



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO 36 OF 2002

IN THE MATTER OF THE ESTATE OF EVANSON NGUTI KAMANDA (DECEASED)

BETWEEN

JACINTER NGUTI GITAU.....PETITIONER

AND

EVANSON NGUTI GITAU .....1<sup>ST</sup> APPLICANT

PHYLLIS NYAMBURA KARANJA .....2<sup>ND</sup> APPLICANT

STEPHENE NGERU KARANJA .....3<sup>RD</sup> APPLICANT

JAMES KAMANDA GITAU.....4<sup>TH</sup> APPLICANT

RULING

1. I must first apologize to all counsel and parties for the delay in delivering this ruling. Once the due date lapsed, I forgot to carry the file with me as I proceeded on leave, and it was at the bottom of my cabinet covered by other more recently heard matters.
2. The background to this is that sometime in 1972 the two brothers purchased a parcel of land being **LR. No.10018 measuring 905 acres** (also referred to as the "suit property").
3. On 23rd May, 1972 the suit property was registered in their names as tenants in common in equal shares (as shown in entry number 8 in the certified copy of the Certificate of Title annexed and marked "EGN 6"). The same document is also annexed to the replying affidavit of **Jacinter Wanjiru Nguti** and marked "JWN16".
4. It is explained that 200 acres were excised from the suit land and transferred to squatters who were employees of the white settler who sold the suit land to the brothers leaving a balance of about 705 acres. That the transfer of the 200 acres to the squatters was approved by the Land Control Board on 12th October, 1976 (see Consent marked JWAN5"). The applicant further states that from the records, this transfer of the 200 acres to the squatters was the last transaction that was ever done regarding the suit land and the same has remained intact in the names of the brothers as tenants in common in equal shares to date.
5. On 10th October, 1977 **TIRUS** passed away and a grant was made in favour of his four widows, and subsequently, upon the demise of all the widows, the same was substituted in favour of the applicants as shown by the annexure marked "EGN1". On 25th November, 2001 **EVANSON** passed away.
6. On 14th March, 2001 a petition for letters of administration intestate dated 13th March, 2002 was filed in court by **FRANCIS KARISHO NGUTI** and **GITAU NGUTI** in their capacity as the sons of the deceased (marked "EGN3a-3K) and a grant of letters of administration was issued on 5th May, 2003.
7. On 5th February, 2004 an application for confirmation of grant dated the same date was filed in court by the firm of **Douglas Ombati & Company Advocates** and a Certificate of Confirmation of Grant which included the mode of distribution was issued on 23 June, 2004 [see annexures marked "EGN4(I)" - "EGN 4 (j)"]
8. It is these two applications namely, the petition for letters of administration intestate and the summons for confirmation of grant and the consequential orders that form the subject matter of this dispute. There are two applications which are being heard and determined simultaneously, one application is dated 9<sup>th</sup> November, 2018 by Sarah **Wanjiru Karisho** and seeks:

(a) The court orders the removal of **JACINTER WANJIRU NGUTI** the administrator of the Estate of **EVANSON NGUTI KAMANDA (Deceased)** and be replaced by any other beneficiary not disqualified by the Court.

(b) That before removing **JECINTA WANJIRU NGUTI** as the administrator, an order be issued to her to furnish true and factual accounts from 3<sup>rd</sup> December, 2015 to date.

(c) That the respondent be ordered to give the Applicant her monthly share of income from the year 2015 to date.

(d) The cost of this application be paid out of the Estate of the Deceased

## **BRIEF FACTS**

9. The application is based on the grounds as they appear on the face of the application and supported by the affidavits sworn by the applicant on 9th November 2018.

The applicant cites section **79 of the Law of Succession Act** and submits that the personal representative in their capacities while administering the estate are not truthful. They maintain that they have powers that enable them to function well as per contemplated by section **82 of the Law of Succession Act**. It is pointed out that the Act also provides the duties of the representative under **Section 83** and therefore the personal representative needs to carry out the affairs of the estate and going contrary to these sections would amount in intermeddling.

In support of this submission, the applicant cites the cases of **In the Estate of Daudi Kyuli Kaindi (Deceased) [2016] eKLR and the case of in the estate of Thionga N. Muthiora, Succession Cause no. 2131 of 2011** on the responsibilities and duties of representatives.

10. The applicant argues that the respondent has failed to diligently administer the estate and these failures were noted by Githua (J) and in her ruling dated 14th October 2015 she ordered that the court supervises the management of the estate. That the judge also directed the administratrix to file financial statements and give an account of all the rental income collected up to the date of the statement. The applicant laments that the respondent has never complied with the orders of the court and has gone on to distribute the income from the rent without any consideration to the orders of the court.

In this regard the applicant cites paragraph 33 of the ruling dated 14th October 2015 where the court stated that:

*“regarding the funds already deposited in the estate account be shared equally among the beneficiaries,*

*it is my view that the determination of this prayer should await filing of audited accounts to determine what would be available for distribution after settlement of the estate’s liabilities...”*

11. The applicant submits that the respondent has never caused any audits to be done nor has she been giving statements to the applicants advocates but she has been distributing rent collected without complying with these orders of the court. The respondent has opened a new account separate from where the income of the estate was being deposited. It is stated that the known accounts in which the income of the estate were being deposited were **Transnational Bank Account No. 68759001 and Housing Finance Account No. 2000071499** but she has secretly proceeded to open an account with **Barclays Bank** where the rent is now being deposited.

The applicant is persuaded that the foregoing acts of the administrator amount to intermeddling and the court should invoke its powers pursuant to **section 45 and 76 of the Law of Succession Act** and remove the respondent from administering the estate and appoint someone else.

Drawing from the case of **In the Estate of Daudi Kyuli Kaindi (Deceased) [2016] eKLR** the applicant submits that the court should order the respondent to furnish accurate account statements to all the beneficiaries.

