



REPUBLIC OF KENYA



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**In Estate of Ezekiel Lukalo Aluda (Deceased) (Succession Cause  
408 of 1998) [2022] KEHC 539 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 539 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 408 OF 1998**

**WM MUSYOKA, J**

**MAY 27, 2022**

**JUDGMENT**

1. On 15<sup>th</sup> October 2009, Chitembwe J dismissed an application dated 24<sup>th</sup> October 2005, which had sought revocation of a grant that had been made in the matter on 29<sup>th</sup> October 1999, on several grounds. An appeal was brought against that decision, in Kisumu Court of Appeal Civil Appeal No. 95 of 2011, reported as Tom Lukalo vs. Beatrice Lukalo & Another [2014] eKLR (Onyango Otieno, Azangalala & Kantai JJA), and, in a judgment delivered on 11<sup>th</sup> July 2014, the Court of Appeal set aside the orders made in this cause on the distribution of the estate and cancelled the certificate of confirmation of grant, and directed a rehearing of the matter on the issue of distribution of the estate amongst the rightful beneficiaries. The High Court was given discretion to only consider the undisputed aspects of the distribution.
2. The oral rehearing proceedings commenced on 29<sup>th</sup> June 2016, before Sitati J, and subsequent hearings were conducted before Njagi J and F. Amin J. I never heard a single witness, and the matter only came to me after F. Amin J recused herself, at the conclusion of the oral hearings. I have read through the record, and I am sufficiently clear about the issues in controversy.
3. Before I recite the oral evidence, I shall review the background to the matter. The deceased herein died on 2<sup>nd</sup> March 1996. Representation to his intestate estate had been sought by Beatrice Lukalo and Margaret Osolika, by a petition filed in Nairobi HCSC No. 1859 of 1996, on 30<sup>th</sup> August 1996, in their capacities as daughters of the deceased, before the cause was subsequently transferred to the High Court at Kakamega, and assigned the instant number. In the affidavit in support of the petition, sworn 15<sup>th</sup> July 1996, the deceased was said to have been survived by a widow, Josephine Lukalo Aluda; two sons, Kennedy Lukalo and Edward Lukalo; and three daughters, Beatrice Lukalo, Margaret Osolika and Fabian Lukalo. He was also said to have died possessed of six assets, being plots numbers 232 Kipsoen, 101 Bendera, 1014 Bendera, 471 Kegondi, 1394 Chavakali and 779 Kedomi, and an unsurveyed one at Onamu. Letters of administration intestate were made to the two on 29<sup>th</sup> October 1996, and a grant was duly issued, of even date. I shall hereafter refer to the two as the administratrices.



4. The making of the grant attracted the filing of a summons for revocation of grant, dated 27<sup>th</sup> January 1997, on even date. The said application was by Tom Lukalo, on grounds that the administratrices had not obtained the consents of all the beneficiaries, some of the beneficiaries had not been disclosed and included as heirs, all the assets of the estate had not been disclosed, Kennedy Lukalo and Edward Lukalo were erroneously said to be mentally incapacitated, and that the deceased was sick and terminally ill when it was alleged that had he suspiciously and fraudulently disposed some of his assets to some of the beneficiaries. In the affidavit in support of that application, it was disclosed that the deceased had married three times. The three wives were said to be Selina, Josephine and Tabitha Shivachi. He was said to have had fifteen children with his three wives. The first wife, Selina Lukalo had three children, being Tom Lukalo, Arthur Uginda Lukalo and Douglas Lukalo. The second wife, Josephine Lukalo, had ten children, being Beatrice Lukalo, Charles Lukalo, Margaret Osolika Ndombi, Fabian Lukalo, Kennedy Lukalo, Edward Lukalo, Antony Lukalo, Humphrey Lukalo, Jackline Lukalo and Margaret Lukalo. The third wife, Tabitha Shivachi, had two children, Beatrice Kavulani and Beverline Gonya. Margaret Osolika Ndombi was said to be securely married. It was also said that Plot No. 272 Kisatiru had not been disclosed as an asset in the estate, and that the same, measuring twelve acres had been dubiously transferred to the second wife at a time when the deceased was terminally ill. It was also averred that the deceased had also transferred Plot No. 204, measuring 5 acres, to Charles Lukalo and Joyce Kisanya, his wife; that at the same time Nairobi Block 75/295, had been transferred to Margaret Minyoso Osolika and her husband, Tom Osolika Ndombi, who later sold it. The application was opposed, vide a replying affidavit, sworn on 16<sup>th</sup> June 1997, by Margaret Osolika. The summons for revocation of grant was subsequently dismissed unheard, for non-attendance and want of prosecution by the parties, on 21<sup>st</sup> October 1999. An attempt to have the dismissed application reinstated was rejected, in a ruling that GBM Kariuki J delivered on 17<sup>th</sup> December 2004.
5. Subsequent to the dismissal orders of 21<sup>st</sup> October 1999, the grant on record was confirmed on 29<sup>th</sup> October 1999, on an application dated 27<sup>th</sup> October 1999. In the affidavit in support, it was disclosed that the deceased had been survived by fourteen individuals, whose relationships were not disclosed. The survivors were identified as Josephine Kaveza Aluda, Kennedy Lukalo, Edward Lukalo, Beatrice Lukalo Aluda, Margaret Lukalo Aluda, Margaret Osolika, Fabian Lukalo, Charles Lukalo, Anthony Lukalo, Humphrey Lukalo, Jacqueline Lukalo, Harriet Lukalo, Tom Lukalo, Arthur Lukalo and Douglas Lukalo. It was proposed that Trans Nzoia/Kipsoen/232 be devolved upon Josephine Kaveza Aluda, Beatrice Lukalo Aluda, Margaret Osolika, Fabian Kavulani Lukalo, Humphrey Zavani Aluda and Anthony Lukalo Aluda; North Maragoli/Kegondi/471 upon Arthur Lukalo; North Maragoli/Kisatiru/471 upon Tom Lukalo; North Maragoli/Kisatiru/1394 upon Josephine Kaveza Aluda; North Maragoli/Kisatiru/1014 upon Francis Imbuga; North Maragoli/Kisatiru/1013 upon Francis Imbuga; and the unsurveyed plot at the Onamu Scheme upon Josephine Kaveza Aluda. The grant was confirmed and the assets distributed as proposed and a certificate of confirmation of grant was duly issued, dated 29<sup>th</sup> October 1999.
6. It was after the confirmation of the grant on 29<sup>th</sup> October 1999 and the dismissal orders of 17<sup>th</sup> December 2004 that a summons was filed herein on 11<sup>th</sup> January 2006, for revocation of the grant, dated 24<sup>th</sup> October 2005. It was the said application that Chitembwe J dismissed on 15<sup>th</sup> October 2009, leading up to the filing of the appeal in Tom Lukalo vs. Beatrice Lukalo & Another [2014] eKLR (Onyango Otieno, Azangalala & Kantai JJA), which ordered the rehearing of the matter on distribution.
7. Subsequent to the Court of Appeal order, the appellant in the Court of Appeal matter, Tom Lukalo, swore an affidavit on 25<sup>th</sup> November 2014, proposing distribution of the estate. He avers that the household of the deceased had three houses. The first house comprises of Tom Lukalo, Arthur Lukalo



and Douglas Lukalo. The second house comprises of Beatrice Lukalo, Charles Lukalo, Margaret Osolika, Fabian Lukalo, Kennedy Lukalo, the late Edward Lukalo (who had no immediate survivors), Anthony Lukalo, Humphrey Lukalo, and the late Jackline Lukalo (who had no immediate survivors) and Harriet Lukalo. The third house comprises the late Beatrice Kavulani (who was survived by a son) and Beverlyne Gonya Mugutu. The deceased was said to have died possessed of ten assets being Trans Nzoia/Kipsoen/232 – 34 acres, North Maragoli/Kegondi/471 – 1.2 acres, North Maragoli/Kisatiru/204 – 2.6 acres, North Maragoli/Kisatiru/1013 – 0.23 acre, North Maragoli/Kisatiru/1014 – 0.6 acre, North Maragoli/Kisatiru/1168 – 6 acres, North Maragoli/Kisatiru/1394 – 0.1 acre, North Maragoli/Kisatiru/1395 – 0.1 acre, Nandi/Denja/Onamu Scheme Plot – 5 acres, Peugeot 404 KTK 575 and a house at Buru. It is averred that the deceased had distributed four of the assets being North Maragoli/Kisatiru/204 to Josephine Lukalo, North Maragoli/Kisatiru/1168 to Charles Lukalo and his wife Joyce Kisanya, North Maragoli/Kisatiru/1395 to Josephine Lukalo, and the Buru house to Margaret Osolika and her husband Tom Osolika. It is averred that the persons who benefited from inter vivos distribution were all from the second house. He proposes distribution as follows. To the first house: Trans Nzoia/Kipsoen/232 – 14.5 acres, North Maragoli/Kegondi/471 – 1.2 acres, and North Maragoli/Kisatiru/1394 – 0.1 acre. To the second house: Nandi/Denja/Onamu Scheme Plot – 5 acres, North Maragoli/Kisatiru/1013 – 0.23 acre, North Maragoli/Kisatiru/1014 – 0.6 acre, Trans Nzoia/Kipsoen/232 – 13.13 acres. To the third house: Trans Nzoia/Kipsoen/232 – 6.32 acres. He states that the administratrices had transferred 34 acres out of Trans Nzoia/Kipsoen/232 to themselves contrary to the confirmed grant and then subdivided the property into Trans Nzoia/Kipsoen/810 and 811, and that Trans Nzoia/Kipsoen/811 was subsequently transferred to Hudson Mbayi Keya. It is also averred that North Maragoli/Kisatiru/1013 and North Maragoli/Kisatiru/1014 were transferred to a stranger, Francis Imbuga. It is proposed that the sale of Trans Nzoia/Kipsoen/811 should be taken as a share for the second house, which should reduce its margin. It is asserted that the second house had taken 83% of the estate, leaving only 17% to the other survivors. It is also proposed that sales of North Maragoli/Kisatiru/1013 and North Maragoli/Kisatiru/1014 be treated as shares allocated to the second house.

