



**In re Estate of Odola Awino (Family Appeal E002 of 2022)  
[2024] KEHC 16031 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16031 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
FAMILY APPEAL E002 OF 2022  
DK KEMEL, J  
DECEMBER 20, 2024**

**BETWEEN**

**JOHN INDIDI AWINO ..... APPELLANT**

**AND**

**BOAZ JUMA OBARA ..... RESPONDENT**

*(Being an Appeal from the judgement of Hon. J.P. NANDI (P.M)  
Bondo dated 8th April 2022 in Succession Cause No. E82 of 2021)*

**JUDGMENT**

1. This appeal arises from the judgement of the trial magistrate Hon. J.P.Nandi dated 8/4/2022 in which the Appellant’s application dated 30/9/2021 seeking for the revocation and or annulment of grant made on 29/3/2021 to the Respondent and confirmed on 20/5/2021 was dismissed with costs to the Respondent.
2. Being aggrieved by the said judgment, the Appellant has since appealed to this court on the following grounds of appeal:
  - i. That the trial magistrate erred in law and in fact in misinterpreting and wrongly applying the law governing succession proceedings in Kenya.
  - ii. That the trial magistrate erred in law and in fact in holding that the Respondent’s father Ezekiel Obara, was an adopted child of the late Odalo Awino without any evidence in that regard and without any court order as provided under section 154 of the Children’s Act.
  - iii. That the learned trial magistrate erred in law and in fact in dismissing the objection raised by the Appellant without any legal basis and /or factual backing hence arriving at an erroneous judgment.



- iv. That the learned trial magistrate erred in law and in fact in holding that the Respondent's father Ezekiel Obara who was not being maintained by the deceased immediately prior to his death, is a dependent within the meaning of section 39 of the *law of succession Act* cap 160 Laws of Kenya.
  - v. That the learned trial magistrate erred in law and in fact by failing to consider that the Appellant was the rightful beneficiary of half (1/2) share of the estate of the deceased.
  - vi. That the learned trial magistrate erred in law and in fact in awarding the deceased's estate to the Respondent who was not legally entitled to half (1/2) share of the estate of the deceased.
  - vii. That the learned trial magistrate erred in law and in fact in failing to critically analyze the evidence of Boaz Juma Obara, the Respondent herein vis a vis the law with regard to adoption and failing to uphold that the Respondent's father Ezekiel Obara and his father were maintaining him and therefore the issue of adoption did not arise.
  - viii. That the trial magistrate erred in law and in fact in misdirecting himself in the application of hearsay evidence as a basis of his decisions in total contravention of the provisions of the *Evidence Act*.
  - ix. That the trial magistrate erred in law and in fact in relying on hearsay evidence which is not admissible in law and in particular section 63 of the *Evidence Act*.
  - x. That the trial magistrate erred in law and in fact in failing to consider, evaluate and take into account the oral and documentary evidence and submissions of the Appellant hence arriving at an erroneous decision in the circumstances.
  - xi. That the trial magistrate erred in law and in fact in failing to analyze all the exhibits before court.
  - xii. That the trial magistrate erred in law and in fact in making a decision based on extraneous issues that were neither pleaded nor proved at the hearing which were not the subject matter before him hence arriving at an erroneous judgment.
  - xiii. That the trial magistrate erred in law and in fact in basing its decision on wrong principles of law thereby entering judgment in favor of the Respondent without any legal basis and /or explanation of the case.
  - xiv. That the trial magistrate erred in law and in fact as he misapplied the law in regard to adoption hence the erroneous judgment.
3. Ultimately, the Appellant prayed that the whole judgment of the trial magistrate be set aside in its entirety and in lieu thereof there be an order for revocation or annulment of the grant of letters of administration issued and confirmed in the names of the Respondent on 20<sup>th</sup> May 2021 with costs to the Appellant.
  4. In *Selle Vs Associated Motor Boat Co* [1968] EA 123 the role of a first appellate court was well established; to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at its own independent conclusions. In so doing, I must accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which I do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the magistrate failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong.