12. The applicant complains that the respondent has been distributing income generated from the rental houses to all the beneficiaries and deliberately omitting to give the applicant her share as a beneficiary of the estate. The applicant is a wife to **Francis Karisho** who was a son of the deceased herein and from whose estate the applicant is entitled to be given a share from the estate of the deceased herein. The applicant qualifies to be given a share of the estate pursuant to section **26 and 29 of the Law of Succession Act**. The court be pleased to order her share be provided from the year 2015 to date.

13. The respondent/petitioner opposes the application and submits that the applicant lacks the capacity to bring the instant application since she is a stranger to the beneficiaries of the deceased herein and to the beneficiaries of the estate of **Francis Karisho Nguti**. The beneficiaries are outlined in the deceased’s will and the confirmed grant as follows;

a) **Miriam Wamwere Nguti**

b) **Esther Kaburu Nguti**

c) **Francis Karisho Nguti**

d) **Geoffrey Ngugi Nguti**

- e) **Paddy Karanja Nguti**
- f) **Gitau Nguti**
- g) **Jane Grace Njeri Nguti**
- h) **Jacinta Wanjiru Nguti**
- i) **Catherine Nyambura Nguti**
- j) **Rose Njeri Kamanda**
- k) **Evanson Gashamba Nguti**

The beneficiaries of the estate of **Francis Karisho Nguti** are;

- a) **Cecilia Nyakarura Gicheru**
- b) **Jane Mokami Karisho Nguti**
- c) **Mary Wamwere Nguti**
- d) **Evans Nguti**

14. It is contended that the applicant is clearly neither a dependant nor heir of either the deceased herein or the estate of **Francis Karisho Nguti**. The status of the applicant herein as a daughter in-law is contested and this culminated in **Eldoret CMCC No. 323 of 2012** as demonstrated in Annexure CNG1 in the affidavit of **Cecilia Nyakarura Gicheru** wherein the court in an attempt to resolve the applicant's legitimacy made orders. That the applicant failed to comply with the orders including orders requiring her alleged issues with the deceased's son to undergo a DNA test and for the last 8 years and to date has not filed any objection proceedings in this matter.

15. It is also argued that the applicants' purported marriage to **Francis Karisho Nguti** whose estate forms the basis of **Eldoret Succession Cause No. 213 of 2012** which has not been determined and therefore the application is premature. The respondents maintain that the applicant herein is not a dependant to the deceased or a family member to the estate of **Francis Karisho**. The applicant cites the case of **Moraa Gisemba v David Nyakoi Ongori (2015) eKLR** and **In the estate of John King'ori Wanyeki (Deceased) eKLR – Succession Cause No. 132 of 2003** to support this submission.

That the issue of whether the applicant is a potential beneficiary can only be determined in **Eldoret High Court Succession Cause No. 213 of 2012** upon compliance of the court orders for DNA in **Eldoret CMCC No. 323 of 2012**. That until the court in **Eldoret High Court Succession Cause No. 213 of 2012** makes finding on whether or not the applicant is a beneficiary of the estate of **Karisho**, she lacks the locus to either bring the instant application or participate in these proceedings.

16. Further, that the applicant's prayer to be given a monthly share of the rental proceedings is premature since her legitimacy of her status is yet to be addressed. The said prayer should await resolution of her legitimacy in the appropriate forum. The respondent cites the case of **Misc. Application No. 21 of 2016, In Re Estate of Njue Kamunde (Deceased) [2018] eKLR** to buttress this submission. She also cites **Nairobi Succession Cause No. 799 of 2009 – In the Estate of Kamau Muigai (Deceased) (2018) eKLR**. This court is reminded of the existence of its orders dated 4th June 2014 which barred the applicant from administration of the deceased's estate and restrained her from intermeddling with the same.

17. The application is described as devoid of merit and without legal basis, and that the administratrix has produced all the accounts of the estate as ordered by the court on 4th June 2014. The applicant has annexed receipts for expenses incurred by the estate as demonstrated by annexures JWN5 a-fb in the replying affidavit. The administratrix further filed financial statements for rent from September 2019 – July 2020 vide a letter dated 17th July 2020 and filed in court on the same date.

The applicant has admitted being served with the application to having been supplied with accounts for the said period, and has annexed the said accounts in the supporting affidavit as SWK3. The administratrix reiterates that she has faithfully complied with the court orders with fidelity and filed the accounts as required.

18. All the remaining beneficiaries of the deceased have all opposed the impugned application and have sworn individual and joint affidavits all dated 26th September 2019 and filed on 30th October 2019. The beneficiaries have deposed that the allegations of the applicant are falsehoods and confirm having been supplied with statements of account as required of her.

**Cecilia Nyakarura Gicheru** has deposed vide an affidavit dated 26th September 2020 that she is the wife of the deceased's son, **Karisho**, and has enumerated her issues of the marriage. The position has been confirmed by other beneficiaries. All the legitimate and blood relatives and beneficiaries of the deceased express satisfaction with the administration of the estate.

19. The administratrix has annexed pictures of farm implements as annexures JWN7 which show the machineries the applicant claims have been sold have been safely kept under security in that property as known as **Eldoret Municipality Block 4/29**. The alleged list of distribution marked as annexure SWK5 is described as concocted, undated and unsigned with the ulterior motive of misleading the court.

The administratrix has annexed copies of pleadings in **Eldoret CMCC No. 439 of 2017** and marked the same as JWN8 wherein she has sued the applicant for fraudulently altering the register of the said farm machineries with a view of selling them to 3rd parties with the motive of stealing a match against the beneficiaries. This court is reminded to bear in mind that the applicant's actions are in breach of the restraining orders of 4th, June 2014.