8. He has attached a number of documents to his affidavit to support his case. There is a green card for North Maragoli/Kisatiru/1395 showing that the property was originally registered in the name of the deceased, before it was transferred to the name of Josephine Kaveza Aluda. There are also green cards for North Maragoli/Kisatiru/1013 and 1168, showing that they were originally registered in the name of the deceased, and were transferred and registered in the name of Josephine Kaveza Aluda on 26<sup>th</sup> June 1992. A green card for North Maragoli/Kisatiru/204, showing that it was originally registered in the name of the deceased, and was transferred to the names of Joyce Kagea Mugalitsi and Charles Kisanya Lukalo on 25<sup>th</sup> May 1995. An affidavit of Simeo Mugalavai Keyonzo, sworn on 8<sup>th</sup> July 1997, talking about transfer of the Buru property, being Nairobi/Block 75/295, to Tom Ndombi Osolika and Margaret Minyoso Osolika. A green card for Trans Nzoia/Kipsoen/232 showing that the same was originally registered in the name of the deceased, and was transferred to the administratrices by way of transmission on 15<sup>th</sup> November 1999, and the same was subdivided on 11<sup>th</sup> September 2006 into Trans Nzoia/Kipsoen/810 and 811, and the title was closed. A green card for Trans Nzoia/Kipsoen/810 showing that the same was registered in the name of the administratrices on 11<sup>th</sup> September 2006. A green card for Trans Nzoia/Kipsoen/811 showing that the same registered in the names of the administratrices on 11<sup>th</sup> September 2006, and was transferred to the name of Hudson Mbayi Keya on even date. A green card for North Maragoli/Kisatiru/1013, showing that the same was originally in the name of the deceased, before it was transferred to the name of Francis Imbuga on 23<sup>rd</sup> March 2000. Finally, there is a green card for North Maragoli/Kisatiru/1014, showing it have been originally in the name of the deceased, before it was transferred to the name of Francis Imbuga on 14<sup>th</sup> January 2000.



9. The administratrices filed their own affidavit on distribution on 16<sup>th</sup> April 2015, sworn on 9<sup>th</sup> April 2015. They aver that the deceased was married to only one wife, their mother Josephine Kaveza Lukalo, who had been married in church, They aver that they were aware that the deceased had several children outside wedlock, who they identify as Tom Lukalo, Arthur Lukalo and Douglas Lukalo, who they claim were raised by the mother of the administratrices. They aver that the mother of Tom Lukalo, Selina, never married the deceased, but was married to another man called Okune of Butere. They further aver that Beatrice Kavulani and Beverlyne Gonya Mugutu were not children of the deceased, for he never recognized them or even raised them, and they were unknown to the entire family. They aver that their mother, Tabitha Mmboga, was married at various times to several men, being James Sangale, John Isabwa and Francis Wamocho Sambu, and that she had had other children apart from the two, and that upon her death she was buried at Misikhu village at the home of Francis Wamocho Sambu. They identify the children of the deceased as being thirteen in number, being Tom Lukalo, Arthur Lukalo, Douglas Lukalo, Beatrice Lukalo, Charles Kisanya Lukalo, Margaret Minyoso Osolika, Fabian Lukalo, Kennedy Lukalo, the late Edward Lukalo, Anthony Lukalo, Humphrey Lukalo, the late Jackline Lukalo and Harriet Lukalo. Kennedy Lukalo and Charles Kisanya are said to be living with disabilities. They state that the deceased sold some of his assets, being North Maragoli/Kisatiru/1013 and 1014, to Francis Davis Imbuga, to cater for his medical bills and those of his children, and to also to cater for the education of his children. They also explain that the deceased also sold the Buru property to Tom Ndombi Osolika and Margaret Minyoso Osolika, who then sold the property to SOS Children's Home. They further aver that the deceased sold and gave out his car KTK 575 to a third party whose whereabouts they did not know. They also aver that North Maragoli/Kisatiru/1168 and 1395 had been purchased by the deceased and their mother, Josephine Kaveza Lukalo, and it was their mother who had solely developed those two assets, as she was a businesswoman. Those developments were done on the property after the deceased had suffered a stroke, was incapacitated and took early retirement in 1984. Regarding Nandi/Denja/Onamu Scheme Plot, it is conceded that the deceased owned it, but Tom Lukalo had refused to cooperate towards getting a title deed. They aver that the property is occupied by third parties, and have no objection to Tom Lukalo, Arthur Lukalo and Douglas Lukalo inheriting the property. They further aver that the deceased had sold several portions of his property out of Trans Nzoia/Kipsoen/232 to several individuals, who had since taken possession. Hudson Mbayi Keya allegedly bought 2.78 acres, Milton Ngandu Mundia bought 7 acres, Lukorito Khalitaba Godfrey bought 6.8 acres, Rotich Cheruiyot Mutwol 2.126 acres and Evans Alemba Aluda bought 4.2 acres. They further aver that the deceased had during his lifetime allocated some of the assets to his sons. Tom Lukalo and Douglas Lukalo had been allocated North Maragoli/Kisatiru/775 in equal shares, which Tom Lukalo developed, and eventually chased away his brother from. The deceased also allegedly allocated North Maragoli/Kisatiru/471 to Arthur Lukalo, which the latter developed. The deceased also had ancestral land at Kedohi in Kegondi, measuring 5 acres, which was unadjudicated, and which Tom Lukalo is said to have taken possession of, and utilizes to the exclusion of everyone else. The administratrices aver that they were the ones who paid off the loan and land rates for Trans Nzoia/Kipsoen/232 after the deceased retired and lacked funds to settle the same. It is alleged that Tom Lukalo did not assist in that exercise. They aver that the assets available for distribution are North Maragoli/Kisatiru/775, Nandi/Denja/Onamu Scheme Plot, the unadjudicated ancestral land at Kedohi village, North Maragoli/Kisatiru/471 and Trans Nzoia/Kipsoen/232. They propose that North Maragoli/Kisatiru/775 should go to Tom Lukalo and Douglas Lukalo; the Nandi/Denja/Onamu Scheme Plot to Tom Lukalo, Arthur Lukalo and Douglas Lukalo; the unadjudicated ancestral land at Kedohi village to Arthur Lukalo, Charles Lukalo, Douglas Lukalo, Kennedy Lukalo, Anthony Lukalo and Humphrey Lukalo; North Maragoli/Kisatiru/471 to Arthur Lukalo; and the 8 acres remaining of the Trans Nzoia/Kipsoen/232 to Beatrice Lukalo, Margaret Osolika, Fabian Lukalo, Kennedy Lukalo, Anthony Lukalo, Humphrey Lukalo and Harriet Lukalo. It is averred that North



Maragoli/Kisatiru/1394 houses a public library, and should not be distributed to any of the survivors of the deceased, instead it should be run for the benefit of the community. They assert that they did not benefit from any inter vivos distribution, unlike Tom Lukalo, Arthur Lukalo, Charles Lukalo and Douglas Lukalo. They aver that they transferred titles to bona fide purchasers of the land from the deceased in good faith, to protect the estate from unnecessary litigation as the deceased had himself received the purchase moneys from them, and that the fact of those transfers should not be used as a basis for reducing the shares of any of the beneficiaries or survivors, as what happened was not part of the distributable estate.

10. The administrators have attached several documents to their affidavit. There is a certificate of marriage, showing that their mother, Josephine Kaveza Aluda, had contracted a statutory marriage with the deceased herein, on 8<sup>th</sup> October 1988. Two documents, dated 19<sup>th</sup> November 2008 and sometime in 2003, respectively, showing that Charles Lukalo Kisanya had suffered mental challenges, related to schizophrenia and polysubstance abuse. A document, dated 10<sup>th</sup> July 1991, showing that the deceased had given the Buru property, being Nairobi/ Block 75/295, to Tom Ndombi Osolika and Margaret Minyoso Osolika, for a consideration of Kshs. 550, 000.00. An application to the Cherangani Land Control Board for consent to subdivide Trans Nzoia/Kipsoen/232 into five portions of even size. The application is dated 20<sup>th</sup> April 1995. A green card for Trans Nzoia/Kipsoen/826 showing that the same was registered in the name of the administratrices on 22<sup>nd</sup> September 2006, and was transferred to the name of Godfrey Khalitaba Lukorito on 29<sup>th</sup> September 2006, and a title deed accordingly issued. A green card for Trans Nzoia/Kipsoen/827, showing that the same was registered in the names of the administrators on 22<sup>nd</sup> September 2006, and was subsequently transferred to the name of Milton Ngandu Mundia, on 29<sup>th</sup> September 2006, and a title deed duly issued. A green card for Trans Nzoia/Kipsoen/1048, showing that the same was registered in the names of the administratrices on 22<sup>nd</sup> September 2009. A green card for Trans Nzoia/Kipsoen/1049, showing that the same was registered in the names of the administratrices on 22<sup>nd</sup> April 2009, and was transferred the same day to Rotich Cheruiyot Mutuol, and a title deed issued to him. A green card for Trans Nzoia/Kipsoen/1050, showing that the administratrices were registered as proprietors thereof on 22<sup>nd</sup> April 2009, and on 18<sup>th</sup> August 2009 the property was transferred and registered in the name of Evans Alemba, and a title deed issued. A green card for North Maragoli/Kegondi/471, showing that the deceased was the original registered proprietor, and as at 19<sup>th</sup> January 1982 he was still the registered proprietor. There is a handwritten document, dated 27<sup>th</sup> December 1988, purported to have been written by the deceased, showing that he gave North Maragoli/Kisatiru/775 to Tom Lukalo and Douglas Otsiavita Lukalo equally; Shiru Tiriki C30 to Arthur Uginga Lukalo; North Maragoli/Kegondi/471 to Charles Kisanya Lukalo; and North Maragoli/Kisatiru/1013 and 1014 to Beatrice Afandi.
11. The affidavit of the administratrices provoked a supplementary affidavit by Tom Lukalo, sworn on 5<sup>th</sup> May 2015. He avers that his mother, Selina Mmboga, had been married to the deceased in the period 1955 to 1961, when she left. He avers that she attended the funeral of the deceased, but had to leave before the final rites as required by custom. He accuses the administratrices of failing to disclose all the children of the deceased, saying that they had listed only five of the children in their petition, being Kennedy Lukalo, Edward Lukalo, Beatrice Lukalo, Margaret Osolika and Fabian Lukalo. He states that at confirmation of grant the number of children increased from five to eight, with the addition of Humphrey Aluda, Anthony Lukalo Aluda, Arthur Lukalo, Tom Lukalo and Douglas Lukalo. He further avers that in the proposed distribution, the number of children increases to thirteen from eight, with the addition of Charles Kisanya Lukalo, Harriet and the late Jackline. He avers that the administratrices have excluded the children of the third wife, said to be Beatrice Kavulani and Beverline Gonya Mugutu. He argues that although the administratrices had detailed the various marriages of the mother of the two, they had not stated who their father was. He confirms that Kennedy Lukalo



