



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO. 13 OF 2019
PREVIOUSLY HIGH COURT AT KITALE
SUCCESSION CAUSE NO 105 OF 2000
IN THE MATTER OF THE ESTATE OF THE REUBEN NDAYALA NDOLO (DECEASED)

RULING

1. The Court has before it an application for revocation of a confirmed grant. The Application was brought under a certificate of urgency. At that time, the Matter was before the High Court in Kitale. That Court transferred the File to this Court in May 2019 after giving directions for the filing of responses and submissions.

2. The Application is brought by a Summons for Revocation and Annulment of the Grant. It is brought under **Section 76, 45, 47** of the **Law of Succession Act Cap160 of the Laws of Kenya and under Rule 49 and 73 of the Probate and Administration Rules** and all other enabling Provisions and Powers of the Law). The Applicants are the 4 Objectors, namely Pamela Vugutsa Mwigai, Milly Alaldwa, Josephine Voyore Anzugira, Wycliff Ndolo and Oliver Kegondi Kihamba. The First Respondent is the Administrator of the Estate (incorrectly identified as “3rd Petitioner”). There are three more Respondents who are also identified as Interested Parties, namely Kennedy Susu Ilayioga, Bernard Onzere Indagula and Danson Mungeresa Kekena.

3. The dispute between the Parties concerns the Estate of REUBEN NDAYALA NDOLO (hereinafter referred to as the Deceased”). The Parties are in the main the Children of the Deceased. The Estate of the Deceased is said to include the following properties:

- i. Kakamega/Kegoye/1016
- ii. Kakamega/Kegoye/1039
- iii. Kakamega/Lugovo/29,
- iv. Kisumu Municipality Plot Number 159, and
- v. Bungoma/Ndalu Scheme/105

4. The Application seeks the following orders:

1. That service of this application be dispensed with in the first instance. (spent)
2. That this application be certified as urgent and the same be heard *ex parte* in the first instance for reasons recorded hereunder. (spent)
3. That pending the hearing and determination of this application the 3rd petitioner or interested parties/respondents by themselves or through their representatives, their servants, their workers and or authorized agents or any persons claiming through them be restrained by way of a temporary injunction from forceful occupation, interfering, leasing off, disposing off, cultivating on, building on, fencing off, alienating, surveying, subdividing, transferring, constructing on the deceased’s property comprised in title Kakamega/Kegoye/1016, Kakamega/Kegoye/1039, Kakamega/Lugovo/29, Kisumu Municipality Plot Number 159, Bungoma/Ndalu Scheme/105. (spent)
4. That pending and hearing of this application there be a prohibitory order restricting any dealing on the deceased land comprised in

land reference numbers Kakamega/Kegoye/1016, Kakamega/Kegoye/1039, Kakamega/Lugovo/29, Kisumu Municipality Plot Number 159, Bungoma/Ndalu Scheme/105.

5. That the interested parties be enjoined in this cause purely for purposes of determining whether they have any legal interest in some of the deceased parcels of land which is registered in their names.

6. That in case the 3rd petitioner, interested parties or any of their servants and or their authorized agents disobeys the orders made above the Officer Commanding Police Stations or officers delegated under their command or any County Administration Officers attached in any office from where the deceased parcels of land are located be ordered to ensure that this orders are executed or obeyed.

7. That the grant of letters of administration intestate issued on the 20/9/2001 and certificates of confirmed grant issued to Duncan Kihamba Ndayala deceased on the 20/1/2005 and rectified and issued to Joyce Aseyo Kihamba on 15/9/2016 in respect of the estate of the late Reuben Ndayala Ndolo be revoked and or annulled and all subsequent order made pursuant to the said grants be set aside and a new grant be issued in the names of the 1st Objector, 2nd Objector and 3rd Objector.

8. That upon granting order number 7 hereinabove this honourable court be pleased to make a declaratory order that the deceased's land reference number Kakamega/Kegoye/1016, Kakamega/Kegoye/1039, Kakamega/Lugovo/29 which were secretly and fraudulently transferred from the deceased's name to the interested parties/respondents and to any other person outside or without a grant and certificate of a confirmed letters of administration is recoverable from them by cancelling or nullifying the title therein to form part of the deceased estate for proper administration, distribution and sharing to the rightful beneficiaries and liabilities if any.

9. That the 3rd petitioner and respondents be ordered to pay the costs of this summons

10. Any other relief this court deems fit and just to grant

5. The Application is supported by the Affidavit of *affidavit of Pamela Vugutsa Mwigai the 1st Objector and other grounds and reasons to be adduced at the hearing hereof and as follows:*

a. That the 1st Objector is the daughter of the deceased herein while 2nd and 3rd objectors are daughters in-law to the deceased whereof the 4th and 5th objectors are the grandsons of the deceased.

b. That the subject matter herein is the estate of the late Reuben Ndayala Ndolo deceased.

c. That the 1st objector who was not included in the main petition herein, the 2nd and 3rd objectors being a daughter and daughters in-law of the deceased respectively also ranks higher in law and fact to file and take out letters of administration other than the 3rd petitioner herein alone.

d. That it has been noticed that under secret, fraudulent and dubious means which were actuated by Duncan Kihamba Ndayala deceased who was the 1st petitioner who was the husband of the 3rd petitioner and the interested parties/respondents have acquired registration and ownership of the deceased parcels of land comprised in Kakamega/Kegoye/1016, Kakamega/Kegoye/1039, Kakamega/Lugovo/29 an action done without letters of administration intestate and without a certificate of the confirmed grant.

e. That the 3rd petitioner and the interested parties are basically intermeddling with the deceased estate and that the deceased property which has not been fully distributed or shared on the ground is in danger of being wasted as the same is being disposed off or likely to be sold to 3rd parties without the consent of the objectors and other deceased family members.