20. It is also pointed out that the estate account has always been with **Trans National bank** and the respondent invites the court to examine the numerous banking slips annexed to the replying affidavit which discloses the full details of the said account. It is contended that the orders of the court dated 14th October 2014 removing M/s Gicheru & Co Advocates from being signatories to the estate accounts automatically rendered the joint account inoperative.

21. The court is urged to find that the application lacks merits and ought to be dismissed.

### **ISSUES FOR DETERMINATION**

The following issues arise for determination:

1. Whether the grant issued should be revoked
2. Whether the applicant is a beneficiary of the estate
3. Whether the administratrix should furnish the court with accounts
4. Whether the respondent should be given monthly shares of the income

### **WHETHER THE GRANT ISSUED TO THE ADMINISTRATRIX SHOULD BE REVOKED**

The circumstances under which a grant may be revoked or annulled are set out in **section 76 of the Law of Succession Act** as follows:

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

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

22. The applicant has not presented any evidence that the grant is defective in substance, and it is also alleged that the grant was obtained fraudulently. The applicant claims to be a wife to the deceased son of the deceased yet she has not presented any proof that indeed she was married to the deceased's son. She also claims that she had an issue with the said **Francis Karisho**, yet she has not complied with the orders in **Eldoret CMCC No. 323 of 2013** where the legitimacy of the applicant as the daughter in law of the deceased was highly contested. The applicant has not taken the DNA test as ordered by the court in order to prove whether she is a beneficiary by virtue of her issue with **Francis Karisho**.

23. The applicant's legitimacy as the daughter in law is also yet to be determined in **Eldoret Succession Cause No. 213 of 2012**. The applicant has not proven that she is a dependant therefore orders for the grant to be revoked cannot issue as she has not met the threshold required, moreover she does not have locus to pursue the application.

### **Whether the administratrix should furnish the court with accounts**

24. The respondent has annexed JWN5a-f in the replying affidavit to the application. There are financial statements and accounts for the period may 2016-August 2019 in the replying affidavit as annexure JWN6. Also filed are financial statements for rent from September 2019

to July 2020 vide a letter dated 17th July 2020. The administratrix has therefore furnished the court with accounts and this prayer need not be considered or granted.

### **Whether the applicant should be given a share of the monthly rental income**

The applicant has not proven that she is a beneficiary of the deceased's estate therefore there is no basis upon which she should be given a share of the monthly rental income of the deceased's estate.

I am inclined to agree with the case of **In re Estate of Kamau Muigai (Deceased) [2018] eKLR** as cited by the respondent where the court held:

*“The question then would be whether a daughter-in-law has an interest in the intestate estate of her father in law. The trite law is that in intestacy the property of an intestate devolves upon the kindred or blood relatives of the deceased, save for the surviving spouse of the deceased. A daughter in law is not a blood relative of a deceased father-in-law, and therefore she does not have a direct claim to his estate. That would be so where her husband, the child of the deceased is alive. Where her own husband is deceased, she no doubt would have an interest in the estate, for the sake of her children, although it would be preferable for the children, being direct descendants of the deceased, to pursue the claim themselves, unless they are minors. Even where her deceased husband had no children, the daughter-in-law would still have a stake in the estate of the father-in-law, but she would claim not as daughter-in-law, for as such she is not entitled”.*

The applicant is not entitled to a share of the deceased's estate and therefore cannot be awarded a share of the monthly rental income.

The application dated 9<sup>th</sup> November 2018 fails in its entirety.

### **Application dated 13<sup>th</sup> November**

25. The application dated 13<sup>th</sup> December 2019 involves a dispute between two Estates of two deceased brothers namely, the Estate of **TIRUS GITAU KAMANDA alias GITAU KAMANDA** hereinafter referred to as **“TIRUS”** and **EVANSON NGUTI KAMANDA** hereinafter referred to as **“EVANSON”**

26. It seeks that the grant issued and confirmed in favour of **JACINTER NGUTI GITAU** on 29th May 2014, be revoked on grounds that:

- a) The same was obtained fraudulently by the making of a false statement, and concealment of material facts from the court.
- b) An order does issue for assessment and payment of income had and received by the estate of the deceased during the illegal occupation of 150 acres from the year 2002 until payment in full.
- c) An order do issue for the appointment of at least two administrators of the estate of **EVANSON NGUTI KAMANDA**
- d) An order do issue for the administrators of both Estates to partition LR. **NO.10018** in two equal portions in accordance with the shareholding and the boundaries set by the deceased and in default the Deputy Registrar do execute all such documents and actions necessary for that effect.
- e) Pending the hearing and determination of this application of this application, an order issues freezing all accounts held for the benefit of the Estate of **EVANSON NGUTI KAMANDA** by the firm of **R.K. LIMO AND COMPANY ADVOCATES and JECINTER WANJIRU KAMANDA** as security for any mesne profits that may be ordered by the Court.
- f) That costs be provided for.

The application is supported by the affidavits of **Evanson Ngumi Gitau and annexures and the witness statements of (1) Evanson Nguti Kamanda, (2) James Kamanda Gitau, (3) Pius Kipsugut Busienei, (4) Philip Ng'etich (5) Henry Kiplagat Kurgat and (6) Stephen Tirop Kibet**

**TIRUS and EVANS** were brothers the former being the elder one.

The applicant points out that, at the time of filing the petition for grant of letters of administration intestate, the petitioners included the suit property **L.R NO. 10018** as part of the estate of **EVANSON**. The lament is that from that list:

- (a) The petitioners did not indicate or disclose that the suit property did not belong to the Estate of **EVANSON** solely.
- (b) The petitioners did not indicate the interest of the estate of **TIRUS** in suit property.
- (c) Form 38 being the consent to the making of grant the petitioners did not take into account the interest and the right of the estate of **TIRUS** to grant its consent as a beneficiary of the suit property.
- (d) No citation was issued to the estate of **TIRUS** or his administrators in respect of the suit property even though they knew that the

estate of TIRUS had a major interest in the suit property. That they had together with the petitioner filed the **Search Details Form dated 22 January 2001 which indicated clearly that the suit property was owned by the brothers as tenants in common in equal shares.**

(e) The Petitioners are accused of failing to disclose to the estate of **TIRUS**, his beneficiaries or administrators that they had made or were in the process of making an application for grant, notwithstanding that they knew that it had an interest by dint of their inclusion of the suit property in the list of **EVANSON'S** properties.

