



**In re Estate of Christopher Oboka Opanga (Deceased) (Succession Cause E109 of 1995) [2023] KEHC 3670 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3670 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE E109 OF 1995  
RE ABURILI, J  
APRIL 25, 2023**

**BETWEEN**

**FRANCO STEPHEN OPANGA ..... APPLICANT**

**AND**

**DANIEL MILTON OPANGA ..... RESPONDENT**

**RULING**

**Introduction**

1. Some of the facts of this cause are well captured in the summary given by the applicant in his submissions. Thus, the deceased Christopher Oboka Opanga died intestate on March 5, 1995 survived by a widow Selipher Opanga and four sons, namely Daniel Milton Opanga, John Kennedy Opanga, Paul Opanga and Franco Stephen Opanga. On diverse dates, a grant of letters of administration intestate and a certificate of confirmation of grant were issued to Selipher Opanga to administer the estate of the deceased. Unfortunately, Selipher Opanga passed away on December 15, 2005 before she could administer all of the deceased's estate. Thereafter, on and/or around January 19, 2006, John Kennedy Opanga passed away survived by a widow Rael Rebecca Nyalanga and a daughter, Selizer Opanga who is still a minor. On and/or around April-August 2006, the surviving children of the deceased, namely Franco Stephen Opanga, Daniel Milton Opanga and Paul Opanga executed a memorandum of understanding (MOU) with regard to the distribution of the estate of their deceased father and the late Selipher Opanga. On October 2, 2007, a grant of letters of administration intestate was issued to Franco Stephen Opanga, Daniel Milton Opanga and Paul Opanga. The grant was issued after the lapse of twelve months from the date of the MOU. Thereafter, a certificate of confirmation of grant was issued to the two administrators on October 2, 2007.
2. According to the applicant, each administrator took ownership of the property as captured in both the MOU and the certificate of confirmation of grant. Further, that according to the MOU, the Applicant and Paul Opanga (now deceased) were to be allocated land parcel No. Kisumu/ Municipality/ Block



7/183 as joint proprietors. Thus, the applicant claims that the certificate of confirmation of grant issued by this court on October 2, 2007 was generated from the MOU. Subsequently on December 14, 2016, Paul Opanga passed away intestate as a bachelor without any children. The Applicant then continued collecting rent from the commercial property situated on the suit property from the date of Paul Opanga's death until October 18, 2019 when the Respondent through his advocate wrote correspondences to tenants occupying the suit property allegedly warning them to stop paying rent to the Applicant. The applicant asserts that the Respondent succeeded partially when one of the tenants, namely Crown Paints Ltd failed to pay rent arrears amounting to a sum of Kshs 9,087,901.00/= for the period between November 8, 2019 to August 9, 2021 after heeding to the Respondent's warning as enshrined in their numerous correspondences to the tenants. That the other tenants occupying the suit property have been paying rent to the Applicant without fail. The Applicant is therefore aggrieved by the constant interference by the Respondent whom he claims has no color of right over the suit property, thus the current application before the court for determination.

### **The applicant's prayers and Case**

3. The applicant herein is Franco Stephen Opanga and is the co-administrator to the Respondent Daniel Milton Opanga. The two are siblings and administrators of the estate of the deceased Christopher Oboka Opanga. Vide summons dated October 25, 2021, the applicant sought the following orders:
  - a. Spent
  - b. That there be a stay of proceedings in Kisumu HC Succession Cause No 7 of 2019 pending hearing and final determination of this application.
  - c. That Daniel Milton Opanga be restrained from inter-meddling with land parcel Kisumu/Municipality Block 7/183 pending hearing and final determination of this application.
  - d. That the grant of letters of administration intestate and the certificate of confirmation of grant issued to Daniel Milton Opanga, Franco Stephen Opanga & Paul Opanga (Deceased) on October 2, 2007 be revoked and/or annulled.
  - e. That the Deputy Registrar to sign all relevant documents to effect the transfer of land parcel Kisumu/Municipality Block 7/183 to Franco Stephen Opanga in place of Daniel Milton Opanga who is one of the administrators.
  - f. In the alternative to prayer (e), the grant of letters of administration intestate and the certificate of confirmation of grant issued herein on October 2, 2007 be rectified and/or amended by removing the name of Daniel Milton Opanga as administrator of the estate of the deceased.
  - g. That cost of this application be provided for.
4. The applicant's case is that he is the legitimate and rightful beneficiary of land parcel Kisumu/Municipality/Block 7/183 as per the mode of distribution in the certificate of grant issued by court on the October 2, 2007. The applicant further averred that the respondent had refused and/or neglected to sign the transfer forms which was causing the applicant to suffer financial hardship and the suit parcel to depreciate in value because of lack of management/administration and further that the respondent was intermeddling with the suit parcel to the applicant's detriment. It was the applicant's case that since inheriting his share of the deceased's estate, the respondent has continuously frustrated the applicant's effort to transfer the suit property into his name which failure has led to the grant becoming useless and inoperative.