and Charles Kisanya Lukalo live with disability. He asserts that there was no evidence that the deceased had sold North Maragoli/Kisatiru/1013 and 1014 to Francis Imbuga, as he was not listed as a liability in the liabilities column in the petition. He points at the affidavit by SM Keyonzo, Advocate, where it is averred that the Advocate did not witness money changing hands, between the deceased and Margaret Osolika and her husband on the sale of Nairobi/Block 75/275. He avers that SM Keyonzo, Advocate, was his Advocate at the initial stages of the matter, but after it was transferred to Kakamega from Nairobi, he found it inconvenient to continue acting for him. On motor vehicle KTK 575, he asserts that as at 6<sup>th</sup> June 1999, the vehicle was still registered in the name of the deceased. He further asserts that Josephine Kaveza Lukalo had not participated in the purchase of North Maragoli/Kisatiru/1168 and 1395, but argues that the same was given to her as a gift by the deceased in his capacity as her husband. Regarding the Nandi/Denja/Onamu Scheme Plot, he asserts that it was only the administratrices and their mother who knew about it and its whereabouts, and proposes that for that reason alone that property should be allocated to their house. Regarding the sale of Trans Nzoia/Kipsoen/232 to the five individuals named, he dismisses the claim as false, on grounds that if there had been such sales, then the five would have been listed as liabilities in the petition. Secondly, he argues that the said purchasers would have made efforts to object to the grant being made in 1996, and confirmed in 1999. He also argues that the instant proposals clashes with that made in 1999, when the said property was allocated to family members, being Beatrice Lukalo Aluda, Margaret Osolika, Josephine Kaveza Aluda, Fabian Kavulani Lukalo, Humphrey Zavani Aluda and Anthony Lukalo Aluda. He asserts that after the confirmation orders of October 1999, the administratrices transferred the whole of Trans Nzoia/Kipsoen/232 to themselves, after which they went on to subdivide it and transfer it to the five individuals: Godfrey Lukorito, Milton Mundia, Rotich Mutwol, Hudson Keya and Evans Alemba. Regarding North Maragoli/Kisatiru/775, he asserts that the same does not belong to the estate, but one Joash Onula Luhambe. He argues that if the said property was to be transferred to the deceased after his death, it was the duty of the administratrices to make that happen. On the alleged ancestral land at Kedohi, he argues that the same does not exist, for if it existed, the administratrices would have listed it in the assets schedule. He asserts that North Maragoli/Kisatiru/775, the Nandi/Denja/Onamu Scheme Plot and the Kedohi lands do not exist, and the distribution proposed by the administratrices could not work. Regarding the library on North Maragoli/Kisatiru/1394, he states that for a long time the deceased operated a bar there, and after his death Beatrice Lukalo took it over, and in 2012 she decided to turn it into a community based library sponsored by a non-governmental organization, from which she was earning a lot of money. He avers that the issue of polygamy did not arise, and what mattered was the number of children that the deceased had. He also asserts that daughters are not allowed to administer estates, unless there were no sons. On the sales of Trans Nzoia/Kipsoen/232, he says the same should be factored against the second house in the proposed distribution.

12. The administratrices filed a reply to the supplementary affidavit by Tom Lukalo, sworn on 16<sup>th</sup> November 2015. They assert that the High Court was required by the Court of Appeal to only consider the undisputed aspects of the distribution of the estate of the deceased. They assert that from the affidavits on record the undisputed assets are North Maragoli/Kisatiru/775, North Maragoli/Kisatiru/1394, and Nandi/Denja/Onamu Scheme Plot, the unadjudicated ancestral land at Kedohi village, North Maragoli/Kegondi/471 and eight acres of Trans Nzoia/Kipsoen/232. They assert that the deceased had thirteen children, and that list did not include Beatrice Kavulani and Beverlyne Gonya Mugutu. They aver that the deceased sold North Maragoli/Kisatiru/1013 and 1014 to Francis Imbuga, and gave vacant possession to him in 1994. They also aver that the Buru Buru property was properly sold to Margaret Osolika and her husband by the deceased, and there was evidence of payment. They aver that that property was subsequently sold to the SOS Children's Homes. On the motor vehicle, they aver that the same, from the information in their hands, was registered in the name of another. On the purchases of portions of Trans Nzoia/Kipsoen/232 by the five individuals, they aver that the



same was brought to their attention by their mother, after the grant had been confirmed, hence they proceeded to transfer the land to the alleged buyers against the terms of the certificate of confirmation of grant. They assert that the transfers were done when there was a confirmed grant hence there was no wrongdoing. On the alleged unadjudicated ancestral land at Kedohi, they aver that it is actually registered as North Maragoli/Kisatiru/782. It initially belonged to the father of the deceased, known as Joseph Aluda, and upon succession being conducted to his estate, the property was transmitted to the names of Jeremiah Chengenya Aluda, Tom Lukalo, Arthur Lukalo, Henry Mususi Aluda, Ambisi Kisanya and Kidake Aluda. On the library, the administratrices aver that the same was set by them and their siblings in memory of their late parents. They concede that a bar used to be operated on the plot, but was run down and closed. They deny that they derive any income from the operation of the library. They would like North Maragoli/Kisatiru/1394 to be devolved upon them in trust for Kennedy Lukalo, and for the library operated from there to be continued in memory of their late parents. They continue to deny that the deceased had married three times. They also assert that under *the Constitution* 2010 both gender were entitled to equal rights. They explain that they came into the picture as administratrices as Tom Lukalo, as the eldest son and child, had failed in his duties as such.

13. To that affidavit the administratrices have attached a huge bundle of documents. There is the judgment of the Court of Appeal, which had ordered a rehearing of the matter on distribution. There is a bundle of handwritten letters by the deceased to the administratrices, detailing the deceased's financial woes, against the background of his medical bills and education expenses for his younger children. There are copies of documents from Nairobi Hospital where he was being attended to. There are also documents on record to show efforts to fund raise for the purpose of the medical and treatment bills of the deceased. There are also documents relating to the sale of the Buru Buru property, and another showing his indebtedness to the Housing Finance Company of Kenya over the said property. There is a copy of records for KTK 575, showing that it belonged to EL Aluda and NBK, as at 7<sup>th</sup> October 2015. A certificate of land title for North Maragoli/Kisatiru/775, dated 11<sup>th</sup> November 1970 shows it to be registered in the name of the deceased. A green card and a certificate of official search for North Maragoli/Kisatiru/782, showing that it originally belonged to the father of the deceased, and that it was transmitted upon succession to Tom Lukalo and Arthur Lukalo, among others. There is also a letter relating to the business that was being run on North Maragoli/Kisatiru/1394.
14. There are several minor affidavits by several individuals. There is one by Milton Mundia, sworn on 26<sup>th</sup> November 2014. He avers to have had bought 7 acres of land from the deceased in 1995, and took possession the same year, and he was issued with a title deed for Trans Nzoia/Kipsoen/827. He has not attached copy of the sale agreement. The other is by Hudson Mbayi Keya, sworn on 26<sup>th</sup> November 2014. He also alleges to have bought 2.7 acres from the deceased in 1995, took possession the same year, and was issued with title deed number Trans Nzoia/Kipsoen/811. He has not annexed a sale agreement. The other is by Mabel Opana Imbuga, sworn on 27<sup>th</sup> November 2014. She avers that her husband, Francis, bought North Maragoli/Kisatiru/1013 and 1014 from the deceased in 1994, but the deceased died before the same were transferred to the name of her late husband. She avers that after Francis Imbuga died, she obtained representation to his estate, and included the two assets in the schedule in the petition that she had filed in court. There are no annexures to the affidavit. The other affidavit is by Lukorito Khalitaba Godfrey, sworn on 26<sup>th</sup> November 2014. He avers to have had bought 6.8 acres of land from the deceased in 1995, to have had taken possession in 1995, and to hold a title deed for that portion, being Trans Nzoia/Kipsoen/826. He has not annexed any documents to his affidavit. The last affidavit is that by Rotich Cheruiyot Mutwol, sworn on 26<sup>th</sup> November 2014. He alleges to have had purchased 0.900 hectare of land from the deceased in 1995. He took possession the same year, and was issued with title deed for Trans Nzoia/Kipsoen/1049. His affidavit has no annexures.



15. Directions were taken on 18<sup>th</sup> November 2014, for disposal of the matter of distribution by way of oral evidence, based on affidavits and witness statements to be filed by the parties and their witnesses. The affidavits that I have recited above were filed pursuant to those directions, and so were witness statements that are on record.
16. The oral hearings opened on 29<sup>th</sup> June 2016. Tom Watla Lukalo was the first on the witness stand. He testified that the deceased had married three times during his lifetime. He identified the wives as Selina, Josephine and Tabitha. He stated that his mother was Selina, who separated from the deceased in the 1960s, and that she was still alive as at the time of his testimony, and was living with him. The second wife, Josephine, was said to have died in 2006. The third wife, Tabitha separated from the deceased in 1972. He identified the children of the deceased according to the three houses. From the first house the children were identified as Tom Lukalo, Arthur Lukalo and Douglas Lukalo. From the second house were Beatrice Lukalo, Margaret Osolika, Fabian Munoko, Jackline Lukalo, Charles Lukalo, Kennedy Lukalo, the late Edward Lukalo, Humphrey Lukalo, Anthony Lukalo and the late Harriet Lukalo. The children from the third house were said to be the late Beatrice Kavulani and Beverlyne Gonya. He said that the deceased died possessed of North Maragoli/Kegondi/471, North Maragoli/Kisatiru/1394, Trans Nzoia/Kipsoen/232, a residential house on Trans Nzoia/Kipsoen/232, North Maragoli/Kisatiru/1395, North Maragoli/Kisatiru/1168, North Maragoli/Kisatiru/204, a house in Buru Buru, North Maragoli/Kisatiru/1013, North Maragoli/Kisatiru/1014, Nandi/Denja/Onamu/unsurveyed and a motor vehicle Peugeot 404 KTK 575. He stated that some of the assets were still in the names of the deceased, being North Maragoli/Kegondi/471, Peugeot 404 KTK 575 and Nandi/Denja/Onamu/unsurveyed. He stated that Trans Nzoia/Kipsoen/232 measured 13.7 hectares, and had been transferred to the name of the administratrices on 15<sup>th</sup> November 1999. It was subsequently subdivided into Trans Nzoia/Kipsoen/810 and 811. Trans Nzoia/Kipsoen/811 was later transferred to Hudson Imbayi Keya. Trans Nzoia/Kipsoen/810 was later subdivided into Trans Nzoia/Kipsoen/1048 to 1050 on 22<sup>nd</sup> September 2006. Trans Nzoia/Kipsoen/1048 was registered in the name of the administratrices, Trans Nzoia/Kipsoen/1049 in the name of Rotich Cheruiyot Mutwol, Trans Nzoia/Kipsoen/1050 in the name of Evans Alemba, and Trans Nzoia/Kipsoen/826 and 827 were registered in the names of Geoffrey Khaitaba Lukorito and Milton Ngandu Mundia, respectively. He stated that North Maragoli/Kisatiru/1394 was registered in the name of the late mother of the administratrices, and was being used by members of the second house. He stated that North Maragoli/Kisatiru/1395 was given to the second wife by the deceased himself. He stated that North Maragoli/Kegondi/471 was in the name of the deceased, and that it was Arthur Lukalo who was using it. North Maragoli/Kisatiru/1168 was where the deceased was buried, and it was transferred to the name of the second house after the deceased passed on. He stated that North Maragoli/Kisatiru/204 was transferred to the name of the names of Charles Kisanya Lukalo and Joyce Lukalo by the deceased. He testified that North Maragoli/Kisatiru/1013 and 1014 were transferred to Francis Imbuga by the administratrices. He described Francis Imbuga as a clansman, and stated that he must have had bought the same, adding that it was the family of Francis Imbuga that was utilizing it. He said that Nandi/Denja/Onamu/unsurveyed was unknown to him, in terms of location, and he did not about its status. He said that the residential house on Trans Nzoia/Kipsoen/232 was occupied by an employee of the administratrices, its actual location was on Trans Nzoia/Kipsoen/1048. He stated that the Buru Buru property was transferred to Margaret Osolika and her husband Tom Osolika Ndombi in 1992. He said that the transfer was by the deceased before he passed on. He said the motor vehicle Peugeot 404 KTK 575 was still in the name of the deceased, although he could not tell whether it was operational or not. He then proceeded to propose that the first house be allocated North Maragoli/Kegondi/471, North Maragoli/Kisatiru/1394, 14.5 acres of Trans Nzoia/Kipsoen/232 and the residential house on Trans Nzoia/Kipsoen/232. He proposed that the second house be given



