REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 5 OF 1994

IN THE MATTER OF THE ESTATE OF MUSIRU KHATELA SHANGUYA(DECEASED)

JUDGMENT

1. The certificate of death serial number [particulars withheld], dated 3rd November 1993, on record, indicates that the deceased person, to whose estate this cause relates, was known as Musiru Khatela Shanguya, who died on 29th July 1993. There is a letter on record from the office of the Assistant Chief of Sichilayi Sub-Location, dated 3rd January 1994. It indicates that the deceased had been survived by three individuals, being Nathan Shilaho Musilu, David Harambee Akhonya and FMK. FMK is described as a minor, and it is proposed that his mother, Josina Khatiala Khatera be his guardian. The deceased was said to have had died possessed of Butsotso/Indangalasia/295, measuring 4.5 acres.

2. Representation to the estate was sought by the Nathan Shilaho Musilu, vide a petition filed herein on 4th January 1994, in his purported capacity as son of the deceased. He expressed himself, David Harambee Akhonya and Josina Khatiala Khatera, as the survivors of the deceased, who he described as having died possessed of Butsotso/Indangalasia/295. Letters of administration intestate were made to him accordingly on 8th November 1994, and a grant was issued to him, dated 9th November 1994. I shall hereafter refer to Nathan Shilaho Musilu as the administrator. The grant was confirmed on 18th September 1995. Butsotso/Indangalasia/295 devolved upon Nathan Shilaho Musilu, David Harambee Akhonya and Josina Khatiala Khatera, at the ratios of 2.5:1:1 acre, respectively. A certificate of confirmation of grant, of even date, issued in those terms.

3. The applications that I am called upon to determine are the summonses dated 10th April 2014 and 4th January 2019.

4. The application dated 10th April 2014, is brought at the instance of the administrator. He seeks that the grant made to himself be revoked, for the reason that the name of Josina Khatera Musilu had been included by error, that the said Josina Khatera Musilu had since renounced her interest in the estate, a fresh grant ought to issue specifying the correct shares of the estate to be Nathan Shilaho Musilu 3.5 acres and Harambee Akhonya 1 acre. In the affidavit sworn in support, the administrator avers that Josina Khatera Musilu, who I shall refer to hereafter as the respondent, was his sister-in-law, being the wife of his brother, Khatela Musilu. He avers that the deceased had made an *inter vivos* gift of a piece of land to the husband of the respondent, and, therefore, she had no claim to Butsotso/Indangalasia/295. He avers further that he was in possession of the 1 acre erroneously given to the respondent in the distribution of 1995. He states that after the error was noticed a meeting was held sometime in 2011, in the presence of family members and local administration, where the respondent renounced her interest in the 1 acre in Butsotso/Indangalasia/295. He further avers the letter from the Assistant Chief dated 3rd January 1994 did not recognize her as a beneficiary. He explains that he has been unable to finalize the process of partition of the property so that each of the beneficiaries can get their share.

5. Attached to the affidavit of the administrator is a certificate of official search dated 26th March 2009, which shows that Butsotso/Indangalasia/295, was registered in the names of Nathan Shilaho Musilu, David Harambee Akhonya and Josina Khatiala Khatera, at the ratios of 2.5:1:1 acres, respectively, with effect from 1st August 2011, and a title deed in those terms was issued on 13th November 2001. There is a copy of minutes of a meeting that was held on 12th March 2011, where elders purported to redistribute the property. Finally, there is a letter from the Assistant Chief of Sichilayi Sub-Location, dated 3rd January 1994, which identifies the survivors of the deceased to be one son, the administrator herein, and two grandsons. It makes no mention of the respondent.

6. The respondent had replied to the application by her affidavit sworn on 21st March 2019. She avers that the administrator was in court when the grant was confirmed, and as the administrator he should have noted any error at the time. She states that the certificate of confirmation of grant was issued on 18th September 1995, yet the administrator has come to court twenty-five years after the event. She asserts that she never renounced her share as alleged by the administrator, adding that if she had denounced her share she would have done so through a formal application. She states that her husband, a brother of the administrator, was a beneficiary of the estate. She states that the other beneficiary, Harambee Akhonya, had since died and he had no family, and, therefore, a new certificate of confirmation of grant should be issued sharing the estate equally between her and the administrator.

7. The second application, dated 4th January 2019, seeks revocation of the grant made on 8th November 1994 and confirmed on 18th September 1995. It is brought at the instance of the respondent, Josina Khatiala Musilu. The grounds upon which the application is premised

are set out on its face, while the factual background is given in the affidavit sworn by the respondent.