5. In his oral testimony before court, the applicant who testified as PW1 stated that the respondent had written to tenants on the suit property telling them not to pay rent. In cross-examination PW1 admitted that the Certificate of Confirmation of Grant stated that they were to share the property equally with his brother Paul Opanga who had since died. He further stated that there was an order by Hon Ndombi that they administer the suit property on a 50% share of the said property and that he and the respondent share the suit property.
6. The applicant stated that he wanted to get the entire property transferred to him because of an MOU that they had as a family which stated that they become joint proprietors over the suit property and not divide it. He further stated that what Hon Mwera J ordered was subject to the agreement by the parties in the MOU.
7. The applicant further admitted in cross examination that the suit property was charged by Barclays Bank of Kenya, now Absa Bank and the same had not been discharged. It was his testimony that they had registered some consents with the respondent and he released 25% of the rent to the respondent.
8. In re-examination, the applicant stated that before a certificate of confirmation of grant was issued, they (he and his remaining brothers) had signed a memorandum of understanding and further that he signed a consent order before Ombwayo J, the terms of which ceased to be in effect once judgement was delivered.

### **The Respondent's Case**

9. Opposing the application, the respondent testified as DW1 and adopted his witness statement dated May 19, 2022. It was his case that following the judgement of Mwera J on the October 2, 2007, the suit property was to be divided equally between the applicant and their now deceased Paul Opanga. He denied that vide their MOU of August 1, 2006, he and his brothers wanted to take the share of the suit property belonging to the deceased Paul Opanga to the exclusion of his widow.
10. The respondent testified that they had not transferred the suit property because there was a charge over it for Kshs 375,000 and that in 2014, the law firm of Orege was instructed to write to Barclays Bank to confirm documents held in its custody but had not done so. He further stated that there were other properties that were still in their deceased father's name.
11. It was the respondent's case that other than the Certificate of Confirmation of grant dated October 2, 2007, no other court had made any orders on how the disputed properties would be divided/shared.
12. In cross-examination, DW1, the respondent stated that as administrators, they had instructed the firm of Orege to write to Barclays Bank to discharge the title over the suit property. He further stated that the certificate of confirmation of grant issued by the court captured the MOU. It was his case that the firm of Orege had a conflict of interest in this matter as they were tenants in the suit property where no rent was being paid.
13. He further stated that the grant issued by Hon. Cherere was in respect of the estate of Paul Opanga and that the distribution regarding 75% and 25% was in respect of rents deposited in court, collected from the suit parcel.
14. In re-examination, the respondent stated that the firm of Orege advocates was not acting with impartiality as it was a tenant in the disputed premises. He further stated that the Certificate of Confirmation of grant superseded the MOU. He further stated that the widow and children of Kennedy Opanga were beneficiaries too to the estate hence he wished the court to give them their share.