5. In this regard the Objector/Appellant stood in as the Objector and the Respondent as the Petitioner in the trial court. The summons for revocation/annulment of grant dated 30/9/2021 was canvassed by way of viva voce evidence. The Appellant called three witnesses in support of his case which was as follows:

6. PW1 was John Indidi Awino testified that he was a farmer and a resident of Usire Sub- Location and that he was born in 1956. That he knew the late Odalo Awino, who was a brother to his father Erasto Awino. That Odalo Awino had no children while his father Erasto Awino had 11 children. That Boaz Juma Obara the Respondent herein is the son to his brother Ezekiel Obara. He went on to state that Odalo Owino went to Tanzania for many years and upon his return he went to live with his brother Erasto Awino.

That later on, Odalo Awino was shown parcel number North Sakwa/ Maranda/1353. That because he did not have children, they agreed with Erasto that Erasto's children namely Ezekiel Obara and John Indidi were to be given the land. That in 1978 the land was registered in the name of Odalo Awino and Ezekiel Obara. That Odalo Owino died in 1975 and his wife died in 2004. That he came to learn of the succession in 2020. That he occupies half (1/2) of the land which belonged to deceased Odalo Awino while his brother Ezekiel occupied the other half. He further stated that he relies on the supporting affidavit dated 30<sup>th</sup> September 2021 and the supplementary affidavit dated 2<sup>nd</sup> November 2021 as his evidence in chief. That Erasto gave his land to four sons, while the two sons John Indidi and Ezekiel Obara were given the suit land by the late Odalo Awino. He relied on the list of documents dated 24/11/2021 produced as exhibits 1-11 respectively.

On cross examination, he stated that in 1978 he was aged 22 years. That Odalo Awino showed him half of the land but had no documents to show that he was adopted by Odalo Awino. That there are however people who heard Odalo Awino giving him the land. He went on to state that Odalo Owino could not register the land in his name because he was still alive. That when Boaz lodged succession, he was living on the suit land and had no notice of the same.

On Re-examination, he asserted that the grant was issued on 29/03/2021 and confirmed on 20/05/2021 that six months had not lapsed as by law required. He testified further that he had no information when the succession was done. That Odalo did the subdivision in 1972 and died in 1975, and that registration was later carried out in 1978 by his wife.

7. PW2 was Jeremiah Omondi Odalo testified that he was born in 1957 and that he knows the late Odalo Awino, and knows also both the Appellant/Objector and Respondent/Petitioner herein. That he recorded his statement on 24/1/2022 and relied on the same as his evidence in chief. The court adopted the same.

On cross examination, he testified that Odalo gave the land to Ezekiel Obara and John Indidi. He stated further that the title deed was in the names of Ezekiel Obara and Odalo Awino. That Odalo's wife was still alive and she knew that the other half was for John Indidi. That they did not foresee a dispute arising in future concerning that land and that's why John did not request Wilfrida (Odalo's wife) to have his name registered on the suit land. That the house of John Indidi is on the suit land.

8. PW3 was Edward Akun Ngado, who testified that he is a retired chief and then aged 78 years old. He went further to state that he hails from West Sakwa location. That he recorded his statement on 24/1/2022 which he wished to be adopted as his evidence in chief. The court adopted the same.

On cross-examination, he stated that in 1978 to 1981 he worked in Nairobi but he used to go home often. That Odalo Owino died in 1975 and that he came for the funeral. He testified further that in 1971, Odalo Awino came from Tanzania and agreed with his brother Erasto Awino that he will give



his land to Ezekiel Obara and John Indidi. That Ezekiel was older and John was still a minor that is why Ezekiel was registered. That he was present when the verbal agreement was made by Odalo Awino, that Ezekiel would occupy his half share and the other half in the name of Odalo Awino was for John Indidi. Further, he stated that Wilfrida likewise confirmed to him that the land belonged to John Indidi. That all the other people who were present during the making of the oral agreement by the late Odalo had since passed on.