It is also pointed out that at the time of applying for confirmations of grant vide an application dated 5<sup>th</sup> February, 2004 the petitioners filed a mode of distribution in which they included the suit land.

27. It is drawn to this court's attention that at paragraph 6 of the affidavit dated 5th February, 2004 in support of summons for confirmation of grant sworn by the Petitioners, is a document marked "FK1" with the title: **"IF SOMETHING HAPPENS TO ME THE FOLLOWING STANDS AS MY WILL"** purportedly signed by the late **EVANSON**. This is the document the respondent (Jacinter) refers to as the deceased's will in her replying affidavit dated 17th June, 2020 annexed thereto and marked "JWN 17.

28. In making the application for confirmation of grant, the Petitioners are said to have committed the following illegalities and frauds:

(a) The Petitioners included the suit property in their mode of distribution but did not disclose to the court that the said property was owed by the two brothers as tenants in common in equal shares.

(b) The petitioners introduced a document which they purported to be the will of **EVANSON** when they knew at all material times that such a document was a forgery and that the deceased died intestate. They are accused of purporting to distribute the 150 acres of the suit property in excess of the rightful share of the estate of **EVANSON**, thereby causing prejudice to the estate of **TIRUS**, his beneficiaries and the applicants.

The petitioners are accused of hoodwinking the court by combining property **L.R. No. 9244/2 and L.R. No. 10018** in their mode of distribution to appear as one and the same property, and without informing or obtaining the consent of the applicants or beneficiaries of the estate of **TIRUS**.

It is contended that the petitioners' actions at the stage of applying for the letters of administration, and at the stage of seeking confirmation of the grant were riddled with fraud, concealment and illegalities.

Applicants submit that the suit property was and is still owned by the two brothers respective Estates) as tenants in common in equal shares and at the time of their demise the property was and is still registered in their names as tenants in common in equal shares.

#### **29. Analysis and determination of application dated 13<sup>th</sup> November**

**The applicant submits that the petitioners were not entitled to include the suit property as part of the estate of EVANSON without involving the estate of TIRUS, his beneficiaries or administrators. 25. Secondly, that the petitioners were not entitled to apply for grant and to distribute the suit property without notifying the applicants or the estate of TIRUS or his beneficiaries and without seeking their consent or participation, so they committed frauds and concealment.**

**30. It is also argued that the applicants or the estate of TIRUS or his beneficiaries were entitled to be informed and involved as beneficiaries in the administration estate of EVANSON with respect to the suit property. That the petitioners' conduct amounts to fraud and concealment were committed and neither the grant nor the confirmation thereof can be allowed to stand.**

It is pointed out that the regime of ownership of land that allows two or more persons to own land is a common law doctrine which was explained in the case of was explained in the case of **ISABEL CHELAGAT.VS. SAMWEL TIROP ROTICH ELD E&L No 915 OF 2012** to the effect that:

*“Tenancy in common on the other hand is different from joint tenancy. In tenancy in common, the two or more holders hold the property in undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only it remains undivided and the hold the interest together, the largest factor that distinguished a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the later. The share of one tenant is not affected by the death of one of the co- owners. The share of the deceased devolves not to the other co-owners but to the estate of the deceased Co-owner”*

That these doctrines applied in the repealed land laws namely, **Cap 300, Cap 280, and Cap 281 and have been re-enacted both in the Land Registration Act of 2012 and the Land Act of 2012.**

Reference is also made to **section 91 (5) of the Land Registration Act** which states as follows:

**31. If on land, a lease or Charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.**

32. The applicant also refers to **section 91 (6) of the Land Registration Act States which provides;**

**No tenant in common shall deal with their undivided share in favour of any other person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.**

33. I agree with the submissions that these provisions are a reproduction of the common law and the repealed statutes and the import of which is that whenever one of the tenants in common dies, his interest automatically becomes part of his estate and neither the remaining tenant nor his estate, beneficiaries, executors or administrators have any legal right or authority to deal with the land held in common without involving the administrators, the executors, the beneficiaries or the estate of the deceased tenant. Further, that subsection 6 prohibits one tenant from dealing with his own share without the involvement of the other.

34. The petitioners are accused of fraudulently including the suit land in their petition without informing or involving the administrators of the estate of **TIRUS**, and they further filed a document which they purported to be the will of **EVANSON** while at all material times they knew that he had died intestate. The document did not meet the mandatory requirements of **Section 11 of the Law of Succession Act Cap 160** which provides that no will shall be valid unless it is signed by the maker and is attested by two or more competent witnesses.

35. It is further submitted that the petitioners obtained the grant fraudulently by concealing from the Court facts material to the cause namely failing to disclose the interest of **TIRUS** the co-tenant. That if they had they informed the court of this fact the Court would not have made the grant in the form that it did, as **EVANSON** could not dispose of or deal with his interest in the suit property let alone bequeath more than his entitlement without the written consent of the co-tenant or his administrators executors or beneficiaries.

36. In opposing the application, the petitioners rely on the replying affidavit dated 17th June, 2020 and all the annexures thereto. It is the petitioners' submissions that on whether this court has jurisdiction to determine the respective shares and entitlements of the deceased's persons in **L.R. 10018** and order for partitioning and severance the same as sought under prayer (d) and especially in view of the pending matter namely Eldoret **ELC No. 191 of 2015, Evans Nguti Gitau v Jacinter Wanjiru Nguti**.