## Submissions by the applicant

15. Only the applicant's counsel filed written submissions by sending them to the email address supplied to the parties in court on the hearing date. In the said submissions, the applicant's counsel framed the following issues for determination:
  - I. Whether the grant issued on October 2, 2007 should be revoked and/or annulled on the ground it has become useless and inoperative through subsequent circumstances.
  - II. Whether the suit property was jointly owned by the plaintiff and the late Paul Opanga.
  - III. Whether the principle of survivorship (jus accrescendi) applies to the suit property following the death of Paul Opanga.
  - IV. Whether the certificate of confirmation of grant dated October 2, 2007 should be revoked, amended and/or rectified with regards to share of heirs under the suit property.
16. Submitting on each of the framed issues, the applicant's counsel submitted as follows:

On whether the grant issued on October 2, 2007 should be revoked and/or annulled on the ground it has become useless and inoperative through subsequent circumstances,
17. The applicant cited the provisions of section 76 of the Law of Succession Act which provides for circumstances under which a grant of representation may be revoked by the court. He submitted that the administrators/representatives of the estate of the deceased have an obligation to discharge the duties as stipulated under section 83 of the Law of Succession Act, which includes the complete administration of the estate of the deceased; which complete administration of the estate of the deceased is achieved by signing the transmission forms and submitting the same at the Lands Office to effect transfer of the property from the deceased's name to its intended beneficiary or heir.
18. It was submitted that on and/or around November 16, 2007, the administrators of the estate of the deceased signed the transfer forms to effect transfer of the suit property to the Applicant and Paul Opanga( deceased) who were to have undivided shares in the property but that the transfer form marked FSO9 could not be registered at that particular time due to the registration of a charge over the property by Barclays Bank. It was submitted that the failure to register and/or file the transfer form at the Lands Office did not defeat the Applicant and Paul Opanga's intention to register the suit property at that particular instance under joint ownership as captured under the MOU. Further, that currently, the suit property is free of any charge or encumbrance, which begs the question why the Respondent had refused to sign the transfer forms to effect transfer of the suit property to the Applicant as its proprietor. The applicant submitted that the primary purpose of the grant has been hindered by the Respondent's refusal to discharge his statutory duties as enshrined under the Law of Successions Act, thereby rendering the grant useless and inoperative through subsequent circumstances.
19. According to the applicant, a grant becomes useless and inoperative when it fails to discharge its primary function as enshrined under the Law of Succession Act. That in this case, a complete administration of the estate of the deceased could not be achieved because of the Respondent's failure to admit that the Applicant was entitled to the complete ownership of the suit property by virtue of joint ownership. That the Respondent's interference over the management of the suit property by the Applicant amounts to a dereliction of his duty thereby rendering the grant useless and inoperative when the Respondent failed to complete the administration of the estate of the deceased.



20. Counsel for the applicant submitted that the Law of Succession Act does not define or say what constitutes the grant becoming useless and inoperative through subsequent circumstances. However, that in the case of In re of Estate of Alfred Kamure Mbindu (Deceased) [2021] eKLR, the court held a grant becomes useless and inoperative by reason of subsequent demise of a sole administrator. The same sentiments were echoed by the court in the case of Julia Mutune M'mboroki v John Mugambi M'mboroki & 3 others [2016] eKLR. In the instant case, it was submitted that the grant became useless and inoperative when the respondent declined to sign transfer forms to vest ownership of the suit property to the Applicant.
21. Further, that the Respondent's participation in the court's proceedings is evidence in itself that he is unwilling to discharge his administrative duty. That the Respondent has approached the court with unclean hands, hence he should be denied from drinking the clean waters of equity. Further, that the Respondent seeks to rely on orders issued by the subordinate court despite the unchallenged evidence that the suit property was still registered in the name of the deceased and not subject to the proceedings of the subordinate court. The applicant cited the holding in HC SUCC. Cause No 07 of 2019 where it was held that 'the suit property does not form part of the deceased's estate capable of being administered in this cause. The same can only be distributed in the matter of the estate of Christopher Oboka Opanga whose name the asset is registered.' The applicant argues that the ruling in the above case effectively rendered all decisions and/or orders issued by the subordinate court null and void with regard to the administration of the suit property; and that since the grant issued herein has become useless and inoperative, this honorable court should revoke the grant issued on October 2, 2007 and issue a new one in the name of the Applicant to enable him complete the administration of the estate of the deceased.