8. The reply to the application is vide an affidavit that the administrator swore on 21st March 2019. He avers that the respondent was his brother's wife, and that brother was still alive. He explains that the deceased had three wives, and the persons who were entitled to a share in the estate were the estate of the late Laurent Akhonya, represented by his son David Harambee Akhonya, Khatera Musilu, the husband of the respondent, the late Handa Musilu, the administrator himself, the late Mumila Musilu and Thomas Ingutia Musilu. He avers that prior to his death, the deceased had distributed his property to four of his sons, being Khatera Musilu, Handa Musilu, Sitati Mumila Musilu and Thomas Ingutia. He avers that Butsotso/Indangalasia/295 was to be shared out between himself, the late David Harambee Akhonya and FM, but he later avers that the said Francis Mbango was not to get anything. He states that the respondent's husband had been given 8 acres which he sold. He states further that there was a family meeting on 12th March 2011 where the respondent relinquished her share in the estate. He wonders why his brother; the husband of the respondent was not raising any objections. He has attached to his reply minutes of the meeting of 12th March 2011.

9. The husband of the respondent, his name is Khatera Musilu, swore an affidavit on 17th June 2019 to support her case. He asserts that he was a son of the deceased, and was entitled to a share from the estate. He states that his wife was after the share that was due to him, and, therefore, he supported her application. He says that he was not aware of the denunciation of the share by the respondent, that the administrator was talking about.

10. The respondent swore a further affidavit on 14th November 2019, averring that the administrator had included her as a survivor of the deceased after agreeing with her husband, a son of the deceased, to represent the family. She asserts that both the Chief's letter and Form P&A 5, signed by the administrator himself, both bore her names.

11. Directions were taken on 4th July 2019 that the two summonses were to be disposed of simultaneously by way of oral evidence.

12. The oral hearing happened on 19th November 2019. The respondent was the first on the witness stand. She testified that the deceased was her father-in-law, while the administrator was her brother-in-law. She said that Harambee Akhonya was dead, and was not married. She stated that the deceased had two wives, who bore him twelve sons and a number of daughters that she could not recall. She stated that the deceased had distributed his property before he died. He retained one farm in his name. She said that the deceased had four sons, and he had distributed his property to all four sons. She said that there was no meeting where the distribution was done.

13. The respondent called Francis Amoyi Makokha as her witness. He stated that succession had been done with respect to the estate of the deceased, and the property was shared out, so that the administrator got 2.5 acres, the late Harambee got 1 acre, while the respondent was given 1 acre. He stated that the respondent's husband died in 2019.

14. The case for the administrator was presented on 30th September 2020. He explained that the only property the deceased left behind when he died was Butsotso/Indangalasia/295, and it was he and Laurent Akhonya who were on the land. The deceased had distributed his estate before he died, and the rest of the children had their own parcels of land. He asserted that the respondent was on the land unlawfully. He stated that the respondent's husband had been given his own land where he was buried.

15. The administrator called one witness, Ruth Luchachia Mayula, who stated that the deceased was her son. She stated that she knew the property in dispute, having planted the sisal boundaries on the land. She stated that the deceased had shared out his land amongst his children, save for two sons, the administrator and the late Akhonya, and, therefore, it was the two entitled to a share in Butsotso/Indangalasia/295. She asserted that the husband of the respondent had his own land, given to him by the deceased.

16. At the close of the oral hearings, the parties filed their respective written submissions. I have read through them and noted the arguments made therein.

17. I shall determine the two applications in turn, starting with the first to be filed, followed by the second one.

18. Both applications are premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. A revocation of grant pegged on section 76 should be founded on the three grounds set out in that provision. The first general ground is captured in section 76(a) (b) (c) of the Law of Succession Act, and focuses on the process of obtaining a grant. If the process is found to be tainted by defects or improprieties, fraud, misrepresentation and concealment of material facts from the court, then the grant would be liable to revocation. Representation ought to be obtained in a clean and open process that is defined by integrity and propriety. The office of administrator is an office of trust. It is an office in equity. It should be underpinned by fairness and confidence. The process of appointing any person to that office must itself not be undermined by lack of integrity and fairness. Where these qualities lack, at these very initial steps of obtaining appointment to office, then the trust and confidence, that the persons beneficially entitled to the assets to be managed by the person seeking that office, would be lost.