North Maragoli/Kisatiru/1395, North Maragoli/Kisatiru/1168, North Maragoli/Kisatiru/204, the Buru Buru property, North Maragoli/Kisatiru/1013, North Maragoli/Kisatiru/1014, Nandi/Denya/Onamu/unsurveyed, 13.13 acres in Trans Nzoia/Kipsoen/232 and motor vehicle Peugeot 404 KTK 575. He proposed that the third house be given 6.32 acres. He stated that no liabilities were listed in the petition when the cause was initiated. He said he was not aware of the unsurveyed ancestral land at Kedohi village that the administratrices were suggesting should be given to him. He suggested that the buyers of any of the assets would not be affected, as they would be catered for by the second house, from whom they bought the property. He said that he was asserting so because the transfers had been done by the administratrices. He also went to address the accusation that he did not assist the deceased. He asserted that the deceased lived with the third wife in Nairobi, and they got two children. He asserted that Margaret Osolika and her husband did not buy the Buru Buru property from the deceased. He also asserted that the children from his mother's side of the family were also entitled to a share in Trans Nzoia/Kipsoen/232.

17. During cross-examination, he stated that his mother married the deceased in 1956 and the two separated in 1960. He said that it was the mother of the administratrices who raised him and his brother Arthur Lukalo. He said that his mother left with his brother Douglas Lukalo, as he was just two months old then, and he later returned in 1968 after circumcision. He conceded that his mother later remarried in Butere. He averred that the third wife was married traditionally on 1965 and left in 1972. She left with her children, who were later returned in 1976. They stayed with the mother of the administratrices, and attended school at Kisatiru Primary School. He said that the first and second wives attended the burial of the deceased, but left before it was over as required by tradition. He said that he related well with the deceased. He said that the deceased was sickly, and was admitted to hospitals in Nairobi. He said that most of the bills were settled by the deceased himself, although he and the administratrices assisted. He said that he did not pay any of the bills directly, but he used to give the money to the deceased. He stated that as at the time of his death, the deceased was living with the second wife, Josephine Kaveza. He also stated that his own home was at North Maragoli/Kisatiru/775. He said that he did not distribute it in his proposals as it did not belong to the estate, as it belongs to one Joash Onula s/o Luhambe. When shown a copy of the register for the property, he conceded that it was registered in the name of the deceased. He said that the land belonged to Joash as the deceased had sold it to him on 3<sup>rd</sup> January 1975. He said that he constructed his home on the land in 1992, after the deceased told him to do so. He said that there were still a lot of problems with the land. He said that legally the land belonged to Joash, and that he was prepared to give it back to his family should they go to court. He said that the said family had never sued him, and was not aware whether the purchase price was ever refunded. He said that North Maragoli/Kisatiru/1013 and North Maragoli/Kisatiru/1014 were occupied by the family of Francis Imbuga, adding that he only saw the transfers when the matter commenced. He conceded that he only saw the sale agreements in open court, showing that they were signed on 10<sup>th</sup> October 1993. He said that he had seen the sale agreement for the sale of the Buru Buru property dated 10<sup>th</sup> July 1991. He said that he was not aware that the deceased had sold portions of the Trans Nzoia property. He said he did not know where the motor vehicle was, but he was proposing that it be given to the second house because that house had it when the deceased died. He said it was a matatu, which plied the Kakamega-Nambacha route. He said that North Maragoli/Kisatiru/782 belonged to his grandfather, and said that it ought to be distributed amongst his sons. When shown a document from the affidavit of the administratrices, he conceded that he was listed as one of the registered proprietors. He said he would have no objection, if it was proved that the deceased had sold North Maragoli/Kisatiru/1013 and 1014 to Francis Imbuga, with the property being devolved to that family. He said that the same would apply to the Trans Nzoia sales. He said that the deceased did not have to sell his assets to settle his medical bills, as had property from which he got good income. He said that he assisted. He conceded that the Buru Buru property was still under mortgage as at the time



it was sold. He said that he saw documents showing that the husband of one of the administratrices paid some of the balance on the mortgage.

18. The second witness on the part of Tom Lukalo was Beverline Makhungu Mugutu. She said that she was a daughter of the deceased from the third house. She said that the deceased had three wives. She said that she was born in 1969, and that the deceased used to take care of her and her sister, Beatrice. She testified that her mother was married in 1966. She said that her parents separated in 1972, but she lived with the second wife and also with her grandmother. She said that she attended Kisatiru Primary School. She said that she did not have a birth certificate, and that her national identity card did not bear the name of the deceased as her surname. She said that the administratrices did not recognize her as a child of the deceased. She said that when she got married it was Tom Lukalo and her brother Oscar Sambu who received her dowry. She said that the father of Oscar was called Francis Sambu, who married her mother after she separated from the deceased. She said that the deceased paid her fees up to college level. She identified Selina as the senior mother, saying that she was alive as at the date she was giving her testimony. She said that her mother died in 2014. She asserted that the deceased was her father, and that she attended his funeral, and even spoke there.
19. The next witness was Jane Afande Isana, a sister of the deceased. She said that the deceased had married three times, and named his wives as Selina Lukalo, Josina Lukalo and Tabitha Lukalo. She said that the deceased had fifteen children. She explained that the deceased had sent away Selina. She said the second wife had ten children, while the third one had two children. She said that their father had ancestral land at Kedohi.
20. Selina Zisiga Kisugane followed. She said she had married the deceased on 12<sup>th</sup> February 1956, under customary law. Dowry was paid. The deceased then chased her away in 1960, before he married a second wife. She had three children with him, being Tom Lukalo, Arthur Oginga Lukalo and Douglas Lukalo. She described herself as the first wife of the deceased. She identified the second wife as Josina Kavesa. She said that at the time she left, the second wife had one child. She also mentioned that the deceased also married a third wife in 1966, who gave her two daughters. She said the second wife had ten children. She said that she returned to the estate after the deceased died, that was in 2015, after she fell ill. She said that she attended the burial of the deceased, but she did not speak at the burial as her second husband had since died. She said that she did not speak also because she had been chased away, and she sat with the general crowd. She said that she was living with her son, Tom Lukalo. She said dowry was paid for her, going into details of what was paid, and by who. She conceded that after she was chased away, she got married to James Ogune, but added that things did not work well in that second marriage. She had three children with second husband, being Joseph Wamayi Ogune, Martha Mugava Ogune and Wycliffe Kamala Ogune. She said two of her children in the second marriage had died, and only one was alive. She said Douglas was her son who lived and worked in Molo. She said that he was not shown where to put up a home by the deceased.
21. Jamin Oganga Katiezo followed. He was a cousin of the deceased, as their fathers were brothers. He said that the deceased had three wives, who he married at different times. He named them as Selina, Josina and Tabitha. He said that Selina had three sons, while the second wife had ten children and the third wife had two daughters. He said that the deceased had paid dowry for the first and third wife. He said that the first wife was chased away. He said that he could not remember when Selina and Tabitha were married by the deceased. He said he did not know the details of the dowry paid for Selina. He said that he did not know the people who delivered the dowry for Tabitha. He said that both Selina and Tabitha attended the burial of the deceased, but they were not in the official programme because they had left the marriage, and were not recognized as wives of the deceased. He said he was not present



when Selina's dowry was paid. He said that the deceased got a share of the ancestral land at Kedohi. The deceased did not set up a home there, but bought land elsewhere where he put up a home.

22. The case for the administratrices opened on 26<sup>th</sup> September 2018. Margaret Osolika was the first at the stand. She testified that her mother, Josephine, was the only wife of the deceased. She was married under customary law, and later the marriage was solemnized in church. She stated that the deceased had thirteen children. She mentioned that Tom, Arthur and Douglas were by a woman called Selina; while the rest were children of her mother. She explained that two of her siblings, Edward and Jackline, were dead. She said that she saw Beverlyne Gonya and Beatrice Kavulani for the first time in court. She asserted that they were not children of the deceased, their mother, Tabitha Mmboga, was never married to the deceased, and their father was unknown. She testified that Tabitha never cohabited with the deceased, her children never lived with him, and they were never introduced to them as his children. She said that only eight acres remained out of Trans Nzoia/Kipsoen/232, after the rest were disposed of to buyers by the deceased. She stated that the deceased had not yet transferred the property to them at the time of his death. She stated that the buyers were in possession, and the land had been surveyed. She said that there were five buyers, and four of them had filed affidavits. She stated that it was the remaining eight acres of Trans Nzoia/Kipsoen/232 that she was proposing for distribution. She testified that North Maragoli/Kisatiru/1013 and 1014 had been sold by the deceased to Prof. Imbuga, and that the buyer had taken possession of the land, although the same had not been transferred to him. She stated that Tom Lukalo resided on North Maragoli/Kisatiru/775, had lived there since 1998, and took possession before the deceased died, the land belonged to the deceased, it measured 6 acres and was meant to be shared equally between Tom and Douglas, but Tom had denied Douglas access. She said that the mother of Douglas was Selina Mmboga, and the deceased had doubted his paternity, but still recognized him as his son. She stated that North Maragoli/Kisatiru/1395 had been bought by the deceased, but developed solely by her mother. She said that by the time of the demise of the deceased, North Maragoli/Kisatiru/1395 was registered in the name of her mother. She said that the Buru Buru house was sold to her and her husband by the deceased in 1991, and was transferred to their names on 23<sup>rd</sup> October 1990. She said that he sold the house to them as he required money for medication and school fees. She said the motor vehicle was sold to a person that she did not know, but a search at the registry of motor vehicles indicated that it was still in the name of the deceased. She said that she had no objection if Tom Lukalo took the vehicle, should it be traced. She said that the ancestral land at Kedohi was about 5 acres, and was originally in the name of the father of the deceased. She added that it was occupied by Tom Lukalo, but was registered in the names of several persons, including Tom Lukalo. She asserted that the deceased was married to only one wife. She said that Tom Lukalo wanted to take advantage of his brothers. She asserted that there were no houses or several households. She described the relationship between the deceased and Tom Lukalo as bad, and that Tom did not cater for the medication of the deceased, and never visited him in hospital or even at home. He even did not contribute to the funeral or burial of the deceased, except for a cheap coffin that he bought under pressure from relatives. She said that it was her mother who took care of Tom. She accused him of having a sore relationship with her mother, and said that he abandoned his role, and sold his birthright to lead the family through his hatred.
23. During cross-examination, she said that in her petition for grant she only mentioned five children, but explained that that was an error on the part of her Advocate. She said that certificate of confirmation of grant was issued in 1999, and it named nine children. She said that the deceased sold some assets before she died, and that the estate had some liabilities, but the same were not mentioned in the petition. She stated that she swore an affidavit on 9<sup>th</sup> April 2015, showing that the deceased had thirteen children, but Tom said that they were fifteen. She said Trans Nzoia/Kipsoen/232 originally was 30 acres, but 7 acres were remaining, and that the property was registered in her name and that of her sister, in their