Drawing from the provisions of Section 94 of the Land Registration Act which vests with the Land Registrar with power of severance of a common tenancy either by way of partition or sale, and the decision in **SUCCESSION CAUSE 336 & 337 OF 1994, MARY WAIRIMU GITHAIGA v MARGARET WANJIKU WATHUKU [2004] eKLR** was confronted with similar issue under **section 94 of the Land Registration Act** and the findings of the Court were;

*“...that the partition/sub-division and transfer in question will entirely be covered by provisions of the Registered Land Act which give the Land Registrar sufficient power and legal authority to effect the transactions without seeking the assistance of a court order. If parties have to come to the court in a dispute emanating from those transactions therefore, the parties will have to come by way of a pure civil suit under the Civil Procedure Act separate from and outside these two succession causes and also outside provisions of the Law of Succession Act.*

*... that none of those certificates included an order for partition or sub-division and indeed in the circumstances of this case, it would have been unwise for the court to have included orders to that extent the legal relationship under which the two women have to move in order to partition or sub-divide any of those two parcels of land and the Registered Land Act had made adequate provisions for such transactions to take place ..... I have held in some other succession causes and I repeat here that such orders are not properly available from court in succession causes...”*

#### **Analysis and determination**

37. The applicant has summarized for determination the following issues:

- (a) Was the suit property owned by the two deceased persons as tenants in common in equal shares?
- (b) If so, did the estate of **TIRUS** have an interest in the suit property, and was the suit property part of his estate?
- (c) If so, were the administrators of his estate of therefore entitled to the suit property as beneficiaries?
- (d) If so, were the administrators of the estate of **TIRUS** therefore entitled to be informed of the petition and confirmation proceedings?
- (e) Was it necessary for the Court to know of these facts and if so, whose duty was it to disclose to the Court?
- f) If the Court was made aware of these facts could the court have issued and confirmed the grant in the way it did:

38. It is the applicant's contention that since the property was owned by both the brothers as tenants in common in equal shares then both estates were entitled to administer the property as such common tenants.

39. The duty of informing the court of all material facts in any proceedings is charged on the party making representations to the Court, in this case the petitioners. This duty was not discharged, and that every effort was made to ensure that the court would not become aware of the full facts material to the cause.

40. The respondent is faulted as not tendering any evidence to show there was no fraud, and all she has done is try to justify their illegal actions. That all documents annexed to her affidavit except the **Land Control Board Consent** of 1976 were made long after the death of **TIRUS** and without involvement of his estate, the beneficiaries or administrators. It is contended that there was intentional concealment and

reference is made to the decision by Gikonyo J when revoking the confirmed grant in **PRISCILLA NDUBI & ANOR V GERISHON GATOBU MBUI Succession Cause No 720 of 2013** that:

*Applying the test of Law in Section 76 of the Law of Succession Act the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this Court does not have jurisdiction to determine the validity or the enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on the distribution of the estate.... Accordingly, non-disclosure of material facts undermines justice and introduces festering into the streams of justice...must immediately be subjected to the serious reverse osmosis to purify the streams of justice*

It is further submitted that the suit property, L.R. NO. 10018 was distributed as if it was part and parcel of LR NO. 9244/2 as reflected in the certificate of confirmation of grant signed by Duly J, (annexture marked "ENG 4 j")

This court is urged to find that the property of EVANSON has not been fully administered, and the respondent is still collecting rent accruing from **ELDORET MUNICIPALITY-11 BLOCK 7/278 (LINCOLN HOTEL) and ELDORET MUNICIPALITY BLOCJ 7/81 (KAPTAGAT HOUSE) and ELDORET MUNICIPALITY BLOCK 2/274.**

41. Further, that there are still bank accounts which are being operated by the respondent (Jacinter), and the consequence of this is that continuing trusts have arisen.

Reference is made to **section 75 A of the Law of Succession Act Cap 160** provides as follows:

**If, after confirmation of the grant of letters of administration at any time there is a continuing trust and only one surviving administrator, that administrator shall without delay apply to the Court to appoint, subject to section 66, as administrators jointly with him not less than one or more than three persons as proposed by him, which failing as chosen by the court of its own motion".**

42. It is also submitted that **Section 71 (2 A)** is instructive, and these provisions are mandatory and places upon the single administrator and the Court to ensure that where there is a continuing trust the administrators must be more than one.

43. It is argued that since such conditions exist in this particular estate the spirit and the letter of these mandatory provisions should be given effect- in fact without the applicants applying, that is to say, *so moto*.

Also cited is **Section 94 (1) of the Land Registration Act** which provides as follows:

**"Any of the tenants in common may, with the consent of all tenants in common, make an application to the Registrar for the partition of the land occupied in common and subject to the provisions of this Act and any other covenants or conditions in a Certificate of a Land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common."**

44. **Section 47 of the Law of Succession Act Cap 160** provides as follows:

**"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient."**

45. That the above section is fortified by section 159 of the constitution. In the case of **ABOK JAMES ODERA T/A. A.J ODERA & ASSOCIATES VS JOHN PATRIC MACHIRA T/A MACHIRA & CO. ADVOCATES (2013) eKLR** the court of appeal held as follows:

*"The aim of the overriding objective principal was to enable the Courts to achieve fair, just, speedy, proportionate, time and cost saving of disposal of cases before it. Its application did not uproot established principles and procedures but to embolden the court to be guided by broad senses of justice and fairness. There was a mandatory requirement that the court of appeal rules of procedure had to also be construed in a manner which facilitated the just, expeditious, proportionate or affordable resolution of appeals."*

46. It is further pointed out that **Rule 73 of the Probate and Administration Rules** provides thus:

**Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary to the ends of justice or to prevent the abuse of the process of the Court.**