19. The second general ground, captured in section 76(d) of the Law of Succession Act, moves away from the process of obtaining the grant and zooms on the administration of the estate. At this point the court would be dealing with a situation where the process of obtaining the grant is adjudged to have been proper and above board, but the administrator faced challenges with the administration process itself. Such would be the case where an administrator fails to apply for confirmation of their grant within the period prescribed by the law, see sections 71(1), 73 and 76(d) (i). The law envisages that confirmation ought to be sought six months after the grant is made, and at any rate within the year of its making. Anything done outside that period would invite revocation. Distribution of the estate, which comes with confirmation of the grant, is a critical responsibility of the administrator. Indeed, it is the only duty that follows after collection and preservation of the estate and payment of debts and liabilities. An administrator who fails to apply for confirmation of grant would have totally failed in his duties as administrator. The other case would be where the administrator fails to proceed diligently with administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased, including pursuing the debts owing to the estate and moneys payable to the estate by reason of the

deceased's death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the timeframes set out by the Law of Succession Act. The *raison detre* of being an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required in law. The office of a personal representative is one trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason of having appointed the personal representatives through the grants of representation.

20. That third general ground is where the grant has become useless or inoperative on account of subsequent events, that is subsequent to the making of the grant. It would arise where a sole personal representative has died. There would be no person to carry on administration under his grant, rendering the document useless and inoperative. It would also be the case where the administrator suffers disability, whether physically or mentally, rendering him incapable of discharging his duties, such as where he becomes senile or of unsound mind or lapses into a coma from which he does not recover or suffers debilitating physical injuries that make it practically impossible for him to do anything for himself. An administrator who is adjudged bankrupt would also fall under this net, for he would lose capacity, by virtue of section 56 of the Law of Succession Act, and he cannot possibly act as administrator, and the grant he holds would become a useless piece of paper.

21. For avoidance of doubt, section 76 of the Law of Succession Act provides 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. Regarding the first application, dated 10th April 2014, I find it curious that the administrator is inviting the court to revoke the grant that was made to him on 8th November 1994. He is the sole administrator. It is unusual for sole administrators to ask the court to revoke their grants. The very fact that he is inviting the court to revoke his own grant, no doubt, should raise eyebrows. Quite obviously all is not well. It is sinister, and there must be mischief of some sort.

23. When one looks at the grounds on the face of the application and the facts deposed in the affidavit sworn in support, it is quite clear that the administrator is not complaining that he obtained the grant through a defective process, or that he exercised fraud and misrepresentation to obtain the grant, or that he concealed matter from the court, or that he had mismanaged or maladministered the estate, or that his grant had become useless and inoperative. He is not raising those issues, which are the grounds identified in section 76 for the purpose of revocation of grants. He appears to be raising issue with the process of confirming the grant. His case is that there was an error, the respondent was not a beneficiary of the estate, and should not have been included in the distribution. Secondly, he argues that she had denounced her interest in the property. He proposes an amendment of the grant, which I understand to mean amendment of the certificate of confirmation of the grant, to remove the name of the respondent, and to have the estate shared out between Harambee Akhonya and himself.

24. Clearly, the administrator is not seeking revocation of his grant, but either a review of the confirmation orders to facilitate redistribution of the estate, or a rectification of the certificate of confirmation of grant to achieve the same objective. The application that confronts me is mounted on section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. Both provide for revocation of grants of representation. They have nothing to do with review of confirmation orders or rectification of the certificate of confirmation of grant. Review of the orders of a probate court, made under the Law of Succession Act and the Probate and Administration Rules, is through Rule 63 of the Probate and Administration Rules. The Law of Succession Act has not made provision for review of orders made under the provisions of the Act. So review is introduced by Rule 63, which has adopted a number of the processes set out in the Civil Procedure Rules, which include the provisions relating to review of court orders and decrees. A probate court therefore gets to exercise the power to review its orders through Rule 63. Review under the Civil Procedure Rules envisages three situations for which the court can exercise discretion. Firstly, it is where there is an error apparent on the face of the record. Secondly, it is where there has been discovery of new and important matter that goes to the core of the case, which the party applying for review would not have placed before the court as at the date of the order

sought to be reviewed. Finally, it would be in cases where there is some other sufficient reason.

25. The administrator pleads that there is an error apparent from the face of the record. That is to say the confirmation orders had an error, which then travelled into the certificate of confirmation of grant. The error for which the court can be invited to rectify would be an error that the court itself made. It would be a case where the applicant is saying that he had presented correct information to the court, but the court made an error in the ruling or judgment, by omitting something from the record or by introducing an erroneous figure or fact. Essentially, it is about the applicant telling the court, that he had presented the correct facts, but the court made an error in capturing those facts or misrepresented them in some way. It is not about the party saying that it had presented the wrong facts, and, therefore, inviting the court to allow it to reopen the case so that he can present the correct facts, and thereafter ask the court to revisit its ruling or judgment and revise its orders to accord with the new facts. Review is not about reopening a case, by presenting new facts, but rather asking the court to look at the facts as presented and to correct its ruling or judgment, and revise its orders based on the facts already on record. In other words, review is about correcting a mistake of the court, and not a mistake of the parties.

