



REPUBLIC OF KENYA



**Mulei v Mulei & another (Probate & Administration Appeal 1 of 2019)  
[2022] KEHC 13220 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
PROBATE & ADMINISTRATION APPEAL 1 OF 2019  
GV ODUNGA, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**MICHEAL MUEMA MULEI ..... APPELLANT**

**AND**

**JOHN MUTUA Z. MULEI ..... 1<sup>ST</sup> RESPONDENT**

**BONIVENTURE PETER NZIOKI ..... 2<sup>ND</sup> RESPONDENT**

*(eing an appeal from the judgement of the learned Senior Principal Magistrate Hon. D. Orimba sitting at Kangundo his Succession Cause No. 45 of 2016 and dated 5/12/2018)*

**JUDGMENT**

1. On December 5, 2018, the Learned Senior Principal Magistrate, Kangundo (Hon D Orimba) delivered a ruling in Succession Cause No 45 of 2016 by which he dismissed an application that had been made before him by the Appellant herein. In the said application dated October 29, 2018, the Appellant sought, in the main, revocation of the Grant of Letters of Administration made to John Mutua Z Mulei, Bonaventure Peter Nzioki and George Kioko Mulei and confirmed on the May 24, 2018 in the Estate of Zakayo Mulei and that all transactions effected pursuant to the said Grant be cancelled.
2. The said application was based on the ground that though the deceased had three wives, the administrators wilfully and actuated by ill motive failed to include and or involve all the beneficiaries in the process leading to the confirmation of the grant. According to the Appellant, Michael Muema Mulei, though they were aware and had been involved in the process leading to the filing of the Succession Cause, the administrators failed to involve them at the confirmation stage thus jeopardising their rights in the Estate and as a result, the administrators failed to factor in the applicant's share of the estate with the shares of the other beneficiaries by distributing the estate partially.
3. It was averred that one of the properties of the estate was irregularly shared and as a result, the same was irregularly subdivided and sold to different people who proceeded to demolish a building that had



- been put thereon by the deceased. It was averred that as a result of the fact that some beneficiaries were not made aware of the process of confirmation, the interests of the beneficiaries who were in possession of and use of parts of the estate were disinherited. The Appellant's position was supported by 3 other beneficiaries who swore an affidavit reiterating the depositions by the Appellant.
4. The application was opposed by an affidavit sworn by the 2<sup>nd</sup> Respondent herein, Bonventure Peter Nzioki, one of the administrators, in which he averred that the applicant and the 1<sup>st</sup> Respondent herein were his step-brothers. He disclosed that their deceased father had three wives and he was his son from the 1<sup>st</sup> wife while the 1<sup>st</sup> Respondent was a son from the second wife and the applicant a son from the third wife. According to him the succession proceedings were conducted openly and fairly with the participation of the beneficiaries from each of the three wives.
  5. He averred that on February 18, 2016 he and the 1<sup>st</sup> Respondent filed a citation in Kangundo Succession Cause No 4 of 2016 against all the children of the deceased citing them to either accept or refuse to take out the letters of administration. Despite service, none of the children took up the challenge hence the applicant and the 1<sup>st</sup> Respondent's petition which they also served on the beneficiaries.
  6. It was averred that though the 2<sup>nd</sup> Objector, George Kioko Mukei, (the 3<sup>rd</sup> Administrator) who is from the same house as the Appellant herein, objected to the petition, by consent of all the parties, the 3<sup>rd</sup> Administrator and both Respondents were made administrators to represent their respective houses. Thereafter the Respondents filed Summons for Confirmation of Grant which was served on all the beneficiaries to which the 3<sup>rd</sup> Administrator filed an Affidavit of Protest and after oral hearing a ruling was delivered in the presence of the applicant's advocate and a Certificate of Confirmation of Grant issued on May 24, 2018. According to him, the interests of all the beneficiaries was taken into account.
  7. According to the 2<sup>nd</sup> Respondent, the proceedings in Kangundo Court more or less came to an end and all that the administrators were doing was to execute the contents of the Certificate of Confirmation of Grant. It was however averred that the 3<sup>rd</sup> Administrator had lodged an appeal against the ruling confirming the grant which was still pending. The Court was therefore urged to dismiss the Appellant's application since an application by the said Objector seeking injunction pending that appeal declined by the High Court.
  8. In his ruling the learned trial magistrate found that the parties had filed Succession Cause No 46 of 2016 which proceeded to full hearing. The Court also found that the Appellant was a brother of the 3<sup>rd</sup> administrator, George Kioko Mulei, who represented the third house in the said Cause. However, the said 3<sup>rd</sup> administrator being dissatisfied with the Court's said ruling moved to the Court of Appeal which appeal was still pending determination.
  9. According to the Court, the law is clear that a matter handled by the High Court cannot be handled at the same time by a lower court and that the said Court having made a ruling, it could not go back and deal with a similar issue that was before the High Court. According to the Learned Trial Magistrate, though the applicant contended that he never participated in the said Succession Cause, the record was clear that each house was represented, the third house, where the appellant came from, being represented by the 3<sup>rd</sup> Administrator.
  10. The Court therefore found that the applicant had not established a prima facie case to warrant the grant of the orders sought hence the application was unmerited. In the Court's view, the applicant should have been patient enough to wait for the outcome of the appeal lodged against its ruling since the issues raised in the High Court and before it were the same.
  11. Aggrieved by the said decision, the Appellant lodged this appeal based on the following grounds:



- a) The learned magistrate erred in law and fact by dismissing the Appellant’s application without considering all evidence on record.
  - b) The learned magistrate erred in law and fact by failing to consider all material facts relevant to the case.
  - c) The learned magistrate erred in law and fact by ruling that George Kioko Mulei represented the Appellant’s interests in the matter without evidence.
  - d) The learned magistrate erred in law and fact by failing to appreciate that the Appellant has a right of his own to challenge the confirmed grant
  - e) The learned magistrate erred in law and fact by failing to note that the appellant as a beneficiary of the deceased’s estate had not been factored in the distribution of the deceased’s estate.
  - f) The learned magistrate erred in law and fact by failing to observe that the appellant was not involved in the process leading to the confirmation of the grant
  - g) The learned magistrate erred in law and fact by failing to note that the deceased’s estate had not been properly distributed amongst all the beneficiaries.
  - h) The learned magistrate erred in law by arguing that the issues raised in the application would be substantially dealt with in Machakos High Court P & A No 61 of 2018.
    - i) The learned magistrate in arriving at the said finding erred in law and fact by failing to note that the Appellant was never a party to any proceedings over the estate of the deceased.
12. Accordingly, the Appellant seeks the following orders:
- a) The appeal herein be allowed and the lower court’s ruling delivered December 5, 2018 be set aside.
  - b) This Honorable court be pleased to re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion and enter a ruling with regard to the Application dated October 29, 2018.
  - c) Any other orders the Honorable Court may deem fit.
13. It was however submitted that the said grounds can be merged into four viz:
- a) Whether the Appellant herein was involved in the proceedings leading to the issuance of the Certificate of Confirmation of Grant dated May 24, 2018.
  - b) Whether the proceedings leading to the distribution of the Deceased’s estate were proper.
  - c) Whether Section 93 of the *Law of Succession Act* was properly applied by the Trial Court.
  - d) Whether the issues in the Application dated October 29, 2018 are the same as the issues in Machakos P& A Appeal No 61 of 2018
14. In support of the submissions the Appellant relied on the case of *Francis Lokadongoy Lokogy vs Reuben Kiplagat Kiptarus [2020] eKLR* as well as Section 78 of the *Civil Procedure Act*, on the duty of this Court to re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.
15. On the issue whether the Appellant was involved in the proceedings leading to the issuance of the Certificate of Confirmation of Grant dated May 24, 2018, it was submitted that the Appellant who was



the Applicant in the Application dated May 24, 2018 contended that together with Mutuku Mulei, Nzioka Mulei and Mbithi Mulei were not involved in the proceedings at the Trial Court, yet the Letter from the Chief dated April 11, 2016, which was filed by the Respondents alongside the Petition clearly captures their names as children of the deceased. Whereas the said letter lists 21 children of the deceased, it was submitted that only eleven (11) are listed under paragraph in the Affidavit in Support of the Letters of Administration sworn by John Mutua & Peter Bonifenture and those of Mutuku Mulei, Nzioka Mulei and Mbithi Mulei among others are missing.