On Whether the suit property was jointly owned by the plaintiff and the late Paul Opanga

22. It was submitted that Section 2 of the Land Act, 2012 defines 'joint tenancy' as a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners.
23. According to the applicant, the (MOU), the MOU provided that land parcel No Kisumu/ Municipality Block/ 7/58 was to be allocated to Daniel Milton Opanga, the respondent herein, which information has been captured under the certificate of confirmation of grant dated October 2, 2007 wherein the land parcel No. Kisumu/Municipality Block/ 7/58 was to be owned solely by the Respondent herein. That according to the MOU, the suit property was to be allocated to the Applicant and Paul Opanga (now deceased) as joint proprietors but that the certificate of confirmation of grant dated October 2, 2007 provided that the suit property was to be divided equally among the two heirs.
24. The applicant argued that in the event of doubt or ambiguity of terms between the certificate of grant and the MOU, the court is called upon to give force to the terms of the MOU, which is akin to a consent or an agreement. That the MOU is binding upon the parties who made the informed decision to affix their signatures therein. Reliance was placed on the cases of Curtis -vs- Cleaning & Dyeing Co. Ltd. (1951), ALL ER 631 and United Kingdom Supreme Court decision in RTS Flexible Systems Ltd -vs- Milkorei Alis Muller GmbH & Co KG (UK Production) (2010) UKSC14, where the court observed that:

' ...Whether there is a binding contract between the parties and if so upon what terms depends upon what they have agreed. It depends not on their subjective state of mind but upon



consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations...'

25. The applicant submitted that since the MOU predates the certificate of confirmation of grant, the terms or provisions of the MOU reflect the true intention of the parties or beneficiaries of the estate of the deceased. Furthermore, that there are two different transfer forms, which indicate and confirm beyond a reasonable doubt that the suit property was to be registered in the name of the Applicant and Paul Opanga (deceased) as joint proprietors.

26. That in the event, the suit property was to be divided equally among the Applicant and Paul Opanga (deceased), then their share should have been expressly stipulated in the transfer forms submitted before the court. Reliance was placed on the Court of Appeal decision in Civil Appeal No 330 of 2003, Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla -vs- Kidogo Basi Housing Cooperative Society Limited and 31 Others where it was held that:

' A court of law cannot re-write a contract between the parties. ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.'

27. The applicant argued that the legal intention of the parties who executed the MOU was that the suit property was to be allocated to the Applicant and Paul Opanga (now deceased) as joint proprietors. In the circumstances, he urged this honorable court to hold that the suit property was jointly owned by the plaintiff and the late Paul Opanga.

On Whether the principle of survivorship (jus accrescendi) applies to the suit property following the death of Paul Opanga

28. The applicant submitted that Section 91 (4) (b) of the [Land Registration Act](#), 2012 provides as follows; if land is occupied jointly, no tenant is entitled to any separate share in the land and consequently on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly. He reiterated that the certificate of confirmation of grant dated October 2, 2007 is a reflection of the beneficiaries' intentions concerning the distribution of the estate of the deceased as captured under the MOU. That the distribution of the estate of the deceased as enshrined under the MOU and the certificate of confirmation of grant was based on principles of equity. That each beneficiary was given an equitable share of the deceased's estate, thereby eliminating or limiting any chances of a beneficiary enriching himself or herself to the detriment of the rest of the beneficiaries.

29. He argued that in the event that this honorable court fails to observe that the suit property was to be owned by both the Applicant and Paul Opanga (deceased) as joint proprietors, then the same will dictate that the Respondent is entitled to a 1/3 of the share of Paul Opanga share (50%) in the suit property, although he maintained that the MOU dictated that the suit property was to be allocated to the Applicant and Paul Opanga as joint proprietors, thereby, reinforcing the maxim that equity looks on that as done which ought to have been done. Reliance was placed on W.M. Musyoka in his book *Laws of Succession* which states that:

' Property is capable of passing upon death other than by will. It may pass by survivorship.....This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the



principle of survivorship.....The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.

30. More reliance was placed on the case of *Isabel Chelangat vs Samuel Tiro (2012) eKLR* wherein the principle of survivorship also known as jus accrescend as explained as follows:

' A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and 'four unities.' The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence.'