He further stated that the house that John build for Wilfrida is still standing on the suit land. In addition, he testified that when the house was built by John, Ezekiel was staying with Erasto and did not live with Odalo Awino nor his wife Wilfrida. That Ezekiel moved to the half share of the suit land in 1990. That Odalo Awino left his half share to John Indidi.

On re-examination, PW3 asserted that Odalo Awino and Ezekiel Obara owned half share each of the suit land. That Ezekiel moved to his half share in 1990.

9. That marked the close of the Objector's/Appellant's case.
10. On his part the Petitioner/Respondent called three witnesses.

DW1 was Boaz Juma Obara. He stated that he is resident of Usire Sub- Location and that he is the one who lodged succession for the estate of Ezekiel Obara Awino who is his father and Odalo Awino is his grandfather. He adopted his replying affidavit sworn on 27/10/2021 and further replying affidavit sworn on 8/12/2021 as his evidence in chief.

On cross examination, he stated that Odalo Awino had no children and that he adopted Ezekiel who is his brother's son. That Erasto was a brother to Odalo and Erasto was father to Ezekiel. That Ezekiel had the following children: 1. George Onyango(alive),2. Boaz Juma-deceased, Helinda Ondogo-deceased, Mary Auma-deceased, Christopher Akumu-deceased, Jared Awino-deceased, Juma Awino-alive, Helen Jane-alive, Connie Awino-alive and John Indidi Awino alias Mathews(alive).

He went further to state that Odalo Awino died on 1/7/1975 when he was not yet born. That he was born on 1/9/1978 and that his father Ezekiel died in 1999. That when registration and adjudication was done, he was not yet born. That his family gave him authority to file succession after discussion before the chief, but does not have the minutes of the meeting over the same. That half share of the suit land was Ezekiel's and the other half share was for Odalo Awino. That Ezekiel has only half share of the suit land parcel number North Sakwa/ Maranda/1353. He stated further that the people who were to file the succession were the children of Odalo or Ezekiel. That Ezekiel died in 1999 when Odalo's wife was still alive. That he did not deem it necessary to involve the Odalo's family as he had adopted Ezekiel as his son but he did not have documentary evidence of the adoption. He admitted that the suit land parcel number North Sakwa/ Maranda/1353 is occupied by the family of Odalo and Obara. He further stated that there is one house on the suit land belonging to Obara but John Indidi also has a house on the suit land.

He went on to state that John Indidi is his uncle. That parcel No. 1368 is for George Onyango, 1369 is for Christopher Okumu, 1370 for Jared Awino, 1367 is for Juma Awino who are Ezekiel's brothers. He also stated that John Indidi inherited the wife of Boaz Juma and was given Boaz's land. That he found him staying there when he was born. That he does not have documentary evidence to show the same. That the chief had minutes that indicated that he was to be given another land which is in the name of Boaz Juma and Walter. He further stated that he sold the land to Boaz which is on the side where he is living and not where John Indidi is living.

It was also DW1's testimony that he sought confirmation of grant under certificate of urgency as he was sick and it was before the lapse of six months but he did not have the medical documents in court.



He went on to state that he sold the land to offset the hospital bill. He went on to say that they sat as the children of Odalo and Obara when he wanted to file succession and agreed that he did it but at that time he did not know that the objector owned the other half share before he lodged the succession.

On re-examination, DW1 stated that he was sick and sought permission to confirm the grant and that he informed his uncle that he was filing succession. That they had a meeting at the chief's office that John Indidi was in the meeting among others, but walked away. That John Indidi established his home in the suit land in 2016.

11. DW2 was George Onyango who adopted his statement dated 9/12/2021 as evidence in chief.

On cross examination, he stated that Ezekiel Awino was his brother while John Indidi is his brother. He stated that he understands adoption as taking a child and staying with him as your own. He went further to state that the suit land was for Ezekiel and Odalo Awino. He acknowledged that Boaz Juma and John Indidi stay on the suit land. He went further to state that Boaz has no house on the suit land but John Indidi has a house on the suit land. Further, he stated that he, Christopher, Jared, Ezekiel and John Indidi are brothers and that their father called Erasto who gave them land. He further stated that John Indidi was left in the hands of Boaz Juma. He averred that they sat as a family six times and later went to the chief's office where they had a meeting on the suit land.