16. It was noted that though the Respondents in the Supplementary Record of Appeal introduced Pleadings in Citation No 4 of 2016, there is no evidence that the Citation was ever served upon the Appellant together with Mutuku Mulei, Nzioka Mulei and Mbithi Mulei contrary to Rule 21(3) of the *Probate and Administration Rules*. It was also noted that no proceedings in the said Citation were availed before the Court. To the Appellant, if at all the Citation was prosecuted and an order issued therefrom, the Respondent would have annexed it to the Petition to show that the Appellants were cited and they refused to agree to take out letters of Administration. Consequently, the only logical conclusion is that the Appellant together with Mutuku Mulei, Nzioka Mulei and Mbithi Mulei were not involved in the proceedings preceding filing of the Succession Cause.
17. It was further submitted that it is a requirement that at the time of filing the Petition it should be accompanied by a written consent of all beneficiaries or affidavit explaining reasons for not obtaining the consent in Form 38 by the Petitioners/Respondents that the lack of Consent was pointed out by Hon TN Sinkiyian in the Court's proceedings of June 24, 2016. According to the Appellant, a quick perusal of the whole proceedings and court documents would reveal that the Petitioners never complied with Rule 26 (1) &(2) of the Probate and Administration Rules which requires that notice be given to every other person entitled in the same degree as or in priority to the applicant and that 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. In this case there was no evidence of such notification.
18. According to the Appellant, contrary to the court's finding there was no evidence that George Kioko Mulei was representing the Appellant and members of the Third House and that nowhere did the 3<sup>rd</sup> Administrator, George Kioko, while objecting to the taking out of the Letters of Administration by the Respondents, exhibit evidence that the Appellant was aware of the proceedings or that he had instructions from his siblings in the Third House. Accordingly, the Trial Court misdirected itself when it alleges that George Kioko Mulei represented the Appellant. Since Rules 8 and 9 of the Probate and Administration Rules are clear that unless a beneficiary appears in person, it is only an Advocate who can legally represent a beneficiary in Court, it was submitted that there is no basis for arguing that George Kioko was representing the Appellant either in law or based on the evidence on record. It was submitted that the non-compliance with the written consent was admitted by Peter Bonifenture Nzioki Mulei in his Replying Affidavit dated November 13, 2018 to the Application dated October 29, 2018 at paragraph 10. Reliance was placed on the case of *Monica Adhiambo vs Maurice Odero Koko [2016] eKLR*, and it was contended that the Appellant together with some others in the deceased's family were not involved before the Petition was filed and in the proceedings leading to the issuance of the Grant.
19. Regarding the issue whether the proceedings leading to the distribution of the Deceased's estate were proper, it was submitted that based on Rule 40 (8) of the Probate and Administration Rules, it is trite law that all beneficiaries to an estate ought to be notified that an Application for Confirmation of Grant have been filed. Further, whereas Rule 40 (8) of the Probate and Administration Rules, requires