capacity as administratrices. She said Tom Lukalo was not getting a share in Trans Nzoia/Kipsoen/232, as he had three acres in Kedoli, North Maragoli/Kisatiru/775, and had appropriated the share from the estate of the father of the deceased. She said that Trans Nzoia/Kipsoen/1048 was an excision from Trans Nzoia/Kipsoen/232, and it measured 5.4 hectares. She denied using that land, but said that it had a caretaker. She said the buyers of portions of Trans Nzoia/Kipsoen/232 from the deceased were to come to court and testify. She said she did not know whether the deceased took them to the Land Control Board. She stated that Godfrey Lukorito had bought land from the deceased, on two occasions, and he had obtained consent of Land Control Board, and a transfer was done to him in 2012, and he had a title deed. He said that the consent was given after the deceased had died. She asserted that she and her co-administratrix gave the consent, and that that was done within their powers as such. She stated that they did so for several buyers. She stated that Tom Lukalo and his brother were not going to get a share of Trans Nzoia/Kipsoen/232, because they were entitled to North Maragoli/Kisatiru/775, which measured 0.9 hectare, and that Tom had been living on that land since 1988. She conceded that the land was registered in the name of a certain Joas Onula, since 1975, and said that she did not know who that person was. She said that the intention of the deceased was to give North Maragoli/Kisatiru/775 to Tom Lukalo and his brother, and that her mother too was of that persuasion. Tom Lukalo was also said to be getting North Maragoli/Kisatiru/782, which was ancestral land, initially belonging to the father of the deceased, and Tom Lukalo had taken the portion due to the deceased. She said that she did not know whether the Nandi land was situated, and that was the land they were allocating to Tom and Douglas Lukalo. She said that it was Tom who knew where the land was. She said that they had tried to get a title deed for the property, but without success. She said that the land was occupied by some people. She said that the deceased had informed her that it measured 5 acres. She said that she was not proposing that any member of her side of the family should get a portion of the Nandi property. She said that Prof. Imbuga bought North Maragoli/Kisatiru/1013 and 1014, in 1993, and that consent of Land Control Board was obtained after his death. She said that North Maragoli/Kisatiru/204 was registered in the names of Charles Lukalo and Joyce Mugalitsi, her brother and sister-in-law, respectively. North Maragoli/Kisatiru/1168 was registered in the name of the deceased; while North Maragoli/Kisatiru/1395 was registered in the name of her mother, she said. She said that her mother got registered as proprietor of North Maragoli/Kisatiru/1395 in 1992, after the same was transmitted from the deceased. She said that she had evidence that the same had been jointly purchased by the deceased and her mother, then again she said that there was no evidence that the same had been jointly bought. She said the same thing with respect to North Maragoli/Kisatiru/1168. She said Tom Lukalo was entitled to a share of both North Maragoli/Kisatiru/1168 and 1395. She said that North Maragoli/Kisatiru/1394 was registered in the name of her mother. It was a developed piece of land, with a community library and eight rooms. She said that she and her siblings had established the library in memory of her parents. She said she objected to Tom Lukalo getting a share of the land. She said that there was no income accruing from the said property. She that the fee charged for use of the library was minimal, and the eight rooms were unoccupied. She also referred to North Maragoli/Kisatiru/1394 and 1395, and said that a bar was operated on 1395, but said that no income was derived from the two parcels of land. She said that she did not know where the motor vehicle was, although it was still registered in the name of the deceased. She said that the deceased had sold the motor vehicle, to a person that she did not know. She said that Tom, Douglas and Arthur were from a different mother, but she did not know Beatrice Kavulani, but Vivian Kavulani was her sister. She asserted that it was not true that Beatrice Kavulani and Vivian Kavulani were named after the same person, adding that there was no evidence that the deceased was the father of Beatrice Kavulani. She said that Tabitha was married to a John Sakwa and another man, and that from her research, they had found that Beatrice Kavulani and her sister were not children of the deceased, and the deceased had not recognized them as his children. She stated that Beverlyne did not attend the burial of the deceased. She said that she



- bought the Buru Buru land in 1990, the sale agreement was done in 1991, transfer in 1991. She asserted that the property was not a gift to her from the deceased. She said that they paid for it, not in the presence of their Advocate, but that of her sister and her mother. She said that the deceased had refused to give land to the objector, and to pay dowry for his wife. She asserted that she and her sister were close to Arthur and Douglas Lukalo, and that it was Tom Lukalo who caused bad blood.
24. Vincent Ombeba Magada testified next. He described the deceased as his cousin, on account of the father of his father and the father of the deceased being brothers, then again he said the father of the deceased and his father were cousins. He described Beatrice as his cousin. He said that the deceased had thirteen children, and that they were from two mothers. He said that the first wife was called Saina, and was the mother of Tom, Arthur and Douglas. He said that the deceased had six to seven parcels of land. He named North Maragoli/Kisatiru/775, which he was registered in the name of the deceased, and was under control of Tom and Douglas Lukalo. He said North Maragoli/Kegondi/471 was under the name of Azar Ujinda Ikuru. He said North Maragoli/Kisatiru/782 was where the ancestral home was, and was under the name of the late father of the deceased. Plot No. 1394, Chavakali Market, was registered in the name of the deceased. He also named two plots at Bendera, being North Maragoli/Kisatiru/1013 and 1014, which were sold to Francis Imbuga to meet medical bills. He said that 1168 housed the matrimonial home of the deceased. He named another parcel of land at Kaimosi, which he said belonged to an Mzungu William. He said that he did not know of any land at either Nandi or Kitale, measuring 32 acres.
25. Anthony Lukalo Aluda followed. He was a son of the deceased. He described the administratrices as his sisters, and Tom Lukalo as his stepbrother. He said that he supported the proposals made by the administratrices. He said that the deceased had only one legal wife, who he named as Josephine Kaveza Lukalo, his mother. He said that he only got to know the name of the mother of Tom Lukalo when the matter came to court, as Selina Mmboga. He named the children of Selina Mmboga as Tom, Arthur and Douglas Lukalo. He said that he did not know them prior to the demise of the deceased, and that he only got to know them when the objection herein was raised. He said that Tom Lukalo was raised in their home as a stepbrother, and was taken care of by his mother and the deceased. He said Tom's brothers were also brought up by the deceased. He stated that the succession cause was initiated by Tom Lukalo. He said that the relationship between the deceased and Tom Lukalo was extremely bad, and that Tom never assisted the deceased when he was sick. He said that his mother had ten children, and then there was Tom, Arthur and Douglas Lukalo. He stated the people who supported the deceased during illness as Beatrice Lukalo, Margaret Osolika and Fabian Lukalo. He said that he did not know Tabitha Shivachi. He said that Beverly and Beatrice were not his stepsisters, and that he did not even know them. He mentioned the assets of the estate as North Maragoli/Kisatiru/775 where Tom stayed, Trans Nzoia/Kipsoen/232 and the ancestral home at Kedoli. He said that 22 acres out of 32 of the Kitale property were sold, leaving a balance of 8. He said that seven members of the family had taken the 8 acres. He named them as Beatrice Lukalo, Margaret, Fabian, Kennedy Lukalo, Anthony Lukalo, Humphrey Lukalo and Harriet. He said that he held about 1.4 acres in Kitale. He said that he stayed in Busia. He said that none of his sisters owned any land. He said he was entitled to part of the ancestral land at Maragoli. He said the Maragoli land was 5 acres, and so was the Denja land. He said that the Denja land should go to Tom, Arthur and Douglas Lukalo, according to the administratrices. He said that the Denja land, that is Nandi/Onamu/Denja Scheme, was meant to go to the three, and Tom Lukalo was supposed to follow it up. He said it was occupied by squatters. He said that he had visited the land once.
26. At the close of the oral hearings both sides filed their respective written submissions. The written submissions by both sides, that by the administratrices, dated 16<sup>th</sup> November 2021, and by Tom



Lukalo, dated 14<sup>th</sup> December 2021, merely summarise the evidence as narrated in the filings and the testimonies.

27. As stated above, the distribution proceedings herein were triggered by the decision of the Court of Appeal, of 11<sup>th</sup> July 2014, in Tom Lukalo vs. Beatrice Lukalo & Another [2014] eKLR (Onyango Otieno, Azangalala & Kantai JJA), which set aside the orders made on 29<sup>th</sup> October 1999, which had confirmed the grant and distributed the estate, and cancelled the certificate of confirmation of grant, dated 29<sup>th</sup> October 1999. The penultimate paragraph of the judgment of the Court of Appeal reads as follows:

“25... The distribution of the estate of the deceased is hereby set aside and substituted therefor with an order that the cause be and is hereby remitted back to the High Court for rehearing before a Judge other than Chitembwe J, on the issue of distribution of the estate of the deceased to the rightful heirs. For avoidance of doubt, the High Court has the discretion to only consider the undisputed aspects of the distribution of the deceased’s estate. This in effect means that the Certificate of Confirmation of Grant issued to the respondents is hereby set aside.”

28. The appeal had arisen, as narrated here above, from a ruling that had been delivered herein on 15<sup>th</sup> October 2009, dismissing a summons for revocation of grant dated 24<sup>th</sup> October 2005. The court was of the view that the grant had been confirmed ten years prior, in 1999, and revoking the grant would mean setting aside the confirmation/distribution orders, whose effect would be nullification of the distribution and developments on the ground, done on the basis of those orders, which the court felt would cause unnecessary difficulties to the beneficiaries. There was also the issue of North Maragoli/Kisatiru/471, which had been allocated to Tom Lukalo, he argued that it did not belong to the estate, which the High Court had brushed aside. The Court of Appeal found that North Maragoli/Kisatiru/471 was not registered in the name of the deceased, and was not, therefore, available for distribution. The Court of Appeal also said that the mere fact that revocation may cause difficulties to beneficiaries, who might have sold or incurred expenses in improving their respective shares of inheritance, is not enough ground to defeat the right of an heir or survivor of the deceased from inheriting from the estate of their father.