31. It was argued that in the instant case, since the suit property was to be registered in the name of the Applicant and Paul Opanga as joint proprietors, the Respondent has no color of right over the same since the property cannot pass under intestacy. Moreover, the Applicant is the surviving joint tenant of the suit property as the right of survivorship takes precedence. In the circumstances, we beseech this honorable court to hold that the principle of survivorship (jus accrescendi) applies to the suit property following the death of Paul Opanga.

On whether the certificate of confirmation of grant dated October 2, 2007 should be revoked, amended and/or rectified with regards to share of heirs under the suit property

32. The applicant cited Section 74 of the *Law of Succession Act* which provides that:

' Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.'

33. He argued that the rectification of a grant of letters of administration is limited to matters set out in section 74 of the *Law of Succession Act*. That these matters specifically refer to corrections of error which the court may order without changing the substance of the grant. These include errors in names, description of any person or thing or an error as to the time or place of death of the deceased or the purpose for which a limited grant was issued. That an error which is envisaged under the section is a mistake which may occur on the face of the grant like typing errors in names of persons or things. He relied on the case of *the matter of the Estate of Hasalon Mwangi Kabero [2013] eKLR* where it was held that:

' An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased's death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say, a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word "error" too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.'



34. Further reliance was placed on the case of *In the Matter of the Estate of Geoffrey Kinuthia Nyamwinga (Deceased)* [2013] eKLR where it was held that:

' The law on rectification or alteration of grants is Section 74 of the *Law of Succession Act* and Rule 43 of the Probate and Administration Rules...What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out the time or place of the deceased's death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general...'

35. The applicant submitted that in the instant case, the error or mistake was with regard to the description of shares of the suit property. That since the certificate of confirmation of grant was generated from the MOU, the aforementioned certificate of confirmation of grant should have provided that the suit property was to be allocated to the Applicant and Paul Opanga (Deceased) as joint proprietors. He urged this Court to exercise judicial Authority, under which Article 159 (2) (d) of *the Constitution* requires the courts and tribunals to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. He also relied on Rule 73 of the Probate and Administration Rules which provides that nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

36. In the circumstance, the applicant urged this honorable court to rectify the error and/or mistake apparent on the face of the confirmation of grant by providing that the suit property was to be allocated to the Applicant and Paul Opanga (deceased) as joint proprietors. He therefore prayed that the 2<sup>nd</sup> Administrator/Applicant's Application dated October 25, 2021 be allowed.

### **Analysis & Determination**

37. I have considered the application, the opposition thereto, evidence both oral and documentary as adduced by both parties and the submissions filed by the applicant's counsel and in my view, the main issue for determination is whether the Summons as filed and argued has merit. There are other questions to be answered in this issue as framed by the applicant in his submissions, which this court will consider.

38. The first question is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*.

39. For avoidance of doubt, Section 76 of the *Law of Succession Act* provides that:

' 76. Revocation or annulment of grant

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

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



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

40. Section 76 was expounded on *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

' Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.'

41. The Applicant invited this court to revoke the grant of letters of administration and certificate of confirmation issued on the October 2, 2007 for the reasons that the respondent had failed to sign the transfer documents over the suit property to have the property transferred to the applicant. The