I take note that in **Nairobi ELC No. 1076 of 2014(OS) Muhuri Muchiri vs Hannah Nyambura (Sued as the administrator of the Estate of Njenga Muchiri also known as Samuel Njenga Muchiri(deceased) (2015) eKLR** the court held as follows; -

*"it is therefore the case that as the applicant in this suit is not asking for sale of the suit property, the alternative that is available to him under the law is that of partition, and he is required to follow the procedure and laid down in Section 94 of the Land Registration Act in this regard. Under the section the power to partition land held under common tenancy is given to the*

**registrars appointed under section 12 and 13 of the Land Registration Act, and this court therefore finds that it cannot grant the order sought of severing the common tenancy in respect of L.R. No. 1049/18 as the procedure provided by law has not been followed.**

47. Further, on the same issue of jurisdiction it is pointed out, and I agree that the application for revocation revolves around circumstances surrounding the registration of **L. R. No. 10018** in the joint names of the deceased herein and **Tirus Gitau** who is also deceased and ownership of Eldoret **Municipality Block 7 /278**. The respondents insist that the deceased died testate and in his will he bequeathed 465 acres to his heirs from **L. R. 10018** leaving behind 235 acres for the Estate of **Tirus Gitau** which forms the basis of **ELDORET P & A NO.5 OF 1984**. That the purchase price of the suit property was financed by loan and the deceased herein solely repaid the loan facility by K.C.B and completed the same in 1978 by which time **Tirus Gitau** had long passed away in 1977. The deceased therefore was entitled to a larger share of L. R. 10018 since he contributed the lion's share during its acquisition.

48. That this position was confirmed in 1980 wherein the deceased and the widows of Tirus Gitau in their capacities as legal representatives of his estate applied for consent for subdivision of the suit property into 3 portions measuring 200 acres, 235 acres and 465 acres and the same was duly approved. It is argued that the deceased in his will therefore limited himself to the 465 acres he was entitled to and amalgamated the same with 505 acres from L.R. **924412** which property under his name alone thus totalling to 970 acres as indicated in the will. The deceased's estate herein was confirmed in 2004 whereas the beneficiaries of Tirus Gitau on the other hand shared out the 235 acres among the 4 houses.

49. The respondents lament that 16 years after the confirmation of grant, the 2nd -4th objectors, have now approached this Court seeking determination of the shares of their deceased father, Tirus **Gitau**, in so far as **L. R 10018** is concerned and are further claiming ownership of those properties known as **ELDORET MUNICIPALITY BLOCK 7 /278** and **ELDORET MUNICIPALITY MC BLOCK 7 /81**.

50. In urging this court to strike out the summons for revocation of grant by the 2nd – 4th objectors, reference is made to the infamous statement that Jurisdiction is everything as was stated by the Court of Appeal in **Owners of the Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Limited (1989) KLR 1**, where it said: -

***'Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings ... A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction***

It is reiterated that **Section 93 of the Law of Succession Act** on the other hand protects the rights of the said bona fide purchasers for value. It also ought to be noted that that there was no caution, caveat, or restriction ever lodged by the objectors to inform the 3" parties of any disputes.

The certificate of confirmed grant has 12 names of beneficiaries from which the following 5 beneficiaries have since passed away.

- a) **Miriam Wamere Nguti**
- b) **Francis Karisho Nguti**
- c) **Godfrey Ngugi Nguti**
- d) **Paddy Karanja Nguti**
- e) **Gitau Nguti**

51. The death certificates of the said beneficiaries have been annexed in the petitioner's replying affidavit as annexures JWN 23 - 25. The deceased's estate has been shared out among all the 12 beneficiaries as per the certificate of grant wherein the estates of the deceased beneficiaries were allocated part of the suit property as follows; -

<b>Name</b>	<b>Parcel</b>	<b>Acreages</b>
a) Francis Karisho Nguti	L. R. 9244/2 & 10018	180
b) Godfrey Ngugi Nguti	L.R. 9244/2 & 10018	180
c) Paddy Karanja Nguti	L.R. 9244/2 & 100018	180
d) Gitau Nguti	L.R. 9244/2 & 10018	200

52. It is argued that these proceedings therefore substantively and directly affect the proprietary rights of the estate of the aforementioned deceased beneficiaries and the hundreds of purchasers but curious enough the said estates or their legal representatives together with the bonafide purchasers have neither been enjoined or at the very least served with the application for revocation of grant, they are in darkness in so far as the same is concerned notwithstanding the impact it has on their respective individual estates.

53. The manner in which the summons for revocation has been presented is faulted on grounds that it shall occasion miscarriage of justice as any variation of the grant in these proceedings substantively affect the proprietary interests of the estates of the aforementioned

deceased beneficiaries and bona-fide purchasers who occasion to be condemned unheard without being afforded an opportunity to make any representations contrary to the principles of natural justice.

54. The petitioner's counsel argues that the deceased herein is the registered owner of L. **R NO. 9244/2, ELDORET MUNICIPALITY BLOCK 7 /278 and ELDORET MUNICIPALITY BLOCK 7 /81** and has annexed title deeds of the said properties as annexures JWN31,32, 33 and 36 respectively demonstrating that indeed the deceased is the legal owner of the said properties.

55. Further, that under the provisions of **section 24 of the Land Registration Act**, the law provides that effect of **“registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all the rights”**. Emphasis is made to the fact that the objectors have not produced anything to demonstrate that the deceased's titles are not clean or encumbered despite what is termed as their wild assertions. It is on this basis that this court is urged to find that the Tirus Gitau did not stake any claim in the past and has not ever staked any claim now.