- that an application for confirmation of Grant be accompanied by written consent of all beneficiaries, no consent was filed in the instant case. It was submitted that in the absence of a written consent, the Trial Court should not have proceeded to hear and determine the Application for Confirmation unless it was satisfied that all beneficiaries were duly notified but the Court never addressed the issue.
20. It was further submitted that whereas the Trial Court purported to distribute the deceased's assets to the first and second wives, this was not based on any pleading on record. It is surprising that the Court would make such a determination. Citing Section 71(1) of the *Law of Succession Act* as read with Rule 40 of the Probate and Administration Rules it was submitted that the Trial Court failed to address itself as to the identification and shares of all the persons beneficiary entitled before confirming the Grant and dwelled in distribution between the 1<sup>st</sup> and 2<sup>nd</sup> wives. It was contended that pursuant to Rule 40 (3)(a)&(b) of the said Rules the Trial Court erred by failing to appreciate the law that the estate should have been distributed amongst the beneficiaries who survived the deceased since all the evidence on record showed that the 1<sup>st</sup> and 2<sup>nd</sup> Wives died in the 1950's whereas the deceased died in the year 1988. Guided by the above provision, it was submitted that it was wrong for the Court to major its ruling on the two wives who passed on before the deceased and who even had children who were also benefitting whereas the Appellant got nothing.
  21. Whereas Section 71 (2)(a) of the *Law of Succession Act* requires that the Court be satisfied that the grant was rightly made before the confirmation, it was contended that the foregoing clearly shows that there was no satisfactory evidence which the Court would use in Confirming the Grant.
  22. It was pointed out that the failure to involve the Appellant and his three other siblings in the proceedings and also failing to factor them in the distribution of the estate clearly shows that the Respondents in their actions intended to defraud the Appellant and his three brothers of their rightful share of the deceased estate. Consequently, the whole proceedings were improper.
  23. As to whether Section 93 of the *Law of Succession Act* was properly applied by the Trial Court with regard to Plot No 86 Kangundo Market, it was submitted that from the evidence on record, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought to sanitize their illegal actions of intermeddling by way of sale of Plot No 86 in the year 2013 without letters of administration by having Plot No 86 given to them. With all the evidence on intermeddling on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Trial Court went ahead in determining that the Plot should be shared between the 1<sup>st</sup> and 2<sup>nd</sup> House and a Certificate of Grant was issued showing that the Plot was to go to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  24. It was contended that the Trial Court never addressed the issue of the intermeddling by sale of Plot No 86 Kangundo by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; that in the Ruling delivered on May 23, 2018, the Court ruled that the Plot No 86 was to go to the 1<sup>st</sup> and 2<sup>nd</sup> Wives; that in the Certificate of the Confirmation of Grant, Plot No 86 is given to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; that there is no nexus between the Ruling delivered on May 23, 2018 and the Certificate of Confirmation of Grant issued on May 24, 2018; and that the Application for confirmation of Grant was never determined by the Trial Court but notwithstanding it issued a Certificate of Confirmation on May 24, 2018. It was the Appellant's position that taking into account the foregoing it is clear that the purported transfers by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents were not legal as the purported Certificate of Confirmation of Grant was marred by the above illegalities most notably the Application for confirmation of the Grant was not determined before the Certificate was issued.
  25. To the Appellant, it is important for the Court to clearly address the application of Section 93 on transfers of immovable property after issuance of Certificate of Confirmation of Grant by looking at the intent of Parliament when making the said provision. In the Appellant's submission, in no way



that the Parliamentarians would have intended to aid fraudulent actions of intermeddlers like the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who would sell a deceased's property thus disinheriting other beneficiaries before petitioning for letters and hastily transferring the assets to the purchasers after Confirmation after using flawed proceedings as in the instant case. To him, Parliament intended to protect innocent purchasers who bought immovable property on the strength of a Certificate of Confirmation of Grant issued by a Court which on the face of it would be deemed legal and proper not in the case of intermeddlers like in the instant case. In this regard reference was made to Article 40(6) of the [Constitution](#) and the case of *Monica Adhiambo vs Maurice Odero Koko* [2016] eKLR, where Nagillah, J ruled that;

' The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the [Law of Succession Act](#). The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the [Law of Succession Act](#) is to ensure that beneficiaries of deceased persons inherit the property.'

26. It was therefore submitted that Section 93 of the [Law of Succession Act](#) does not apply in the instant case where a certificate of Confirmation of Grant was issued using a flawed process without involving all the beneficiaries and without factoring the interests of all beneficiaries with the sole aim of aiding intermeddlers who obtained the Certificate without an application for Confirmation being determined by the Court. The purported transfer was illegal ab initio as the Trial Court failed to consider all evidence on record and rightly apply the law. The Appellant referred to the case of [In re Estate of Njuguna Thagicu \(Deceased\)](#) [2018] eKLR, where Muchemi, J ruled that;

' The respondent was found by the court to have obtained the grant confirmed on May 18, 2010 by fraudulent means and by non-disclosure of fact material to the case. This grant was nullified for the said reasons. The effects of a nullified grant is that if there is any transaction made under the grant before revocation is null and void ab initio. This is an automatic result of non-compliance with the law or of fraud. A court of law does not have to make a pronouncement on its nullity. Any sub-division done or any titles obtained by virtue of the grant revoked on May 29, 2014 are void ab initio and hereby so find and declare.'