- applicant further stated that as per the certificate of confirmation issued on the October 2, 2007 the suit property was distributed to himself and the deceased Paul Opanga and now was his wholly as a result of the death of Paul Opanga, since the certificate of confirmation of grant was generated from the signed MOU and that the property was to be registered jointly in his name and the name of Paul Opanga as stipulated in section 2 of the Land Act.
42. In his defence, the respondent averred, which was admitted by the applicant, that the failure to transfer the property was because there was a charge over the suit parcel and that efforts to have the same discharged had not borne fruit and further that the share that was intended for the deceased Paul Opanga ought to be distributed to other beneficiaries of the deceased, with the applicant herein only getting half of the whole since the property in question was to be shared equally between Paul opanga and the applicant herein.
  43. Having admitted that he knew there was a charge over the suit property, the applicant in my mind was conceding that the suit property was not free for transmission to himself as he wanted. The said property was registered in the name of Christopher Oboka Opanga, the deceased father of the parties herein. The Certificate of official search for the said property as annexed to the affidavit sworn by the applicant on October 25, 2021 clearly marked as FSO shows that on 20.4.76, a charge was registered on the said land title in favour of Barclays Bank for Kshs 375,000 which charge has not been discharged as there was no evidence to prove the discharge, which evidence would no doubt have been by way of a discharge of charge from the Bank.
  44. I have perused the MOU signed on August 1, 2006 among the family members of the deceased. Whereas in the MOU, the parties thereto wished that the suit property be owned jointly between the applicant and Paul Opanga, during the distribution of the estate, it is the same beneficiaries who consented to have the grant confirmed and a certificate thereof issued wherein it is clearly stated that the suit property Kisumu/Municipality/Block 7/183 to be divided equally between (correct English where those involved are two) the two heirs Franco Stephen Opanga and Paul Opanga. Paul Opanga died later before the transfer was effected.
  45. Therefore, as far as the confirmed grant is concerned, there is no joint ownership of that property as claimed by the applicant. The same language used in sharing equally the suit property was also used in sharing out the other four properties wherein the assets were to be divided equally among the named heirs as per the certificate of confirmation of grant dated October 2, 2007.
  46. In my humble view, if the intention of the parties was to have the suit property owned jointly, as stipulated in section 2 of the Land Act, nothing prevented them from stating so, so that the court only endorses the wishes or agreement by the heirs. The other angle to this intention is, if Paul Opanga was alive and he consents to and concludes the process of registration of the suit property in joint names with the applicant herein. In the absence of evidence of joint ownership of the suit property and Paul Opanga having demised before the joint registration of the property with the applicant herein, which property is still registered in the names of their late father, whose estate they were sharing, I am unable to find and hold that the applicant is now entitled to the whole of the suit property following the demise of Paul Opanga.
  47. Further, as the applicant was only entitled to 50% of the share of that suit property, according to the confirmed grant, following the demise of Paul Opanga, the 50% share of the said property would be available for distribution to all the other surviving beneficiaries of the deceased Christopher Oboka Opanga as Paul was not survived by any child or spouse.
  48. I find that the refusal by the respondent to sign documents to devolve the whole of the suit property in favour of the applicant herein is well founded and does not amount to intermeddling with the estate



of the deceased as claimed by the applicant herein, as the applicant can only have his 50% share of that property as per the order confirming the grant and not whole as claimed.

49. In the circumstances, I find no ground upon which this court should revoke the grant issued to the two parties to administer the deceased's estate. The two administrators should as a matter of fact and law, cooperate and complete the administration process.
50. To this end, I find and hold that the applicant has failed to demonstrate that the grant should be revoked.
51. The other question which is closely related to the one resolved above is whether the certificate of confirmation of grant issued on October 2, 2007 to the applicant and the respondent herein being co-administrators of the estate of their late father should be revoked. In principle, the applicant appears to be unhappy with the mode of distribution of the estate as adopted by the court on confirming the grant and the contents of the certificate of confirmation of the grant. This dissatisfaction is borne out from the body of the record of his Summons, affidavit and his detailed written submissions.
52. The power or discretion vested in the court by section 76 of the Law of Succession Act is for revocation of grants of representation. The Law of Succession Act does not define grant of representation, as the section that carries definitions or interpretations of terms or words used in the Act, that is to say section 3, does not include the word or term "grant." The Probate and Administration Rules, the subsidiary legislation made under the Law of Succession Act does define the term, at Rule 2, in the following words:

' grant means a grant of representation, whether a grant of probate or of letters of administration with or without a will annexed, to the estate of a deceased person.'

53. Rather than dealing with the definition of the term, what the Law of Succession Act does at, at sections 53 and 54, is to provide for the forms that the grant may take, which then gives us some sense of what a grant of representation is or means or refers to. The provisions say as follows:

' Forms and Grants

53. Forms of grant

A court may—

- (a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—
- (I) probate of the will to one or more of the executors named therein; or
- (ii) if there is no proving executor, letters of administration with the will annexed; and
- (b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.

54. Limited grants



A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.'