On re-examination, he stated that John Indidi built his house on the suit land in the year 2016 and that Boaz Juma died in 1975 and that John Indidi inherited his wife.

12. DW3 was Maurice Okoth Ojode who adopted his statement dated 9/12/2021 as his evidence in chief.

On cross examination, he stated that they belong to the same clan with Odalo Awino. Further, that he did not know which land John was given. That the children of Erasto were Obara Awino, Juma Awino, Mathews Awino, Christopher Awino, Chocho Jared Awino and George Awino and that he knew where all of them stayed where they had title. He however did not know why John was not given land but nonetheless he was aware that it was John Indidi who occupied the suit land, and had a house there. He further stated that there is no other person in occupation of the suit land.

On re-examination, he stated that John is the only one living on the suit land and further that the house of Odalo and Obara are also on the suit land.

13. At this point, the petitioner's case was closed.

14. On appeal, the Appellant submitted on two issues. Firstly, was the question who should administer the estate of the deceased Odalo Awino? The Appellant, while relying on evidence on record, submitted that the deceased and his wife both died and had no children to survive them. It was submitted further that the deceased was a brother to Erasto Awino, thus Erasto Awino would have been the immediate person to administer the estate of Odalo Awino, but however he too was dead. Quoting the Respondents evidence on cross examination, he stated that the deceased had other brothers and sisters but the Respondent did not deem it necessary to involve them (the other family members to Odalo Awino) because to him, the deceased had adopted Ezekiel Obara Awino as his son.

The Appellant submitted further that the next immediate person to administer the deceased Odalo Awino's estate were the children of Erasto Awino. These children included the Appellant herein John Indidi Awino and Ezekiel Obara Awino the father to the Respondent herein. Ezekiel Obara Awino having died, the Appellant submitted that the other children of Erasto Awino ranked first to administer the estate of the deceased Odalo Awino.

The Appellant relied on sections 39 of The [Law of Succession Act](#) to wit:

39. Where intestate has left no surviving spouse or children



- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
  - (a) father; or if dead
  - (b) mother; or if dead
  - (c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
  - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
  - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

15. The Appellant submitted further that the Respondent’s father Ezekiel Obara (deceased), being brother to the Appellant John Indidi and other brothers and sisters ranked in priority to administer the estate on the deceased. It was further submitted that Section 66 Law of Succession Act gives the court discretion which discretion has to be in accordance to part V and in this case section 39 of the Law of Succession Act becomes vital.

It was the Appellant’s submissions that there was clear evidence on record that the deceased Odalo Awino had beneficiaries being his brothers and sisters who were never involved in the succession proceedings of his estate. These brothers and sisters to the deceased ranked in priority as compared to the Respondent in respect to the half share of the suit land namely North Sakwa Maranda/1353 that belonged to the deceased.

16. The Appellant submitted that he brought evidence before the trial court as to why the half share of land in deceased’s name was to be administered by him. Erasto being the father to the Respondent’s deceased father and the father to the Appellant among others shared his land to all his sons except two –Ezekiel Obara and John Indidi Awino who were staying with the deceased Odalo Awino. That there were documents to support the evidence to confirm that all others received save for the two. (see pages 53 to 55 of the record of appeal)

The appellant submitted that the Respondent’s evidence clearly with his witnesses confirm that the Appellant stays on the land and that the Appellant did not receive any share of land from his father. Further, while relying on the evidence/testimony of PW3 the former chief Edward Akun Ngado the Appellant stated that Pw3 stated that the deceased agreed with Erasto Awino that he would give his land to the Appellant and the Respondent’s father.