27. As to whether the issues in the Application dated October 29, 2018 are the same as the issues in Machakos P&A Appeal No 61 of 2018, it was submitted that the issues herein though relating to the same subject matter, they are distinct in that:

- (i) The Appellant herein is not the Appellant in No 61 of 2018.
- (ii) The Appellant in 61 of 2018 does not represent the interests of the Appellant herein
- (iii) Whereas Appeal No 61 of 2018 majored on distribution of Plot No 86, the motor vehicle xxxx and Kshs 50,000, the instant deals with the distribution of the whole estate
- (iv) If Appeal No 61 of 2018 is determined the interest of the Appellant would not directly be determined.

28. In this regard the Appellant relied on Section 76 of the [Law of Succession Act](#) and submitted that it is all clear that the Succession proceedings were defective in form and substance and were actuated by an intent to defraud the Appellant and his three brothers namely Mutku Mulei, Mbithi Mulei



and Nzioka Mulei. He argued that the instant appeal is merited, Application dated October 29, 2018 was meritorious and urged the Court to set aside the Ruling delivered on December 5, 2018, make determination on the Application dated October 29, 2018 by setting aside the ruling delivered on December 5, 2018 and revoke the Certificate of Confirmation of Grant issued on May 24, 2018, cancel all transactions made pursuant to the impugned orders and order distribution of the estate in line with Section 38 of the [Law of Succession Act](#) amongst all the Surviving beneficiaries.

### **Respondents' Submissions**

29. In opposing the Appeal, the Respondents set out the background of this dispute and submitted that following the dismissal of the Protest by the 3<sup>rd</sup> Administrator who represented the 3<sup>rd</sup> house, the appellant's brother George Kioko Mulei, applied for stay of execution in the High Court against the ruling of court plus an injunction to stop the new buyers from developing or selling plot 86 but the Court declined to grant the said orders.
30. According to the Respondents, a month down the line the appellant herein applied for the said grant to be revoked by the Kangundo Senior Principal Magistrate Court citing non-disclosure of material facts by the administrators as one ground and failure to involve him and his other siblings in the hearing of the application for confirmation of grant as one other reason. The court heard the matter and denied the orders sought hence this appeal.
31. The Respondents submitted that the appellant having been cited to take out the proceedings was therefore aware of the proceedings from the onset. That the Appellant was represented in the proceedings was confirmed by the affidavit sworn by the 3<sup>rd</sup> Administrator on behalf of the 3<sup>rd</sup> house and who was represented by M/S Priscillar Kioko and Company, the same law firm representing the Appellant as well According to the Respondents, had George Kioko imposed himself on his brothers who included the appellant the appellant and his brothers would have challenged the said appointment. However, the fact that the appointment was not challenged shows that the house of the third wife consented to George being an administrator from and for their house. It was therefore submitted that the proceedings in the lower court were representative proceedings and that George, who represented the interest of the third house, made the third house's proposal of distribution of estate and he and his wife testified in support of that and a ruling was given after full hearing of the Summons for Confirmation of Grant.
32. It was noted that on page 66 paragraph 3 of the supplementary record of appeal the Appellant's advocates said this:-

' Adv Tum

I HB for MS Kioko for the Objector, the purpose of the mention is to record a consent to the effect that George Kioko Mulei to be enjoined as the third administrator representing the third house. My instructions are that the file can be taken to the Registry for proper direction.'

33. It was submitted that the Appellant cannot complain about the same thing when it doesn't suit him but when it does he keeps quite.
34. It was contended that the trial court acted in full compliance with the provisions of rule 40 and 41 of the Probate and the Administration Rules and that he required no consent from the beneficiaries as the Grant was to be confirmed after a full where all the three houses were represented and heard.



35. The Respondents then submitted on the reasoning that led the Court to arrive at its decision as regards the distribution of the estate and urged the Court to dismiss the appeal.

### **Determination**

36. I have considered the issues raised in this appeal. This being a first appeal, I agree that in arriving at its determination the Court is to be guided by the position reiterated in holding of the Court of Appeal in case of Francis Lokadongoy Lokogy vs Reuben Kiplagat Kiptarus [2020] eKLR where the court opined as follows:

' Court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.'