26. The administrator in this case is not saying that the court made any error or mistake during the process of confirmation of the grant, resulting in the generation of a certificate confirmation of grant that introduced a beneficiary who was not named in the subject application for confirmation of grant. What he is telling the court is that he himself made a mistake of introducing the said beneficiary into the record, when in fact she was not supposed to be in the record. It is not an error on the face of the record. The court dealt with the record as it was, and made orders based on the material that the administrator presented. The record of the court sought to be reviewed would be the certificate of confirmation of grant. There is no error in that certificate. The persons listed in there as beneficiaries are the persons that the administrator presented in his petition, in the letter from the local Assistant Chief filed simultaneously with the petition, and in the confirmation application. The court confirmed the grant based on the documents that were before it. The certificate of confirmation of grant is based on that record, and it cannot be that the court made any error. There would, therefore, be nothing to review.

27. The purported error, from my understanding of the filings, was an error of the administrator. He is telling the court that he should not have introduced the respondent into the record as beneficiary, because she was not one. The error complained of was not an error of the court, but that of the party. The way to deal with errors made by a party in its pleadings is by way amendment of those pleadings before the close of the party's case. What the administrator should have done, to avoid his mistake or error going into the ruling of the court, and subsequently to the certificate of confirmation of the grant, was to amend his petition or his summons for confirmation of grant, to remove the name of the respondent from his filings, before the court confirmed the grant. Once he presented his confirmation application with that error and closed his case, he sealed his fate. A party is bound by its pleadings. Let me add that it was the administrator who initiated the succession cause and the confirmation application, if he made errors they were his errors, and not misrepresentation of facts by the respondent.

28. Was there discovery of an important matter of evidence, which the administrator did not have at hand when he prosecuted his confirmation application? The mistake he talks about is that the respondent was not a beneficiary of the estate, as she was a daughter-in-law of the deceased, and her own husband, the son of the deceased, was alive and well at the time, and that the said husband was not even entitled to a share in Butsotso/Indangalasia/295. Was this information that the administrator did not have when he presented his confirmation application? Was it information that he came by only after the grant had been confirmed? I do not believe so. The respondent was the wife of his brother. That was a fact that he must have known when he presented the petition for grant of letters of administration intestate on 4th January 1994. I say so because he listed her as a survivor of the deceased in the affidavit that he swore in support of the petition. The affidavit is undated, but was filed in court on 5th January 1994. Together with the petition, the administrator filed a letter of consent signed by the respondent and another. On 3rd January 1994, he filed the typed letter from the Assistant Chief, dated 3rd January 1994, the respondent is named as the guardian of one of the grandsons of the deceased, who was entitled to a share in the estate. It would appear that she was introduced into the matter to represent the interest of the alleged grandson. The fact that the respondent was a daughter-in-law of the deceased was something that he knew in 1994, when he applied for the grant, and he must have known then, that, as a daughter-in-law, she was not entitled to a share in the estate. Even if he discovered, after the grant was confirmed, that daughters-in-law are not entitled to share in estate of their late parents-in-law, that would still not excuse him, for the discovery envisaged is of facts, and not the law.

29. Secondly, when he filed his summons for confirmation of grant, on 9th June 1995, he listed her as one of the heirs or beneficiaries surviving the deceased, and proposed that she be allocated 1 acre out of Butsotso/Indangalasia/295. One of the duties of an administrator is to ascertain the assets of the estate and the persons with beneficial interest in the assets. That duty is discharged before the confirmation application is mounted. The proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules are quite specific about that. They require the court to be satisfied as to the identity of the persons beneficially entitled to a share in the estate and of their respective shares. It is the business of the administrator to so satisfy the court, and the court ought not to confirm the grant unless it is satisfied that the persons beneficially entitled have been identified and their respective shares ascertained.

30. For avoidance of doubt, the proviso to section 71(2) and Rule 40(4) say as follows:

> "*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.*"

> "*Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.*"

31. The administrator must have had done his homework, of ascertaining the persons beneficially entitled to a share in the estate and their respective share, before he presented his summons for confirmation of grant. If he had not, then he should not have presented the application as at the date that he did. The law required him to do due diligence, and it is presumed that he did, hence his summons for confirmation of grant. The court must have been satisfied in terms of the proviso to section 71(2), hence it proceeded to confirm the grant based on the facts that the administrator placed before it. The persons presented as beneficiaries were family members. The administrator should have known the members of his own family, and the family history, including that relating to the family property. He had time to ascertain the

surrounding facts before he filed the application. There was nothing for him to discover, and if there was, he had all the time between 4th January 1994 when he filed the petition for representation, and 9th June 1995, when he filed the summons for confirmation of grant, to ascertain those facts.