The Appellant further relied on Rule 26 (1) and (2) of the Probate and Administration Rules thus:

26. Grants of letters of administration

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in



Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

17. Secondly, the Appellant submitted that the Respondent failed to abide by this rule. The learned Magistrate erred in law and in fact in basing his decision on wrong principles of law thereby entering judgment in favor of the Respondent without any legal basis.
18. Ultimately, the Appellant prayed that the appeal be allowed, the judgment of the subordinate court be set aside and there be an order of revocation or annulment of the grant of letter of administration issued and confirmed in the names of the Respondent herein plus costs.
19. On his part, the Respondent submitted that the Appellant was given a conditional stay of execution of the lower court judgment and that he was to deposit Ksh 200,000/- in a joint interest earning account as a security pending the hearing of the appeal. The Respondent submitted further that the appellant failed to comply with the lower court order thus he should not be entertained at the High court. On this, he relied on the case of *Mohmed Ali Osman t/a Hahan Petroleum vs. Juanco Group limited (2021) EKLK* where the court held: “an application for stay invokes the discretionary powers of this court under order 42 Rule (1) of the civil procedure rules that empowers the court to stay execution either of its judgment or that of a court whose decision is being appealed from, pending appeal..”

On this issue, the law is very clear, In *Josephine Wambui Wanyoike Vs Margaret Wanjira Kamau & Another Civil Appeal No. 279 of 2003*, the Court of Appeal stated as follows;

“We hasten to add that the *Law of Succession Act* is a self-sufficient Act of Parliament, with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63 (1)”.

The said Rule 63(1) of the Probate and Administration Rules stipulates thus:

63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
  - (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub.Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

In my view, the said Order 42 rule 6(1) is not applicable in this case and hence this ground of objection must fail. Further, the objection regarding the non-compliance over the order on security is without basis since the Appellant cannot be denied his in-alienable right to access justice in ventilating his appeal. It is instructive that the Respondent could as well fall back on the default clause by proceeding with the execution of the decree.

20. The Respondent likewise submitted that the deceased intended that Ezekiel Obara to inherit his property upon his death, relying on the testimony of dw3.

In conclusion Respondent submitted that the orders sought by the Appellant should not be granted as the Respondent adhered to all the legal procedures in obtaining the grant.

21. I have carefully considered the record of appeal as well as the rival submissions. I find the issues for determination are as follows;



- i. who should administer the estate of the deceased Odalo Awino?
  - ii. Whether the grant should be revoked.
22. Delving onto the first issue for determination, the record bears witness to the fact that the deceased herein Odalo Awino died intestate survived by his wife Wilfrida who later in 2004 died leaving no children surviving them. The Respondent herein, in his capacity as a grandson, went on to acquire a grant of letters of administration to the estate of the deceased Odalo Awino on 29<sup>th</sup> March 2021, which was confirmed on 20<sup>th</sup> May 2021 before the lapse of six months. The said estate of the deceased entailed land parcel number North Sakwa /Maranda/1353. From the courts record, it is not in dispute that this parcel was registered in the names of Ezekiel Obara being the father to the Respondent and Odalo Awino the deceased herein, each in half (1/2) share. The issue that is salient here is whether the Respondent herein was in his right place to administer that estate of the late Odalo Awino or were there other beneficiaries who under the law ranked higher than him in light of the estate of the deceased.
23. This situation falls squarely under section 39 of the *Law of Succession Act*.
39. Where intestate has left no surviving spouse or children
- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
    - (a) father; or if dead
    - (b) mother; or if dead
    - (c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
    - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
    - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
  - (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.
24. In line with the above provision, the brothers and sisters of the deceased ranked high in administering the estate of the deceased Odalo Awino. From the testimony of DW1, the Respondent herein, the Respondent stated that half share of the suit land was Ezekiel's (his father) and the other half share was for Odalo Awino. That Ezekiel has only half share of the suit land parcel number North Sakwa/ Maranda/1353.
25. It was the Appellants submissions that he brought evidence before the trial court as to why the half share of land in deceased's name was to be administered by him. That Erasto being the father to the Respondent's deceased father and the father to the Appellant among others shared his land to all his sons except two –Ezekiel Obara and John Indidi Awino who were staying with the deceased Odalo Awino. That there were documents to support the evidence to confirm that all others received save for the two. (see pages 53 to 55 of the record of appeal)
26. The appellant further submitted that the Respondent's evidence clearly with his witnesses confirm that the Appellant stays on the land and that the Appellant did not receive any share of land from



his father. Further, while relying on the evidence/testimony of PW3 the former chief Edward Akun Ngado, the Appellant stated that Pw3 stated that the deceased agreed with Erasto Awino that he would give his land to the Appellant and the Respondent's father.