37. In this appeal, it is contended that the Appellant together with some others in the deceased's family were not involved before the Petition was filed and in the proceedings leading to the issuance of the Grant. However, was expressly deposed by the Appellant that though they were aware and had been involved in the process leading to the filing of the Succession Cause, the administrators failed to involve them at the confirmation stage. It is therefore clear that the Appellant and his siblings were involved in the process leading to the filing of the Cause. It is clear from the proceedings that the 3<sup>rd</sup> Administrator who is a brother to the Appellant herein held himself as representing the 3<sup>rd</sup> house. In those proceedings, he was represented by the same firm now representing the Appellant both before the lower Court and in this appeal. In the course of the proceedings, the said Counsel informed the Court they had instructions to enter into a consent to the effect that George Kioko Mulei to be enjoined as the third administrator representing the third house. That consent was duly adopted and the said George proceeded with the matter in his capacity as the representative of the 3<sup>rd</sup> house. That consent, I have not been told has been set aside and in these proceedings or in the proceedings before the trial Court there is no indication that an application was made to have it set aside. Accordingly, the Appellant herein could not, under the guise of seeking to have the grant revoked, set aside the said consent order.
38. The second issue raised is that at the time of the Confirmation of Grant the Appellant and his siblings were never consulted and that they never consented to the Confirmation of the Grant. First, as the 3<sup>rd</sup> Objector was the representative of the 3<sup>rd</sup> house, it is my view that it would have been superfluous to seek the consent of each and every member of the third house. In any case, the Confirmation of the Grant was not by consent as the 3<sup>rd</sup> Objector, on behalf of the 3<sup>rd</sup> House protested to the manner in which the distribution of the Estate was proposed by the Respondents herein. Accordingly, the confirmation was to proceed by way of viva voce evidence and the 3<sup>rd</sup> Objector was heard on behalf of the 3<sup>rd</sup> House. In these circumstances, I find that the failure to comply with Rule 40(8) of the Probate and Administration Rules did not occasion any injustice.



39. The power of the Court to revoke a grant of representation is discretionary since Section 76 of the Act is not couched in mandatory terms. As was held by Musyoka, J *In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) [2015] eKLR:*

' The power granted under Section 76 of the Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under Section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice.'

40. In other words, the court in deciding whether or not to revoke a grant must take into account the all the relevant facts including the prejudice, if any, that was occasioned by the failure to comply with section 76 of the Act. It therefore follows that the mere fact that the conditions under section 76 of the Act exist, it does not necessarily follow that the grant must be revoked. In my view where no prejudice has been alleged and the justice of the case tilts against the interference with these proceedings, the Court ought not to revoke the grant. As held by Mwita, J, *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa, Succession Cause No 158 of 2000:*

' Power to revoke a grant is discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of the beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interests of justice.'

41. I have considered some of the issues raised in this appeal and it is clear that there are directed at the manner in which the Estate was distributed. That was the subject matter of the Protest and the Appeal by the 3<sup>rd</sup> Administrator, George Kioko Mulei, which appeal I have dealt with. By raising the same issues during the pendency of the said appeal, I agree that the Appellant herein was seeking, through the backdoor, to circumvent the outcome of the said appeal. I therefore agree with the decision by the learned trial magistrate in declining to entertain issues which were live before this Court on appeal notwithstanding the fact that the Appellants were not exactly the same. However, Civil Appeal No 61 of 2018 having been initiated by the 3<sup>rd</sup> Administrator, George Kioko Mulei, who was litigating on behalf of the 3<sup>rd</sup> house, the Appellant herein, a member of the same house could not purport to go solo by initiating his own fresh proceedings when there was an order by which George Kioko Mulei was joined to the proceedings to represent the 3<sup>rd</sup> house which order had not been set aside.

42. All in all, I find no merit in this appeal which I hereby dismiss but with no order as to costs, the parties herein being family members.

43. It is so ordered.

**G V ODUNGA**

**JUDGE**

**JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**M W MUIGAI**

**JUDGE**

**Delivered the presence of:**