32. The administrator was fairly consistent with respect to the mode of distribution of the estate. There cannot have been any error. The distribution that the court approved was that the estate be shared as so that he got 2.5 acres, the late Harambee got 1 acre, while the respondent was given 1 acre. That distribution was what he proposed in the summons dated 3rd July 1995. That same mode of distribution is reflected in the letter by the Assistant Chief, dated 3rd January 1994, that the administrator filed in court on 5th January 1994. There cannot be a discovery of new facts or evidence, or an error. To me it more a question of change of mind, what is called an afterthought.

33. The other argument that the administrator makes is that the husband of the respondent was alive as at the date the petition was filed and confirmed, suggesting it should have been him listed a survivor and not his wife, the respondent. Again, this cannot have been by error nor discovery of new facts. These where members of the family of the administrator. He knew that the husband of the respondent was alive. Yet, despite knowing that he went ahead to list his wife rather him in his petition and his summons for confirmation of grant. He obtained a letter from the Assistant Chief, which did not list his brother as a survivor of the deceased, instead it listed his wife. These are facts he knew. The petition was his, and so was the confirmation application. If anything, the administrator misled the court into believing that the respondent's husband was dead, and it was on that basis that the wife was being hoisted as a beneficiary. He concealed matter from the court. He misrepresented facts to obtain the grant. He practiced fraud, and, therefore, the process of obtaining the grant was defective. He did not approach the court with clean hands. He comes out as a devious man. He is making these disclosures now not so as to set the record straight, but to exclude the respondent from benefit, so that he can get a larger share of the property. Otherwise, why would he be disclosing at this stage that the deceased had other children apart from himself and the three grandsons, yet when he sought his grant, and its confirmation, he did not disclose them. He hid them from the court. Those facts are now convenient to the administrator only because he wants the respondent removed from benefit.

34. The other argument that he makes is that the husband of the respondent was not entitled to share in Butsotso/Indangalasia/295 for the deceased had given him another piece of land. The question that should ask is when did he discover this fact? Did he not know of it as at the date he sought representation and confirmation of the grant? Was it a new fact that he has just discovered? In any case, what is his case? Is it that the respondent was not entitled to a share because she was a daughter-in-law of the deceased, or was it because her husband was alive and well, or was it that her husband had been given his own land *inter vivos?* Is the administrator not grasping for straws, looking for some argument that would persuade the court to revisit the distribution so as to remove the respondent from the equation?

35. The third ground for review is any other sufficient reason. The administrator has not advanced any grounds which would bring the application within this omnibus provision.

36. The final word on review is that the same ought to be initiated within reasonable time. The Civil Procedure Rules do not set timelines within which review ought to be sought, and, therefore, the reasonable test applies. The orders confirming the grant were made in 1995. The application to review the said order, if I were treat the revocation application before me as an application for review, was mounted in 2014, some nineteen years thereafter. It cannot be said that review was sought within reasonable time. A lapse of nineteen years is grossly inordinate.

37. Should I treat the instant application as one for rectification of grant? I do not think so. Rectification is provided for under section 74 of the Law of Succession Act, and it is limited to rectification of grants of representation, under certain conditions. It has nothing to do with certificates of confirmation of grant. The procedure for it is prescribed in Rule 43(1) of the Probate and Administration Rules, which is in similar terms.

38. The two provisions state as follows:

> *"74. Errors may be rectified by court*
>
> *Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly."*
>
> Rule 43(1) says:
>
> *"Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made."*

39. Section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, are about grants of representation and rectification of errors on such grants.

40. In simple everyday language, an error means a mistake. The *Concise Oxford English Dictionary*, twelfth edition, Oxford University Press, New York, 2011, page 485, says as much. In *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, St. Paul, 2004, page 659, error is defined as a mistake of law or fact in a judgment, opinion or order of the court. It defines mistake as an error. Section 74 of the Law of Succession Act is, therefore, to be invoked to correct errors or mistakes, relating to grants of representation.