54. As stated above, the main concern of the applicant is the certificate of confirmation of the grant. The question is whether a certificate of confirmation of a grant is in fact a grant of representation intestate or the equivalent of a grant, to be revoked or annulled by application of section 76 of the [Law of Succession Act](#). The answer to that question, appears to me, to be that a certificate of confirmation of grant is not a grant of representation.
55. Grants of representation take the form stated in sections 53 and 54 of the [Law of Succession Act](#). They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the [Law of Succession Act](#), as evidence of the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant. The grant sought to be confirmed, through that process, remains intact, after confirmation.
56. Whereas a grant of representation is an order appointing personal representatives or administrators, the certificate of confirmation of grant does not do anything of that sort. All that it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distributing that estate in accordance with the distribution schedule approved.
57. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the [Law of Succession Act](#). This is because the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application and therefore the revocation of the certificate, if at all it is revocable under section 76, which I maintain that it is not, would be of little consequence, as it is only the certificate that would be affected by such a revocation order, since the orders on confirmation, from which it is extracted would remain intact. Thus the certificate being a mere extract, its revocation would not affect its source, the orders confirming the grant.
58. In this very old case which file was retrieved from the archives, quite poorly stored as most of the old documents are in tatters, on February 18, 1996, a grant which had been issued to Selpher Opanga, the mother to the parties hereto was confirmed. Following her demise on December 15, 2005, the four sons surviving her, among them, the two applicants herein were substituted in her place and later confirmed on October 2, 2007.
59. I reiterate that a grant of representation is not equivalent to a certificate of confirmation of grant, it is not an extract from some order. A grant is the order itself, appointing administrators, and it is the court granting that representation. The orders on confirmation of a grant remain unaffected by a revocation or annulment of the certificate of confirmation of grant.
60. The proper thing to do should have been to have the confirmation orders set aside or vacated and thereafter the certificate of confirmation of grant would stand annulled, following the setting aside of the orders from which the certificate of confirmation of grant draws its life. Otherwise, failure to vacate or set aside the orders confirming the grant would mean that a fresh certificate could still be extracted



from the same orders, since a grant of representation and the certificate of confirmation of grant are two separate or different instruments.

61. The certificate of confirmation of grant is provided for under Rule 41(5) of the Probate and Administration Rules, which provides that:

' Where the court in exercise of its power under section 71(2)(a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and ...'
62. Section 76 of the [Law of Succession Act](#) has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application.
63. The only connection between confirmation of grants and revocation of grant is that set out in section 76 (d) (i) of the [Law of Succession Act](#). It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of the grant.
64. Section 76 of the Act relates to confirmation of grants to that very limited extent only, not with confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are captured in the certificate of confirmation of grant, has no remedy under section 76 of the [Law of Succession Act](#), since that provision does not envisage revocation of certificates of confirmation of grants.
65. I have perused the provisions of the [Law of Succession Act](#) and I find no provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the [Law of Succession Act](#), which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process.
66. In the absence of any provision in the [Law of Succession Act](#) for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to file an appeal or review, or setting aside the orders of confirmation to the extent that the same is permissible under the [Law of Succession Act](#).
67. The above notwithstanding, an aggrieved beneficiary by the distribution of the estate can file an appeal against the orders made by the court on distribution. At that point, the court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review or on an application for annulment or revocation of the grant under section 76 of the Act.
68. The grant herein was confirmed on October 2, 2007, and the trial court became functus officio so far as confirmation of the grant was concerned. The Applicant ought to have appealed against the orders that confirmed the grant, if he was not satisfied with the distribution that the court ordered. Part of jurisprudence from the Court of Appeal prescribes that a party requires leave of the High Court to file an Appeal in the Court of Appeal in succession matters since the right of appeal is not automatically



given in the statute. In *Rhoda Wairimu Kioi & John Kioi Karanja -Vs- Mary Wangui Karanja and Salome Njeri Karanja, CA Civil App. NAI 69 of 2004* it was held that:

' We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court.'