29. From the above, I understand my remit to be that I should go ahead to consider the undisputed aspects of the distribution. According to the proviso to section 71(2) of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 40(4) of the *Probate and Administration Rules*, the duty of the court is to ascertain the beneficiaries of the estate and the shares due to those ascertained beneficiaries. The shares are of the assets of the estate that are available for distribution, which would mean that the court has to ascertain the assets that are available for distribution. Distribution is about the assets, and one cannot talk of shares without reference to the assets. I understand the Court of Appeal to be telling me to go ahead and distribute the undisputed assets among the undisputed beneficiaries. Of course, the aspect on the undisputed beneficiaries is controversial, for I must ascertain the beneficiaries first before I can consider distribution. That is the spirit of the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules. If the beneficiaries are disputed, I will have no option but resolve the question. It is only with respect to the assets that I can talk of “undisputed aspects of the distribution.”

30. For avoidance of doubt, the proviso to section 71(2) of the *Law of Succession Act* states as follows:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons



beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

31. While Rule 40(4) provides:

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

32. These proceedings relate to distribution of the intestate estate of the deceased herein. He died in 1996, long after the *Law of Succession Act* had come into force in 1981. By virtue of section 2(1) of the *Law of Succession Act* his estate fell for distribution in terms of Part V of the *Law of Succession Act*, that is to say sections 35 to 40 of the Act. The law governing applications for confirmation of grant is section 71 of the *Law of Succession Act* and Rules 40 and 41 of the Probate and Administration Rules. The proviso to section 71, as read together with Rule 40(4), is that the administrator applying for distribution must satisfy the court that they have properly ascertained the persons beneficially entitled to a share in the estate and have properly ascertained the shares due to such beneficiaries. The effect of it is that the court then incurs a duty to be satisfied, before it confirms the grant, that the administrator asking for confirmation has properly ascertained the persons beneficially entitled to a share in the estate and the shares due to such beneficiaries.

33. The starting point is with the persons beneficially entitled to a share in the estate. The 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. 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 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, in the manner set out in sections 35, 36, 38 and 39 of the *Law of Succession Act*.

34. The surviving widow has or widows have prior right over the children, so I shall start with considering whether the widow or widows of the deceased have been properly ascertained. Although there is a contest as to whether the deceased was a polygamist or not, for one side says that he had only one wife, while the other says he had married three. The material on record points to the deceased having had married three times. Selina Zisiga Kisugane was the mother of Tom, Arthur and Douglas Lukalo. She was alive at the time of the oral hearings, and she came to court and testified. She explained that she was the first wife of the deceased, who married had three wives during his lifetime. She named them as herself, Josina and Tabitha. Her story was supported by a sister of the deceased, Jane Afande Isana, who talked of three wives, being Selina, Josina and Tabitha. Selina Zisiga Kisugane explained that she was chased away, and the deceased married Josina thereafter. She went on, herself, to get married in Butere,



where she had three other children. She did not lay any claim to the estate. These testimonies were on all fours with those of Beverline Makhungu Mugutu and Jamin Oganga Katiezo. Clearly, Selina Zisiga Kisugane is not a surviving spouse of the deceased, for she was not his wife as at the date of his death, having entered into another marriage subsequent to her being chased away. Tabitha had ceased to be a wife of the deceased too, the moment she remarried after she left the deceased. Josephine or Josina was, therefore, the only wife of the deceased as at the time of his death. Josephine or Josina died in 2016 and Tabitha in 2014. So, the conclusion that I should make is that the deceased was not survived by any spouse as at the time that I am considering distribution of his death. In other words, there is no surviving spouse.

35. The next category of survivors to be ascertained would be the surviving children of the deceased, and if any of the children be dead, the ascertainment of the children of the dead children of the deceased. Tom Lukalo was the first to file an affidavit on distribution. According to him, the deceased had fifteen children, which he has categorized into houses. As I have found above, the deceased married three times, and, therefore, the categorization is proper. According to him, Tom, Arthur and Douglas Lukalo are in the first house; Beatrice, Charles, Fabian, Kennedy, Edward, Anthony, Jackline and Harriet Lukalo and Margaret Osolika are in the second house; while Beatrice Kavulani and Beverlyne Gonya Mugutu are in the third house. Edward and Jackline Lukalo and Beatrice Kavulani are said to be deceased. Whereas Edward and Jackline Lukalo left no issue, Beatrice Kavulani was said to have been survived by one child, a son. According to the administratrices, the children of the deceased were thirteen, namely Tom, Arthur and Douglas Lukalo, Beatrice, Charles, Fabian, Kennedy, Edward, Anthony, Jackline and Harriet Lukalo and Margaret Osolika. Edward and Jackline Lukalo are said to be deceased. So the two sides agree on thirteen children. The status of the other two is contested, that is Beatrice Kavulani and Beverlyne Gonya Mugutu.
36. Beatrice Kavulani and Beverlyne Gonya Mugutu, also referred to as Makhungu, were introduced into the matter by Tom Lukalo, on the basis that their mother, Tabitha, was a spouse of the deceased, and that either the two were children that the deceased sired with the said Tabitha, or he had taken them in and accepted them as his children. I have looked closely at the affidavit of Tom Lukalo, and I have not seen any evidence exhibited on the paternity of Beatrice Kavulani and Beverlyne Gonya Mugutu, either by way of certificates of birth or of deoxyribonucleic (DNA) test certificates. Beatrice Kavulani is said to be deceased, so she could not have filed any affidavit. Beverlyne Gonya Mugutu is alive. She did not file an affidavit on distribution, but she did make and file a written statement, dated 2<sup>nd</sup> June 2015, and she testified in court. Her case is that her late mother, Tabitha Shivachi, was married to the deceased in the period between 1965 and 1972. They had two children, herself and the late Beatrice Kavulani. The two then separated in 1972. The testimony of Beverlyne Gonya Mugutu is supported in material particulars by other witnesses. There is Jane Afande Isana, a sister of the deceased. She said that the deceased had three wives, said to be Selina Lukalo, Josina Lukalo and Tabitha Lukalo. She identified the total number of the children of the deceased as fifteen, and that the third wife, the mother of Beverlyne Gonya Mugutu, had two children. The other witness is Selina Zisiga Kisugane, the mother of Tom Lukalo. She identified herself as the first wife of the deceased, who left after a disagreement. She said the deceased had three wives, being herself, Josina Kaveza and a third wife she did not identify, but said that third wife had two children with the deceased. Jamin Oganga Katiezo was the other witness, a cousin of the deceased. He also testified that the deceased had married three times. He named the wives as Selina, Josina and Tabitha. The testimonies of these elderly members and former member of the family of the deceased were not challenged by the administratrices. The administratrices called a distant cousin of the deceased, Vincent Ombeba Magada. He was not asked about the wives of the deceased, but he talked of the children of the deceased being thirteen, born of two mothers, with Selina being the mother of Tom, Arthur and Douglas Lukalo. I note that in his affidavit, sworn on 8<sup>th</sup> May 2018,



he avers that Selina M'Mboga and Tabitha M'Mboga were never married to the deceased. However, I find the testimony of Jane Afande Isana and Selina Zisiga Kisugane more believable and credible. Jane Afande Isana was the sister of the deceased, and would have known more about the family of her late brother than a distant cousin, like Vincent Ombega Magada. Selina Zisiga Kisugane bore three children with the deceased. I find it unbelievable that she could have had such a high number of children with a man to whom she was not married. It would be simply incredible. So, when she says that there was a third wife, with two children, I also believe her.

37. The conclusion to draw from the above, is that the deceased had married three times, and, from the three marriages, he got fifteen children. Three with the first wife, ten with the second wife and two with his third wife. Two of the children died without issue, and one with issue. The total number of survivors, therefore, should be twelve children and one grandchild. The beneficiaries from the family should total thirteen individuals.
38. The proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules deal with ascertainment of the persons beneficially entitled as well as their shares. Both sides have made proposals on distribution of the assets that they have identified as available for that purpose. Tom Lukalo proposes distribution according to houses; while the administratrices propose distribution to the individuals that they have ascertained, of course, excluding Beverline Makhungu Mugutu and the son of the late Beatrice Kavulani. Issues are raised with regard to inter vivos distributions in favour of some of the survivors, of course with the intent that I should take them into account, by virtue of section 42 of the *Law of Succession Act*, during distribution. I will not discuss the proposals by the parties before I first of all establish the assets that are available for distribution in the first place.
39. Related to the allocation of shares to the persons ascertained as beneficially entitled to a share in the estate, is the question of the assets available for sharing or distribution. Generally, the parties are agreed on the bulk of the estate available for distribution. The assets available for distribution would be those properties that vest in the administratrices, which had vested in the deceased before his death, or that were brought into the estate by the administratrices after they were appointed as such. Any assets not yet registered in the name of the deceased would not be available for distribution, and would not have been vested in the administratrices, and the administratrices would have no capacity to distribute assets whose titles are not legally vested in them.
40. According to Tom Lukalo the assets available for distribution are Trans Nzoia/Kipsoen/232; North Maragoli/Kisatiru/204, 1013, 1014, 1168, 1394 and 1395; North Maragoli/Kegondi/471; Nandi/Denja/Onamu Scheme Plot; motor vehicle registration mark and number KTK 575; and the house at Buru Buru, Nairobi. The actual registration details for the Buru Buru property is Nairobi/Block 75/295. According to the administratrices the assets available for distribution are North Maragoli/Kisatiru/775; Nandi/Denja/Onamu Scheme Plot; unadjudicated ancestral land at Kedohi; North Maragoli/Kegondi/471; and Trans Nzoia/Kipsoen/232. The actual registration details for what the administratrices are calling unadjudicated ancestral land at Kedohi is North Maragoli/Kisatiru/782. I will need to consider whether these assets belong to the estate, vest in the administratrices and are available for distribution.
41. I will start with Trans Nzoia/Kipsoen/232. According to the documents on record, an application was made on 20<sup>th</sup> April 1995, by the deceased, to the Cherangani Land Control Board, to have Trans Nzoia/Kipsoen/232 subdivided into six portions. There are no documents to show whether the approval of the Land Control Board was granted. The green card on record, for Trans Nzoia/Kipsoen/232, shows that the said property was registered in the name of the deceased on 15<sup>th</sup> November 1999, and on the same date it was transferred to the names of the administratrices, in their capacity as such.