56. Has the petitioner has demonstrated the manner in which the deceased acquired the said properties? She has by produced the sale agreements dated 1<sup>st</sup> February 1986 and 26<sup>th</sup> May 1998 alongside numerous letters as part of her evidence and marked the same as annexures JWN 34-49. The deceased at the time of acquisition of LR9244/2 borrowed a loan facility to finance the purchase price as demonstrated by entry no.11 in annexure JWN31. It is contended that taking all these into considerations the petitioner has illustrated that the deceased solely acquired the said for valuable consideration, pointing out that under the provisions of **section 25 (1) of the Land Registration Act** rights of the deceased herein are indefeasible.

57. If the argument presented is that the objectors' assertion over the ownership of **L.R NO. 9244/2, ELDORET MUNICIPALITY BLOCK 7/278 and ELDORET MUNICIPALITY BLOCK 7/81** must carry the day, in my view would be pre-empting what is pending before the Environment and Land Court.

## CONCLUSION

58. From the evidence of the title there is a concerted demonstration as to the extent of the share of each party so that on the face of it the registered properties belong to the deceased and the property would devolve in their respective Estates. What appears apparent is that the administrators are the only ones authorized in law to administer the estates limited only to the suit property and no one administrator is legally allowed to deal without the consent of the other.

59. The arguments presented as well as the legal provisions, seem very appealing as regards claims that the property in question is owned by the deceased brothers as tenants-in-common in equal shares, and that the applicants were not informed or involved thus constituting concealment and fraud. Indeed, the only way a property held in common can be dealt with is if both tenants are involved.

(vi) **Section 54 of the Law of Succession Act Cap 160** provides:

**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 of this Act**

(vii) The **Fifth Schedule rule 13 and 18** of the Act provide:

**13 Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to that property, may be granted to the person beneficially interested in the property, or to some other person on his behalf.**

**Section 18. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to that exception.**

(viii) That read with **Rules 19, 20 and 21** the options and the powers of the court in circumstances such those of this case, are wide and far reaching. It is argued that the guiding principle is that the court looks to do justice.

60. I take note of the applicant's contention that even if the document alluded to by the petitioners constituted was a valid will, a testator can only distribute property which he would have been entitled to dispose of inter vivo during his life time subject to the legal provisions with regard to common or joint tenancies. I cannot fault that argument (Include in determination).

However, there is an intertwining of two areas of law, pitting the arguments of ownership versus inheritance and issues of full disclosure.

### a) **The jurisdiction of this court to entertain the application for revocation of grant in this matter**

1. The matter on the jurisdiction of this probate court to entertain the current application has been passionately argued by the petitioner; informed by the view that the premise of this application is to determine the partition of the suit property the objectors is entitled to, holding that this court lacks the jurisdiction to entertain this application has its jurisdiction is ousted by the provisions of **Article 162(2) and 165(5) and Section 94 of Land Registration Act** among other relevant provisions of the law.

2. **Article 162(2)** of the Constitution gives the Environmental and Lands Court the Jurisdiction over civil matter resulting on the ownership of land in the following terms; that the court has the power 'to hear and determine disputes relating to...

a) \_

b) The environmental and the use and occupation of and title to land.'

Article 165(5) of the constitution states that 'the high court shall not have jurisdiction in respect to matters

a) \_

b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

Section 94 of the Land Registration Act vests with the Land registrar the power of severance of common tenancy either through partition or sale.

The petitioner further relies on the **Succession Cause No. 336 and 337 Of 1994, Mary Wairimu Githaiga vs. Margaret Wanjiru Wathuika (2004) eKLR.**

Those transactions that are the partition or subdivision and transfer in question will entirely be covered by the provisions of the Registered Land Act, which gives the Land Registrar sufficient power and legal authority to effect the transaction without seeking the assistance of a court order. If parties have to come to the court in dispute emanating from those transactions, therefore, the parties will have to come by way of a pure civil suit under the Civil Procedure Act separate from and outside these two succession causes and also outside provisions of the law of succession act... none of those certificates include an order for partition or subdivision, and indeed in the circumstance of this case, it would have been unwise for the court to have included orders to that extent...

3. The objectors, on the other hand, have contended that the powers conferred by **Section 94 of Land Registration Act** upon the registrar have been pre-empted by the petitioner's action of purportedly distributing more land the **Estate of Evanson** was entitled to contrary to what appears in the register and have further differentiated the case above from the circumstances in this case wherein the said case the application was seeking the court's orders for partition which is different as the applicants herein are seeking the court to revoke a grant and direct the administrators to perform their duties as such administrators.

4. Taking the foregoing arguments and presentations, the key question to consider is whether this court has jurisdiction to determine the dispute which revolves on issues of trust, title, ownership, occupation and use of land which is a preserve of the Environment and Land Court. The parties have proceedings pending in the Environment and Land Court vide Eldoret ELC No.191 of 2015, Evans Nguti Gitau v Jacinter Wanjiru Nguti vide plaint dated 3rd July, 2015 where I note that they sought final orders in the following terms against the petitioner herein in her capacity as the legal representative of the deceased:

a) A permanent injunction against the defendant restraining her from trespassing fencing, sub-dividing, selling, leasing, wasting, disposing and or carrying on agricultural activities on the share of the plaintiff namely; ploughing, planting or alienating the plaintiff's share of 351.5 acres in the suit land number L.R. NO. Soy Farm 10018 until the hearing and determination of this suit.

b) An order that the plaintiff is entitled to 351.5 acres of the suit land L.R. Soy Farm 10018 by way of adverse possession.

c) Costs of the suit be provided for.

I share the position taken by the court in **in Re Estate of Wilson Mutyauvyu Ndunda, Machakos High Court Succession Cause No. 321 of 2003**, regarding the issue as to the appropriate forum for determination of disputes relating to succession of a deceased's estate involving questions of title to land assets, and held as follows:

"... that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction.