41. The interpretation section of the Law of Succession Act, section 3, does not define a ''grant of representation.'' The definition is carried

in Rule 2 of the Probate and Administration Rules, in the following terms:

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

42. Sections 53 and 54 of the Law of Succession Act, provide for the forms that the grant may take. The provisions say as follows:

> "*Forms and Grants*
>
> *53. Forms of grant*
>
> *A court may—*
>
> *(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—*
>
> *(i) probate of the will to one or more of the executors named therein; or*
>
> *(ii) if there is no proving executor, letters of administration with the will annexed; and*
>
> *(b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.*
>
> *54. Limited grants*
>
> *A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."*

43. The summons by the administrator raises issue with the mode of distribution of the estate ordered by the court in 1995. The suggestion is that there is an error which ought to be corrected, and such rectification can only be of the certificate of confirmation of the grant.

44. Section 74 and Rule 43(1) can only be invoked to rectify errors in grants of representation. The discretion given to the court is to rectify grants. Section 74 and Rule 43(1) have nothing to do with corrections of errors that arise from confirmation proceedings. So, I cannot purport to exercise the discretion to order rectification under those provisions to do what the applicant invites me to do.

45. My understanding of the instant application is that administrator is seeking a radical revision of the distribution ordered. To achieve that he has sought to doctor documents that fit his case. For one, when he moved the court in January 1994, he lodged on record a typewritten letter from the Assistant Chief of Sichilayi Sub-Location, dated 3rd January 1994, which mentioned the respondent as a guardian of one of the grandchildren of the deceased, and it was on that basis that he listed her as a survivor in the petition. In the instant application, he has introduced another letter, quite apart from the one he filed in 1994 It is from the same Assistant Chief, it is handwritten, but does not talk about the respondent. Two things arise from this. One, that the two letters are not consistent, and it would suggest that one of them is genuine, while the other is not. Second, if the signature appearing in both letters is the genuine signature of the Assistant Chief who purported to sign them, then it would mean that the said Assistant Chief was party to a scheme to mislead and hoodwink the court. I believe that the initial letter, the typewritten one, which was lodged in court simultaneously with the petition in 1994, is the genuine one. The second, lodged herein on 30th April 2014, as an annexture to the affidavit in support of the application, is not genuine. It was manufactured to give credence to the scheme by the administrator to remove the respondent from benefit.

46. One other thing. The administrator has attached a certificate of official search in respect of Butsotso/Indangalasia/295. It is dated 26th March 2009. It shows that that property was, as at that date, registered in the names of the administrator, the respondent and Harambee Akhonya as co-tenants. Their shares in the property are indicated in the record, as 2.5 acres to the administrator, and 1 acre each to the rest. That would mean that the ownership is in the nature of a tenancy in common. The sharing indicated tallies with that in the certificate of confirmation of grant dated 18th September 1995. That would mean that the distribution that the court approved and passed in 1995 has been implemented by the lands registration authorities, and the property has since been transmitted to the names of the beneficiaries named in the certificate of confirmation of grant. According to the certificate of official search, the registration happened on 1st August 2001, and a title deed was issued on 13th November 2001.

47. I have talked about the title in Butsotso/Indangalasia/295 being transmitted to the names of beneficiaries named in the certificate of confirmation of grant. Transmission of title is a concept under land legislation. It is not provided for in the Law of Succession Act, nor in the Probate and Administration Rules. Indeed, the two pieces of legislation do not breath a word about transmission. The same is a process under land legislation. The Law of Succession Act and the Probate and Administration Rules do not prescribe what an administrator ought to do with the confirmation orders and the certificate of grant. That prescription is to be found in land legislation. The provisions in land legislation require that the administrator ought to present the certificate of confirmation of grant to the relevant land registrar for the property rights to be transmitted in accordance with the said certificate.

48. Transmission of property upon death, after confirmation of the grant is a process which is governed by the Land Registration Act, No. 3 of 2012, and not the Law of Succession Act, as stated elsewhere. Upon confirmation orders being made by a probate court, the next step should be transmission of the same in terms of sections 61 and 62 of the Land Registration Act. Upon transmission, the beneficiaries named in the certificate of confirmation of grant are issued with title deeds from the property the subject of the transmission.