The above evidence tied up with the provisions of section 39 above indicates that the Respondent's father and the Appellant herein were the persons entitled to the deceased's estate. Now that the deceased had already subdivided the property during his life time and half share already registered in the name of the Respondent's father, i find that the other half that was still in the name of the deceased is meant for the Appellant herein John Indidi. Having arrived at this deduction, i find that the right person to administer the estate of the deceased is the deceased's brother herein John Indidi and not the Respondent who is a grandson. It is clear that the Respondent had snatched the share due to the Appellant yet the Appellant is still in occupation of his half share of the land while the Respondent has the other half through his father who incidentally is a brother to the Appellant. The evidence of the Appellant in the trial court was quite cogent and credible and ought to have carried the day but then the trial magistrate appeared to have been swayed by the issue of the adoption of the Appellant and his brother by the deceased. The adoption aforesaid was one of kinship and that the deceased ensured that the two children of his brother would be catered for by the land in question.

27. On the issue of revocation, Section 76 of the Law of succession Act is very clear and stipulates as follows on Revocation or annulment of grant

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

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

28. From the record, it was the evidence of the Respondent herein that he did not deem it necessary to inform the other relatives (surviving brothers-including the Appellant herein; and sisters) of the deceased Odalo Awino which was in contravention of Rule 26 of the Probate and Administration Rules (supra). Besides this, it is clear that the Respondent clearly concealed material facts (that the



deceased had surviving brothers and sister) from the court, which fits in as a ground for revocation of a grant as provided by section 76(b) above. It is clear that despite the Appellant being in possession of half share of the land as directed by the deceased, the Respondent surreptitiously lodged the succession cause without informing him or even inviting him to participate in the confirmation of the grant. The Respondent thus withheld material facts from the court thereby warranting a revocation of the grant issued to the Respondent. In that regard, I find that the decision of the learned trial magistrate was in error and must be interfered with.

29. Finally, the Respondent sought to challenge the appeal on the grounds that the Appellant failed to comply with the order regarding the deposit of security for the due performance of the decree. Indeed, the said order is expected to have accompanied with a default clause to the effect that in the event of default then the stay should lapse and that the Respondent was at liberty to execute the decree. Nothing barred the Respondent to do so. I find the Respondent's objection seeking to have the Appellant denied an opportunity to ventilate his appeal must be rejected as the Appellant has a right to access justice under Article 48 of *the Constitution*.
30. As the Appellant's appeal has succeeded, the issue that remains for disposal is whether the grant should be revoked. It is my view that revoking the grant will take the parties back yet the matter is now at the tail end. There is no reason to interfere with the grant itself since the bone of contention is on distribution of the estate. I find that an order cancelling the certificate of confirmation of grant and substituting it with a fresh one wherein the Appellant is captured as the beneficiary of the half share of LR NORTH SAKWA/MARANDA/1353 would be appropriate.
31. In light of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgement of the trial court dated 8/4/2022 is hereby set aside and substituted with an order allowing the Appellant's summons for revocation of grant dated 30/9/2021. The certificate of confirmation of grant issued to the Respondent on 20/05/2021 is hereby cancelled. A fresh certificate of confirmation of grant be and is hereby issued reflecting the Appellant herein John Indidi Awino as the beneficiary of half share on LR No. North Sakwa/ Maranda/1353. As parties are family members, I order each party to meet their own costs

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**

**D. KEMEI**

**JUDGE**

In the Presence of

N/A M/s Khayo.....for Appellant

M/s Owenga..... for Respondent

Ogendo.....Court Assistant

