by some of the children after the alleged inter vivos distribution. Some was allegedly sold by the Akala family after the alleged exchange. Questions would arise concerning the authenticity of the alleged sales, particularly those that were done by persons other than the deceased himself. Proof of such sales would be critical. The point is that there are very complex issues around the assets of this estate, which can only be unraveled in confirmation proceedings that are properly conducted. Thrown into this mix is the fact that the surviving members of the family of the deceased herein are pitted against each other, on the one hand; while on the other, a large group of individuals, who allegedly bought portions of the estate, are pitted against the surviving family members. The impasse can only be resolved in proper confirmation proceedings. I note that an effort was made to raise all these issues in the revocation application, but the hearing of an application for revocation of grant is not the proper forum for handling issues that relate to distribution of the assets of the estate.



33. Finally, I would state that the sole process of initiating a succession cause is distribution of the assets of the dead person. That distribution happens at confirmation of the grant, and once the grant is confirmed, the succession cause comes to its end. That should underscore the importance of confirmation proceedings. It is the single most important process in succession proceedings, and the failure to get it right would mean the matter of succession to the estate in question would remain unresolved. The court herein has confirmed the grant herein twice, but that has not resolved the matter, because the two confirmation processes were not undertaken in full compliance with section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, for all the complexities of this estate were not presented to the court at those proceedings, and, therefore, they were not dealt with, and remain outstanding.
34. I believe I have said enough to demonstrate that these proceedings have not altogether been tidy. Firstly, the administrator did not make a full and frank disclosure of all the children of the deceased. It was not disclosed that the deceased was a polygamist, and the members of the second family were not disclosed, and were not factored at distribution. Secondly, a large group of individuals, said to be buyers of property from the deceased, were allocated shares in the estate, in confirmation proceedings where the children of the deceased were not involved, and where no proof was provided of their interest in the estate. Thirdly, a majority of the alleged buyers were alleged to have acquired an interest, not directly from the deceased, but from other individuals, raising doubt as to the authenticity of such sales. Fourthly, there are two sets of confirmation orders in force, which are inconsistent. Fifthly, some of the assets of the estate do not appear to have been placed before the court for distribution. That is to say Uasin Gishu/Ndalat Scheme/454 and the Kericho property. The distribution orders made on September 24, 2015 and November 15, 2016 did not do justice to the estate, for they were made in proceedings that did not involve all the beneficiaries and did not distribute all the assets that make up the estate.
35. In view of the above, it is my finding that there is merit in the application dated November 29, 2016. The cause herein has not been handled well, to the detriment of all involved. The administrator has not been very candid to the court and to the persons who are beneficially entitled to shares in the estate. Consequently, I hereby revoke the grant that was made to him on July 3, 2014. The children of the deceased shall agree on fresh administrators, four in number, and one of who shall be a daughter. Secondly, the orders on confirmation of the grant herein, made on September 24, 2015 and November 15, 2016, are hereby set aside, and the certificate of confirmation of grant dated December 14, 2016, and any other are hereby canceled. The new administrators shall apply afresh for confirmation of their grant, in proceedings that shall take into account everything that I have discussed in this judgment. The matter shall be mentioned, on a date to be given at the delivery of this ruling, for appointment of administrators. Any party aggrieved has twenty-eight days' leave to file appeal at the Court of Appeal. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MAY, 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Manyoni, instructed by Momanyi Manyoni & Co, Advocates, for the applicants.

John Kipsirem Maritim, administrator.