The register for Trans Nzoia/Kipsoen/232 was subsequently closed on 11<sup>th</sup> September 2006, upon its subdivision into parcels numbers Trans Nzoia/Kipsoen/810 and 811, which were registered in the names of the administratrices. I see on record green cards for Trans Nzoia/Kipsoen/826, 827, 1048, 1049 and 1050, showing that these titles are in the names of Godfrey Khalitaba Lukorito, Milton Ngandu Mundia, the administratrices, Rotich Cheruiyot Mutuol and Evans Alemba, respectively. According to the record, the register for these subtitles were opened on diverse dates between 22<sup>nd</sup> September 2006 and 22<sup>nd</sup> April 2009. The green cards for Trans Nzoia/Kipsoen/826 and 827 show that the two were subdivisions from Trans Nzoia/Kipsoen/810. The green cards for Trans Nzoia/Kipsoen/1048, 1049 and 1050 show these to have been subdivisions from Trans Nzoia/Kipsoen/825. Clearly, therefore, the proposal by both sides to distribute Trans Nzoia/Kipsoen/232 is unrealistic, as Trans Nzoia/Kipsoen/232 no longer exists, as, following its subdivision, the register for it was closed and new registers were opened for the sub-titles resulting from the subdivisions. Most of the subtitles were registered in the names of third parties, and, therefore, these lands are not available for distribution as assets in the estate of the deceased, that is to say, Trans Nzoia/Kipsoen/826, 827, 1049 and 1050. Only Trans Nzoia/Kipsoen/1048 is in the names of the administratrices, and it should be the only asset vesting in, and forming an asset of the estate of the estate, and, therefore, available for distribution. The asset that should have been listed for distribution is Trans Nzoia/Kipsoen/1048, and not Trans Nzoia/Kipsoen/232. Trans Nzoia/Kipsoen/1048 measures 5.436 hectares.

42. Next I consider North Maragoli/Kisatiru/204. The green card on record indicates that North Maragoli/Kisatiru/204 is registered in the name of Charles Kisanya Lukalo and Joyce Kageha Mugalitsi, and it measures 1.1 hectare. That registration happened on 23<sup>rd</sup> May 1995. The property is not an asset in the estate. It did not belong to the deceased as at the date of his death, and did not vest in the administratrices. It is not available for distribution. However, its disclosure is critical, for Charles Kisanya Lukalo, is a son of the deceased, and this property originally belonged to the deceased and was transferred to Charles Kisanya Lukalo as a gift. It is, therefore, a gift inter vivos, it is subject to section 42 of the [Law of Succession Act](#), and ought to be brought to the hotch potch at distribution/confirmation.
43. I will take North Maragoli/Kisatiru/1013 and 1014 together. The green cards on record, for the two, show that the same were registered in the name of the deceased on 8<sup>th</sup> December 1972, and both were transferred to the name of Francis Imbuga on 14<sup>th</sup> January 2000. The other document is handwritten, and is dated 10<sup>th</sup> October 1993, and is in respect of sale of North Maragoli/Kisatiru/1013 and 1014. It appears to be an acknowledgement of receipt of Kshs. 25, 000.00, being part-payment, by the buyer, Francis Imbuga. It bears the signatures of the deceased, the buyer, the wife of the deceased and a witness. As it is, these two no longer belong to the estate. They do not vest in the administratrices, and they are not available for distribution.
44. The green card for North Maragoli/Kisatiru/1168 shows that this asset was registered in the name of the deceased on 20<sup>th</sup> February 1971. It was transferred, on 26<sup>th</sup> June 1992, to the name of Josephine Kaveza Aluda. That transfer happened before the deceased died, so that on the date of his death the property did not vest in him, and it did not vest in the administratrices on the date of their appointment. Therefore, it never formed part of the estate of the deceased, and it was not available for distribution as part of his estate.
45. The green card for North Maragoli/Kisatiru/1395 shows that it was registered in the name of the deceased on 26<sup>th</sup> June 1992. It was transferred on 26<sup>th</sup> June 1992 to the name of Josephine Kaveza Aluda. That transfer happened before the deceased died, so that on the date of his death the property did not vest in him, and it did not vest in the administratrices on the date of their appointment. Therefore, it never formed part of the estate of the deceased, and it was not available for distribution as part of his estate.



46. The green card for North Maragoli/Kegondi/471 indicates that the same was initially registered in the name of the deceased on 21<sup>st</sup> February 1974, who then transferred it to Reuben Gwalungula Mugini on 5<sup>th</sup> May 1977, and then it reverted to the deceased on 19<sup>th</sup> January 1982 by way of exchange. I am not sure whether North Maragoli/Kegondi/471 and North Maragoli/Kisatiru/471 refer to one and the same property, for there is a search certificate for North Maragoli/Kisatiru/471, dated 21<sup>st</sup> October 2005, which indicates that this property is registered in the name of Marko Mbaizi Sasia, since 7<sup>th</sup> April 1970. It would appear that North Maragoli/Kegondi/471 is a property that was registered in the name of the deceased as at the date of his death, and it formed part of his estate, and vested in the administratrices, and should be available for distribution. However, North Maragoli/Kisatiru/471 is not an asset of the estate, and is not available for distribution. I have seen the affidavit of Tom Lukalo, sworn on 31<sup>st</sup> July 2014. He talks of North Maragoli/Kisatiru/471 and North Maragoli/Kegondi/471 as if they belong to the estate. It would appear that the correct property is North Maragoli/Kegondi/471, which is in the name of the deceased. North Maragoli/Kisatiru/471 was allocated to Tom and Douglas Lukalo, in the distribution of 29<sup>th</sup> October 1999, and the Court of Appeal, in the judgment of 11<sup>th</sup> July 2014, in Tom Lukalo vs. Beatrice Lukalo & Another [2014] eKLR (Onyango Otieno, Azangalala & Kantai JJA), specifically stated that North Maragoli/Kisatiru/471 was not an asset in the estate, and Tom Lukalo had been allocated a property which did not exist, or which could not be transferred to him because it was not registered in the name of the deceased. I find it surprising, despite that very definitive pronouncement by the Court of Appeal, the administratrices continue to treated North Maragoli/Kisatiru/471 as an asset in the estate and to propose to give it to Tom and Douglas Lukalo, instead of doing that which the Court of Appeal directed them to do, which I have set out here below, at paragraph 48 of this judgment, in verbatim. North Maragoli/Kisatiru/471 has nothing to do with the estate of the deceased herein, so long as it remains in the name of another person.
47. None of the parties have placed on record relating to Nandi/Denja/Onamu Scheme Plot. There is no documentary evidence, therefore, that this property exists. Since its existence cannot be verified or ascertained, it cannot be said to be an asset in the estate of the deceased, and it is not available for distribution as such. It does not vest in the administratrices under section 79 of the [Law of Succession Act](#), and there is no basis for them to propose it for distribution. The administratrices assert that they know nothing about it, and expect Tom Lukalo to be the best suited person to deal with it, in terms of perfecting its title. So, what I understand them to be saying is that the said property should be allocated to him, and he should, after that, take steps to have the title perfected. It would appear to be property that the deceased had acquired, whose title was not processed before he died. With respect, the administratrices appear to be shirking their responsibilities as such. It is their duty to perfect any titles that were left imperfect by the deceased. To complete transactions that were left incomplete by the deceased. To complete transfers of property that the deceased left untransferred to his name. That is part of the duty to collect, get in and gather the estate, that section 83(b) of the [Law of Succession Act](#) talks about, when it provides:



<p>“83.</p>	<p>Duties of personal representatives</p> <p>Personal representatives shall have the following duties—</p> <table border="1" data-bbox="574 470 821 1937"> <tr> <td data-bbox="574 470 638 548">(a)</td> <td data-bbox="638 470 821 548">...</td> </tr> <tr> <td data-bbox="574 548 702 1310">(b)</td> <td data-bbox="702 548 821 1310">to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;</td> </tr> <tr> <td data-bbox="574 1332 638 1411">(c)</td> <td data-bbox="638 1332 821 1411">...</td> </tr> <tr> <td data-bbox="574 1411 702 1489">(d)</td> <td data-bbox="702 1411 821 1489">...</td> </tr> <tr> <td data-bbox="574 1512 638 1590">(e)</td> <td data-bbox="638 1512 821 1590">...</td> </tr> <tr> <td data-bbox="574 1590 638 1668">(f)</td> <td data-bbox="638 1590 821 1668">...</td> </tr> <tr> <td data-bbox="574 1691 638 1769">(g)</td> <td data-bbox="638 1691 821 1769">...</td> </tr> <tr> <td data-bbox="574 1769 638 1848">(h)</td> <td data-bbox="638 1769 821 1848">...</td> </tr> <tr> <td data-bbox="574 1870 638 1948">(i)</td> <td data-bbox="638 1870 821 1948">...”</td> </tr> </table>	(a)	...	(b)	to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;	(c)	...	(d)	...	(e)	...	(f)	...	(g)	...	(h)	...	(i)	...”
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(c)	...	
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(e)		...
(f)	...	
(g)	...	
(h)	...	
(i)	...”	

48. The Court of Appeal, in *Tom Lukalo vs. Beatrice Lukalo & Another* [2014] eKLR (Onyango Otieno, Azangalala & Kantai JJA), dealt with the duty of administrators with respect to collection and getting in of the assets of the estate, where it said:
21. Even if the said parcel of land was indeed the property of the deceased but only remained to be transferred to him at the time of his demise, it was the duty of the respondents as legal representatives of the estate of the deceased to institute proceedings against the registered proprietor for transfer of the same to them as legal representatives of the estate of the deceased. The record does not have evidence of the respondents’ efforts to recover the said parcel of land.
  22. The appellant is only an heir to the estate of the deceased. He would have no capacity to institute recovery proceedings in his own right. In the premises, we wonder how the order of the learned Judge with respect to the parcel of land would have been executed.”
49. What this then means is that whether Nandi/Denja/Onamu Scheme Plot was a property that had been allocated to the deceased by the authorities or he had bought it from someone, the administratrices had a duty to pursue its registration in the name of the deceased, so as to bring it within the estate, in which case it would vest in their names, to enable them distribute it. If the deceased had bought it from someone, and that person was reluctant to transfer it to the estate, then it would be the duty of the administratrices to institute recovery proceedings. The administration of the estate was committed to them by the court, and it was their duty, by virtue of section 83, to gather the estate. That duty could not be pushed to the heirs or survivors or beneficiaries who did not hold the grant of representation. Equally, such imperfect assets as Nandi/Denja/Onamu Scheme Plot, in terms of title, ought not to be distributed, for transmission of the same, to the persons to whom they are eventually devolved, would be impossible, before the personal representatives perfect the titles to them.
50. Regarding motor vehicle registration mark and number KTK 575, the administratrices say that they do not know where this asset is. They, therefore, do not know about its condition. Crucially, they state that the motor vehicle was sold by the deceased to another person, but they have no details of the buyer, nor



do they have documentary evidence to support the alleged sale. They have exhibited search certificates for the motor vehicle, which show it to be still in the name of the deceased. One of them is dated 6<sup>th</sup> June 1999 and the other 7<sup>th</sup> October 2015. However, I am not persuaded that that is enough. It was the duty of the administratrices to locate the whereabouts of the vehicle, to establish whether it was still in existence, for it could be grounded or dismantled for scrap metal and spares, and, therefore, completely not available for distribution. It would be imprudent to allocate an asset to a beneficiary, when the existence of the alleged asset is unknown. I emphasize, it is the duty of the personal representatives, to locate the physical whereabouts of any asset, before they offer it for distribution. It is not enough to distribute it based on documentation, when the physical whereabouts are unknown. It should not be left to the person allocated the asset, at distribution, to trace and locate the physical whereabouts of any asset. Existence of an asset should not just be in terms of documents and registration, it is also physical. Paper existence will not do, without physical existence. As the physical existence or whereabouts of the motor vehicle has not been established, the motor vehicle ought not to be distributed.