49. Section 61 of the Land Registration Act provides as follows:

> *"Transmission on death of a sole proprietor or proprietor in common.*
>
> *61. (1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased …*
>
> *(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—*
>
> *(a) any transfer by the personal representative; and*
>
> *(b) ….*
>
> *(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor."*
>
> *Effect of transmission on death.*
>
> *62. (1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or change with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.*
>
> *(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor."*

50. The Land Act, No. 6 of 2012, carries similar provisions in sections 49 to 54 on transmission. The provisions relevant to the matter at hand are sections 49 to 51 of the Land Act, and they state as follows:

> *"49. Transmission on death of joint proprietor*
>
> *If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.*
>
> *50. Transmission on death of a sole proprietor or proprietor in common*
>
> *(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of () [deceased]" or "as administrator of the estate of () [deceased]", as the case may be. (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—*
>
> *(a) any transfer by the personal representative; and*
>
> *(b) any surrender of a lease or discharge of a charge by the personal representative.*
>
> *(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.*
>
> *51. Effect of transmission on death*
>
> *(1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.*
>
> *(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor."*

51. The fact that the proprietary rights were transmitted in terms of the certificate of confirmation of grant, means that the exercise of administration of the deceased herein was completed in 2001 when the title deed was issued in the names of the persons in the certificate of confirmation of grant. The probate court is *functus officio*. It cannot revisit the matter. If the administrator is unhappy with the transmission

process, then he ought to raise the matter with the land registrar, and if he has to go to court over that process, then he has to move the court responsible for resolving disputes relating to land matters as set out in the relevant land legislation. I reiterate, the transmission process is not provided for in the Law of Succession Act and the rules made under it, it is provided for in a separate piece of legislation, in respect of which the High Court has no jurisdiction. It would then mean that the probate court has not been granted jurisdiction over any disputes around transmission of property upon death. It follows, therefore, that any disputes around transmission should be resolved, not through the Law of Succession Act and the Probate and Administration Rules, but under the relevant land legislation, which govern transmission.

52. As the law governing the processes of transmission of interests in land is located in the Land Registration Act and the Land Act, the answer as to the question as to the court with jurisdiction to address or resolve disputes around transmission is to be found within the Land Registration Act and the Land Act. Both statutes carry provisions which state the jurisdiction of the court with regard to the administration, operationalization, application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

53. The provisions in the Land Registration Act state as follows:

> "*Interpretation.*
>
> *2. In this Act, unless the context otherwise requires—*
>
> "*Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011:*
> *… Jurisdiction of court.*
>
> *101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."*

54. The Land Act carries similar provisions; which state as follows:

> "*2. Interpretation*
>
> *In this Act, unless the context otherwise requires—*
>
> "*Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); …*
>
> *150. Jurisdiction of the Environment and Land Court*
>
> *The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."*

55. The effect of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention which revolve around transmission of property upon the death of the proprietor and after completion of succession proceedings fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes is meant to refer to the Environment and Land Court and any subordinate that has been conferred with jurisdiction over the processes the subject of the two statutes.

56. Article 162 of the Constitution identifies the Supreme Court, the Court of Appeal and the High Court as the superior courts, and envisages the establishment, through legislation, as per Article 162(2), of a court, with status equal to the High Court, to hear and determine disputes relating to the environment and the use and occupation of and title to land. Article 162(3) provides that Parliament, while legislating that court into existence, shall determine its functions and jurisdiction. That of itself would suggest that the High Court would have no jurisdiction to handle disputes that centre on the environment and the use and occupation of and title to land. Article 165 of the Constitution specifically establishes the High Court and delineates its jurisdiction. At Article 165(5), the Constitution declares that the High Court has no jurisdiction over matters that fall within the jurisdiction of the court envisaged in Article 162(2) of the Constitution.

57. The relevant portions of Articles 162 and 165 state as follows:

> "*162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).*
>
> *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
>
> *(a) …*
>
> *(b) the environment and the use and occupation of, and title to, land.*
>
> *(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2) …*
>
> 165 *(5) The High Court shall not have jurisdiction in respect of matters—*

(a) …

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

58. Parliament has complied with Article 162(2) (3) of the Constitution, and passed the Environment and Land Court Act, No. 19 of 2011, which brought into existence the Environment and Land Court. The object of the said Act is set out in its preamble, which states as follows:

“*… to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”*

59. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

“*13. Jurisdiction of the Court*

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

60. The effect of all these provisions is that the High Court has no jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court, and, it specifically has no jurisdiction or power to address itself to any of the disputes that arise around the processes provided for under the Land Registration Act and the Land Act, which are subject to the exclusive jurisdiction of the Environment and Land Court. The dispute that has been placed before me relates to transmission of the property of a dead person in terms of a certificate of confirmed grant in the hands of the grant-holder. The orders sought would lead to change of the particulars reflected in the register created on 1st August 2001. Transmission of property and change of particulars in land registers are processes governed by the Land Registration Act and the Land Act, and under that law the court with jurisdiction to deal with any disputes or issues that may arise over the processes is the Environment and Land Court. Transmission is a process which confers title on the beneficiaries named in a certificate of confirmation of grant. It is a process of transfer of title. Therefore, it any issue arising around it would be a dispute over title to which Articles 162(2) and 165(5) of the Constitution apply. Change of particulars in a register also concerns title. These processes are at the core of Articles 162(2) and 165(5) of the Constitution. The change of particulars of a land register, and in particular that would result in the removal of the name of a registered proprietor from the register, is one of the functions that are envisaged in Article 162(3) of the Constitution.