However, without deciding, it would appear that the Environment and Land Court is more suited of the two courts for the hearing and determination of the question of beneficial ownership of the suit property asserted by the Objectors and denied by the administrators, and which really turns on construction of contracts of sale of land alleged by the parties. The determination of the interested parties' right to property is simply a matter of application of succession law and it depends on the finding of the court on the question of beneficial ownership of the suit property."

In the present matter, the nature of the dispute, and the reliefs being pursued are such that this court's jurisdiction is limited, fettered and indeed vested in the Environment and Land Court (ELC)

I echo the sentiments to the effect that the upshot is that the dispute as to the applicants' interest in the estate of the deceased as creditors or otherwise must be determined by the civil court in the Environment and Land Court, and the Succession Court to deal with the matter as a purely succession cause as distinguished from a dispute as to ownership of the land as an asset of the deceased's estate after the interests of the parties, if any, in the estate are determined.

Whereas the matters herein have been confused, I find that this court has no jurisdiction to determine the issue on the share of the suit property that either of the estates is entitled to as that jurisdiction is vested with the Environmental and Land Court under the constitution

2010. It is worth noting that the dispute on the share that is available for each party is the subject of ELC No. 191 of 2015, which is the right forum for the determination of civil suits resulting from the suit property.

5. The Court of Appeal has directed to this dilemma of parties moving from the civil court to succession courts on the same issue and advises filling of separate civil suit in ownership of property disputes in **Leonard Kimanthi Mwanthi v Rukaria M'twerandu M'iriungi (2013) eKLR** that;

The litigation in this matter has seen parties litigate for the same subject matter both under the civil procedure and the law of succession. We must state this is a procedure that causes confusion as there is a clear justification and sound reasoning why legislature separated both regimes. This case is a clear demonstration that when both regime of law are applied interchangeably, a simple matter for example of succession of a deceased estate becomes protracted and parties keep hovering from civil court to succession cause”.

As regards the 2nd preliminary issue on whether the application dated 13th December, 2019 is incompetent and incurably defective for breach of the mandatory provisions of the oaths and Statutory Declarations Act are procedural issues which in my view in this particular instance, should not be allowed to derail the substance of the suit and I will not delve into the arguments.

The High Court at Nyeri in **Misc. Application No. 32 of 2003, Evans Nginya Another =vs= Esther Muthoni & 2 others (2016) eKLR** held: -

*"Without venturing into merits or lack thereof of the applicant's summons for revocation or annulment of grant, there is some force in the arguments by the learned counsel for the respondent. While I agree that under Section 76 of the law of Succession Act, any interested party may apply to have a grant revoked or annulled at any time, such application must be made within reasonable time. I noted that the certificate of confirmation of grant was not exhibited in these application but if the same was confirmed in 1981, as both parties appear to agree, then a delay of 12 years before the application for revocation or annulment of grant is by any standards unreasonable. However, it is apparent in this matter that apart from the effluxion of time and the death of some of the administrators, the estate has been distributed and if the arguments by the counsel for the respondents is anything to go by the administration of the estate was completed 12 years before the current application was filed: the transfer of the estate to the beneficiaries of the deceased means that the subject matter of the succession cause has dissipated. Although the learned counsel for the applicants submitted that the applicants first went to the Land Disputes Tribunal and thereafter to the Appeals Committee before coming back to this court, hence the delay, there is no legal basis for the rather long and winding route they opted to take at any rate, it is not provided for anywhere in the Law of Succession Act.*

#### **The revocation of the grant**

6. Turning to the substantive issue on revocation of grant; the **Section 76 of the Law of Succession Act** provides: -

#### **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;**

**Under rule 41(3) of the Probate and Administration Rules it is stated that**

**(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.**

7. The duty of a probate court to distribute the property of the deceased to the rightful beneficiaries requires a disclosure of any claims against the property of the deceased. In **re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** the high court at Meru held that:

*[13] Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings...But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (...) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly*

*regulated by law. I will give ample justification for taking this position.*

[14] The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation.

8. I find that the fact that there was a common tenancy is a relevant material fact for the succession cause proceedings. The failure to bring this to the court's attention during the proceedings amounted to fraud necessitating revocation of grant under Section 76 of the Law of Succession Act.

9. It is a long-established principle of the law that every case needs to be decided on its peculiar circumstance for the ends of justice. The petitioner contends that even if the application for revocation of the grant is appropriate, the duration of 16 years taken by the objectors to bring this application defeats the ends of justice as on that grant third parties had acquired part of the property of the deceased, and it would be unlawful to interfere with their property rights as they are innocent purchasers for value without knowledge of fraud as protected under section 93 of the law of Succession Act.

10. The direct reading of Section 76 of the Law of Succession Act and giving events to its wording is that application for revocation of the grant can be made before or after the grant's confirmation. The matter of limitation of is in my view purely a point of law and can lead to the conclusion of the matter. Courts have rejected the argument that limitation of action under **Section 4 of Limitation of Actions Act** applies to succession causes as the Law of Succession Act contemplates itself as a complete act to handle all the matters resulting from succession causes (**See in re Estate of Devchand Lagdhir Shah (Deceased) [2018] eKLR**). Nevertheless, there is a trend by the courts to reject applications for grants brought outside reasonable time. The rationale for this trend is to first protect the judicial process from misuse by parties and second to afford the protection given to third-party buyers under **Section 94 of the Act**. Indeed, under **section 76 of Laws of Succession Act**, the court can modify the grant to exclude the suit property for the estates of the deceased pending determination of the civil suit at the environmental and lands court.

I therefore find the argument that the matter is filed out of reasonable time for no justification is an issue that can only be comprehensively addressed once the Environment and Land Court makes a determination on the issue of ownership, for to do otherwise at this point would be short-circuiting the matter which is pending before the Environment and Land Court.

**Delivered and dated this 22<sup>nd</sup> day of January 2021**

**H. A. OMONDI**

**JUDGE**