69. Alternatively, the Applicant should have mounted an application for review of those orders, if he had the competence to file such an application, and if he had grounds upon which he could urge review. This court is being invited to relook at the confirmation orders by way of revocation, by the same party that consented to the mode of distribution of the estate, a process that is not provided for in law.
70. I reiterate that the Applicant is inviting the court, in his summons for revocation dated October 25, 2021, to revoke a certificate of confirmation of grant. A certificate of confirmation of grant is a document that the court generates or extracts from the orders that had been made at confirmation as evidence or proof of the making of the said orders. Revoking or annulling the certificate of confirmation of grant without setting aside or vacating the confirmation orders which give it life would be an exercise in futility. Revoking or cancelling the certificate without more only renders the said document ineffective, but leaves the confirmations orders intact. Thus, the summons dated October 25, 2021 invites the court to revoke the certificate but leave the confirmation orders intact. Such an exercise serves no purpose, and it would be a wastage of judicial time and effort.
71. I have said so much about the trial court which confirmed a grant being functus officio. The grant herein was confirmed on October 2, 2007, and a certificate of confirmation was generated from that order. After a grant has been confirmed, the processes that follow, that is to say with respect to the implementation or execution of the confirmation orders as encapsulated in the certificate of confirmation of grant, have nothing to do with the *Law of Succession Act*, as the said law or the rules made under it, the Probate and Administration Rules, do not provide for what should happen after the certificate of confirmation of grant has been generated from the confirmation orders. The process of the carrying into effect of the confirmation orders is regulated by the land legislation through a process known as transmission, which is not provided for under the *Law of Succession Act*.
72. On whether the applicant is entitled to the orders sought, I observe that the applicant and the respondent are co administrators of the estate and that the estate of the deceased is not yet fully distributed many years after confirmation of the grant. the applicant conceded that there are other assets in the estate which are still in the deceased's name despite the confirmation of the grant. The applicant also conceded that he was to share 50% of the property in dispute herein, with his late brother Paul Opanga and that is exactly what the order on confirmation and certificate of confirmation says.
73. In view of the orders on confirmation of the grant which was predicated on the schedule of distribution filed and adopted by the court, and the subsequent certificate of confirmation of grant, I find and hold that the idea that the applicant was to hold the said property which he was to share with the now deceased Paul Opanga in their joint names is a creation of his own imagination. Once his brother died before causing the property to be so registered in their joint names, legally, the deceased Paul Opanga left an estate of his own and therefore any person interested in that estate must petition for a grant to benefit from that estate which has to be distributed to eligible bonafide beneficiaries. If the late brother was not survived by any wife or children or parents, then his surviving brothers and sisters would be entitled to his share equally unless there is mutual consent that the asset or estate devolves to a particular person or persons. See section 29 of the *Law of Succession Act* on who the dependants are.



74. Nonetheless, in this case, the asset which is being fought over is still in the deceased Paul Opanga's father's name as it had not been transferred to the said Paul Opanga prior to his demise. That being the case, this property and share due to the deceased Paul Opanga would still be available for distribution among all other beneficiaries of the main estate as the deceased was not survived by a wife or children. The applicant cannot claim to be the sole surviving heir to the estate of Paul Opanga who, at his demise, left nothing capable of being distributed as the asset assigned to him had not been transferred or crystalized.
75. The applicant also focused so much energy on the Transfer by personal representative to person entitled under a will or an intestacy form RL7, marked as FSO-10 which document was not even registered and which on the reading thereof provides that '...the transferees declare that they hold that interest as proprietors in common in the following shares :...  
[or as joint proprietors]...' and there is absolutely nothing on that form to show that at that time on November 16, 2007, Paul Opanga and the applicant herein signified their intention to be registered as joint proprietors of the suit property. I say so because there is no selection of the option of the mode of ownership of the property in issue.
76. The upshot of all the above is that the applicant's summons for revocation and/or annulment of grant dated October 25, 2021 lacks merit and the same is hereby dismissed.
77. As the feuding parties are family members, I order that each party shall bear their own costs of the Summons.
78. The administrators are further directed to complete the process of administering the estate of the deceased as required by law and as per the grant issued and confirmed by this court in the next six months of this date unless there are any amendments that may be necessary, which should be sought expeditiously. The administrators shall then, pursuant to section 83 of the Law of Succession Act, file into court a true and accurate accounts and in default, this court shall recall the grant and annul/revoke it.
79. In the circumstances, as there is nothing pending in this matter, save for the rendering of the accounts, the file shall hereby remain closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF APRIL, 2023**

**R.E. ABURILI**

**JUDGE**