51. The house at Buru Buru, Nairobi, or Nairobi/Block 75/295 is said to have been sold to one of the administratrices and her husband, that is Margaret Osolika and Tom Osolika. There are several documents on record which are meant to support the alleged sale. One is dated 10<sup>th</sup> July 1991, allegedly done in the hand of the deceased, and which appears to be a sale agreement in respect of Nairobi/Block 75/295, between the deceased on one hand and Margaret Osolika and Tom Osolika on the other. There is a transfer of lease of the same property, dated 23<sup>rd</sup> October 1990, executed by the deceased, and lodged at the registry of lands on 1<sup>st</sup> November 1990, and registered on the same date. I have carefully and scrupulously perused through the file of papers before me, and I have not seen copy of a green card or a certificate of official search for Nairobi/Block 75/295 or a copy of the title deed for that property after registration of the lease on 1<sup>st</sup> November 1990. I cannot, tell, therefore, whether the same was ever registered in the names of the administratrix and her husband. It is alleged that they later sold it to another. One thing is clear, though, that as at today, when I am writing this judgment, Nairobi/Block 75/295 is not an asset in the estate of the deceased and is not available for distribution. Tom Lukalo appears to question the validity or genuineness of the transaction. The material on record shows that these things happened during the lifetime of the deceased. Whether Nairobi/Block 75/295 was transferred to Margaret and Tom Osolika as a gift or for a consideration, the result is the same. The asset left the estate of the deceased before he died. I would have no jurisdiction, under Articles 162(2) and 165(5) of *the Constitution*, to probe the said sale, and any party keen on questioning the transaction ought to move the court with the appropriate jurisdiction. Whether the property was sold or was a gift inter vivos is critical, though, for it was sold, then section 42 of the *Law of Succession Act* will not apply, but it would if it was gifted inter vivos. The parties did not deal with the issue decisively, at the oral hearing, and I cannot tell, one way or the other, whether Nairobi/Block 75/295 was gifted inter vivos to the two or whether it was sold to them. I cannot, therefore, say whether or not section 42 of the *Law of Succession Act* should apply to it or not, for the purposes of distribution. In other words, I cannot, without the evidence, to support either position, order that Nairobi/Block 75/295 should be brought to the hotch potch.

52. For avoidance of doubt, section 42 of the *Law of Succession Act* says:



<p>“42.</p>	<p>Previous benefits to be brought into account</p> <p>Where—</p> <table border="1"> <tr> <td data-bbox="558 398 638 1267">(a)</td> <td data-bbox="638 398 842 1267"> <p>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</p> </td> </tr> <tr> <td data-bbox="558 1267 638 1935">(b)</td> <td data-bbox="638 1267 842 1935"> <p>property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of</p> </td> </tr> </table>	(a)	<p>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</p>	(b)	<p>property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of</p>
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	<table border="1"> <tr> <td> <table border="1"> <tr> <td>this Act,</td> </tr> </table> </td> </tr> </table> <p>that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”</p>	<table border="1"> <tr> <td>this Act,</td> </tr> </table>	this Act,
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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		
(b)	property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,		

53. 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) and *In re Estate of Nyachico Osindi (Deceased)* [2019] eKLR (Ougo J) and *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J). What would amount to an inter vivos gift would be one made by way of a complete transfer of a property to the name of the beneficiary of the gift during the lifetime of the deceased; as well where the deceased died before he had completed the process, but there is some evidence that he had substantially done much of what was required, and that only final step, such as registration or transfer, was remaining.
54. The green card for North Maragoli/Kisatiru/775 shows that the same was registered in the name of the deceased on 7<sup>th</sup> April 1970. It was then transferred to Joas Onula Luhambe on 3<sup>rd</sup> January 1975 for a consideration. There is also a certificate of official search, dated 22<sup>nd</sup> February 2006, which shows the proprietor of North Maragoli/Kisatiru/775 to be Joash Onula Luhambe since 3<sup>rd</sup> January 1975. Clearly, therefore, North Maragoli/Kisatiru/775 is not an asset in the estate of the deceased, it not available for distribution, it does not vest in the administratrices, and anyone allocated the asset would be unable to have it transmitted to their name.
55. What the administratrices describe as unadjudicated ancestral land at Kedohi is actually registered as North Maragoli/Kisatiru/782. It is not clear to me why the administratrices describe it as unadjudicated, given that it is registered land. Unadjudicated land can only refer to property that has not been subjected to demarcation, adjudication and registration. Once land is registered, it cannot, thereafter, be referred to as unadjudicated. Anyhow, there is a green card on record, for that alleged unadjudicated ancestral land at Kedohi, that is North Maragoli/Kisatiru/782. It shows that it was registered in the name of Joseph Aluda on 7<sup>th</sup> April 1970. It was then transferred to the name of Jeremiah Chegenye Aluda on 13<sup>th</sup> December 2006, through Kisumu HCSC No. 95 of 2004. On the same date, 13<sup>th</sup> December 2006, it was registered in the names of Jeremiah Chegenye Aluda, Tom Lukalo, Arthur Lukalo, Henry Mususi Aluda, Ambisi Kisanya and Kidake Aluda. There is a restriction in favour of Rodgers Magada, Edward Aluda and Muhanda Aluda. There is a certificate of official



search, dated 19<sup>th</sup> October 2015, which shows that North Maragoli/Kisatiru/782 was registered in the names of Jeremiah Chegenye Aluda, Tom Lukalo, Arthur Lukalo, Henry Mususi Aluda, Ambisi Kisanya and Kidake Aluda on 13<sup>th</sup> December 2006, and it reflects the restriction that I have referred to above. Am told Joseph Aluda was the father of the deceased, and the share that was devolved to Tom and Arthur Lukalo, from the estate of Joseph Aluda, ought to have been devolved to the estate of the deceased herein. North Maragoli/Kisatiru/782 is not an asset in the estate of the deceased, for it is not in his name, but in the names of others. The estate has an interest, though, in the property. The share that was devolved to Tom and Arthur Lukalo, out of the estate of the father of the deceased, did not go or should not have been devolved to them absolutely, for they were not entitled to it absolutely. They had no direct right to it. It was share meant for their father, the deceased herein, and that share should have been devolved to his estate, rather than to Tom Lukalo and Arthur Lukalo. The persons who survived the deceased herein are not just the two, Tom and Arthur Lukalo, but all the thirteen children of the deceased herein. All thirteen are entitled to this share. Even where section 41 of the *Law of Succession Act* is applied, to devolve the share to the children of a dead child of the deceased, it would still be devolution to all the thirteen, who should take equally, according to that provision. Tom and Arthur Lukalo can only be holding the share in North Maragoli/Kisatiru/782 in trust for themselves and the other eleven beneficiaries. That share held by Tom and Arthur Lukalo, in North Maragoli/Kisatiru/782, is an asset in the estate of the deceased, it should vest in the administratrices, and is available for distribution.

56. Despite my very scrupulous and careful perusal of the record before me, I have been unable to find any document relating to North Maragoli/Kisatiru/1394. I was told that it is registered in the name of Josephine Lukalo. However, without a copy of green card or certificate of official search or title deed for it, I cannot, for sure, say in whose favour it is registered, and whether it is an asset in the estate of the deceased or not.
57. From the analysis above, of the documents relating to the assets that have been placed in record, I have established that there are only three assets for distribution. That is to say Trans Nzoia/Kipsoen/1048, North Maragoli/Kegondi/471 and the share devolved to Tom and Arthur in North Maragoli/Kisatiru/782. However, the share of the estate in North Maragoli/Kisatiru/782, may not be available for distribution immediately, before the restriction registered in the title is addressed, with respect to the interests of the persons in whose favour it is registered. It would appear, from that, that only Trans Nzoia/Kipsoen/1048 and North Maragoli/Kegondi/471 are really available for distribution. Trans Nzoia/Kipsoen/232 no longer exists, and the only portion of it still in the name of the deceased is Trans Nzoia/Kipsoen/1048. The following assets are not in the name of the deceased and are, therefore, not for distribution, that is North Maragoli/Kisatiru/204, 471, 775, 1013, 1014, 1168 and 1395, and Nairobi/ Block 75/295. North Maragoli/Kisatiru/204 is a gift inter vivos, and should be brought to the hotch potch. It is not clear whether North Maragoli/Kisatiru/1168 and 1395, and Nairobi/ Block 75/295 were gifts inter vivos, the evidence on record was patchy on that aspect, for insufficient evidence was led on the circumstances under which they were transferred to the wife and children of the deceased who benefited from them. There is no evidence of the physical existence of Peugeot 404 KTK 575 nor of its sale to a third party by the deceased, the physical and documentary existence of Nandi/Denja/Onamu Scheme Plot and the documentary existence of North Maragoli/Kisatiru/1394.
58. I have identified the thirteen survivors of the deceased here above, who ought to benefit from shares in the assets that I have identified here above as available for distribution. However, I feel it would be premature to distribute the said two assets between the said beneficiaries, before the administratrices address the issues that I have raised above, such as perfecting titles of some of the assets, if at all the estate is entitled to them. Secondly, it would be prudent to give time to Tom Lukalo, and his supporters, who



may wish to lead some evidence to establish whether North Maragoli/1168 and 1395, and Nairobi/Block 75/295, were inter vivos gifts, for if they were, they ought to be brought to the hotch potch, not for distribution, but for the application of section 42 of the *Law of Succession Act*. Similarly, the administratrices may also wish to lead evidence to show that Tom, Arthur and Douglas Lukalo also benefitted from inter vivos gifts. They also need to explain in greater detail the circumstances under which transfers were done to Godfrey Khalitaba Lukorito, Milton Ngandu Mundia, Rotich Cheruiyot Mutuol and Evans Alemba out of Trans Nzoia/Kipsoen/232, and who benefitted from the sales, so that the court can assess whether to treat the distribution of the proceeds from the said sales as gifts inter vivos or not. The bringing of such gifts to the hotch potch could have a critical impact to the distribution in the end. It is important that the parties address those issues before final orders on distribution are made.

59. I shall allocate a date, for mention of the matter, at the delivery of this judgment, after ninety days, to enable the parties decide on their final course of action, in view of everything that I have said above. It is only after that that I should make final orders on distribution. I grant leave, of twenty-eight days, to any party, who may be aggrieved by the determinations that I have made in this judgment, to move the Court of Appeal, appropriately. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS.....27<sup>th</sup>  
..... DAY OF .....May.....2022**

**WM MUSYOKA**

**JUDGE**

**Erick Zalo, Court Assistant.**

**Mr. D. Akwala, instructed by Akwala & Co., Advocates for the administratrices.**

**Mr. Munyendo, instructed by Anziya & Company, Advocates, instructed by the objector.**