61. The final word on the transmission is that if the administrator is unhappy about co-owning the property with the respondent, then solution does not lie in redistribution of the property by a probate court, since that court is *functus officio*, but with getting the common ownership severed in accordance with the relevant provisions of the land legislation. The parties ought to place that issue before the land registrar, and if he is unable to resolve escalate it to the court with jurisdiction. The probate court has nothing to do with it.

62. I am told that the respondent had since renounced her interest in the property. This contradicts the earlier argument that the respondent was not entitled to a share in the estate because she was a daughter-in-law and that her husband had no interest in the property because he had benefitted from a gift *inter vivos* of another property. If the respondent had no interest in the property in the first place, it would mean that she would have nothing to renounce, for the right term is renounce and not denounce. One cannot renounce a right they do not have. The very fact of renunciation presupposes existence and acknowledgement of a right. By saying that the family caused the respondent to sit in a meeting to get her to put down a renunciation would mean that it recognized that she had a right to the land which she had to renounce to enable the administrator have access to it. In any event, the purported renunciation of the right to inherit the property by the respondent, which is provided for in the Law of Succession Act, was coming too late in the day. The grant had been confirmed, and the probate court had become *functus officio*. The proprietary rights had been transmitted to the respondent in accordance with the applicable land legislation, and such rights could only be defeated in accordance with the said land legislation. I reiterate what I have stated above, that the probate court has no jurisdiction to wade into the matter of extinguishing the rights of a registered proprietor of land.

63. Regarding the second application, by the respondent, it would appear that the same is properly grounded on section 76 of the Law of Succession Act. She is not complaining about the process of obtaining the grant, but rather about the failure by the grant-holder to complete administration of the estate. She accuses the administrator of failing to proceed diligently with administration of the estate. She says that that has rendered the grant useless and inoperative. She argues that the grant was confirmed in 1995, and ever since the administrator has not completed administration.

64. I believe that that the application dated 4th January 2019 is misplaced. It was filed in 2019, during the pendency of the administrator's application dated 10th April 2014. If the respondent had been keen, she would have noted that the administrator had attached a certificate of official search on Butsotso/Indangalasia/295. That certificate clearly indicates that the certificate of confirmation of grant dated 18th September 1995 was presented to the relevant land registrar, who caused the property to be transmitted to the persons whose names appeared in that certificate. That happened in 2001, and a title deed was issued in those names. Administration of the instant estate has been concluded. Nothing remains undone. The probate court has become *functus officio*. The file ought to be closed and sent to the archives. It would serve no purpose to revoke the administrator's grant, for he has nothing more to do. He and the respondent are co-proprietors of Butsotso/Indangalasia/295, together with the estate of Harambee Akhonya. They are co-owners of the property, being tenants in common. If the respondent did not know that, then she should now know. Evidence to that effect is one record. She should make an effort and conduct a search herself on Butsotso/Indangalasia/295.

65. She says that the other co-owner, Harambee Akhonya, died, and he had no family. The fact of that death does not mean that succession to his estate is to be done through the instant cause, which relates to the estate of his late father, for there can only be one cause relating to the estate of one individual. No two or more estates ought to be subject to one single succession cause. Succession to the estate of any individual should be through a single cause in the estate of that single individual. Secondly, it does not mean that where a person dies without immediate family, he or she does not have an estate. Harambee Akhonya is a registered proprietor of part of Butsotso/Indangalasia/295, and his estate owns the 1 acre under his name. I note that the administrator and the respondent are not the only persons related to him, for he had other siblings. They all have a right to a share in his estate. Let them mount a succession cause in his estate so that his share in Butsotso/Indangalasia/295 can be distributed by the court. In that cause initiated in his estate.

66. In view of everything that I have said so far, it should be clear that there is no merit in the applications dated 10th April 2014 and 4th January 2019. The two are for dismissal, and I hereby dismiss them. Each party shall bear their own. Any party aggrieved by the dismissal has leave of twenty-eight (28) days to move the Court of Appeal appropriately. Since administration of the estate herein was completed in 2001, when transmission happened, this cause is spent. The court became *functus officio*. The file herein shall be closed, and removed to the archives. It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH 2021

W. MUSYOKA

JUDGE