f. That the 3rd petitioner herein who is also daughter in-law of the deceased subject to this cause did not seek and or consult or receive a consent from the objectors and all the deceased family members or obtain their instructions to lodge an application in court seeking the rectification of the grant from Duncan Kihamba Ndayala and George Ndayala who are all deceased and initially being the 1st and 2nd petitioners in this cause.

g. That the entire documents filed by the 3rd petitioner in her application seeking for rectification of the grant in her application dated 18/12/2015 and filed in this court on the 5/2/2016 in respect of the deceased estate and in respect of the grant that had been issued to her husband are forged, false, have been uttered and the purported rectified certificate of confirmation of grant issued to her on 15/9/2016 by this honourable court was based on a false affidavit consisting of false information.

h. That the grant of letters of administration, the confirmed grants herein and the one rectified in favour of the 3rd petitioner is being misused by the said petitioner to miscarry justice and now being used to disinherit some lawful beneficiaries who have legal interest in the deceased estate.

i. That by virtue of the grants herein the deceased petitioners and the 3rd petitioner and their proxies, authorized agents have under fraudulent means or dubious means caused to be registered as owners of portion of the deceased land and have fenced it off and wants to construct on them at the objectors' detriment.

j. That he proceedings to obtain the grants herein were defective and fraudulent in substance.

- k. The grants were obtained and rectified by means of making false statements or by concealment from the court of something material to the case.
- l. That the respondents have locked out and denied the applicants access to the suit premises to enable them tend on their crops on the suit land.
- m. That the grants were obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or advertently.
- n. That the rectified grant issued to the 3rd petitioner on 15/9/2016 seems to be allocating land to deceased beneficiaries who include George Ndayala etc.
- o. That the 3rd petitioner and the interested parties are taking advantage of the disputed grants and titles in their favour and are seeking to dispose off or sale the parcels in question to 3rd parties despite the objectors' concerted efforts and requests to stop them from doing so being in vain.
- p. That the objectors realized from aspiring buyers recently that the 3rd petitioner had secretly and exclusively and secretly gone to court without their consultation and rectified the grant in question in their absence.
- q. That some of the persons who have benefited from the titles that were gotten outside the grant did purchase the said land from the deceased herein during his lifetime or at all.
- r. That the 1st and 2nd petitioners herein at the time of filing this petition concealed material facts to this court and did not list all the names of the deceased children and especially the 1st objector.
- s. That inter alia the petitioner and interested parties have disinherited rights full heirs of the deceased estate including the 1st objector who is a daughter.
- t. That the petitioner/respondents have seriously prejudiced the objectors unless the orders sought are granted in their favour.
- u. The objectors have a prima facie case against the respondents.
- v. This application is brought in good faith, timeously to protect the deceased's estate and the same shall not prejudice the interested parties/respondents in any way considering that they have never been in occupation and use of the suit parcels.
- w. That unless orders are issued by this Honourable Court to restrain the respondents and maintain or keep the status quo which has been interfered with pending the outcome of this summons then there is a likelihood of provocation or cause of breach of peace.
- x. That the issue of whether the respondents have beneficial interest in the deceased's estate is also yet to be determined.
- y. That further unless the orders sought are granted the deceased estate shall be subjected to irreparable loss and great damage.
- z. That it is imperative and in the interest of justice that the orders sought out in the summons herein be granted.
 - aa. That this court has jurisdiction to hear and determine this application.

6. In summary the Applicant/Objectors are complaining that the Administrator of the Estate and the interested parties have invaded the Estate of the Deceased and are claiming purchasers have invaded their land. Further that the Petitioners and/or Administrators obtained letters of administration by misleading the Court and excluding the heirs. Having obtained letters of administration they behaved in a way unbecoming of administrators by acting for their own personal benefit and to the detriment of some or all of the other heirs. In relation to the current administrator, it is said she has no right to be an administrator of the Estate of the Deceased who was her father-in law and not a blood relative.

7. The concerns that led the Parties to bring the matter to Court are contained in the Certificate of Urgency which states "*the nature and reason of the urgency is that:*

- 1. That the 3rd petitioner, the interested parties by themselves, their servants and or their authorized agents who are claiming through them have invaded some of the deceased land and claiming purchaser's interest and are frantically ploughing, constructing, fencing, dealing and threatening to forcefully evict, eject, restrain the objectors and rightful beneficiaries from their peaceful use of the said land comprised in land reference number Kakamega/Kegoye/1016, Kakamega/Kegoye/1039, Kakamega/Lugovo/29, Kisumu Municipality Plot Number 159, Bungoma/Ndalua Scheme/105.
- 2. That the 3rd petitioner, the interested parties by themselves, their servants and or their authorized agents who are claiming through them are intending to dispose off, lease off, alienate and or sale off the portions of the parcels of land in question which were either transferred to 3rd parties outside the grant or before the grant was confirmed to fully defeat the interest of rightful and legal beneficiaries.

3. The 3rd petitioner who is in possession of a rectified certificate of confirmation of grant irregularly obtained in this court on 15/09/2016 has totally failed to distribute the deceased property in accordance with the Succession Act.

4. The respondents who have not been in occupation of some of the deceased land by themselves, through their authorized agents are threatening and confronting the objectors and the rightful beneficiaries which situation is catastrophic with a possibility of provoking peace or triggering anarchy on the ground.

AND UNLESS this application is certified as urgent and heard on priority basis the objectors and the entire family of the deceased is likely to suffer irreparable loss and damage hence this application together with the objection proceedings shall be rendered nugatory.

8. This matter comes before this Court following transfer from the High Court in Kitale. Although no part of the Estate of Reuben Ndayala is situated in Kitale, the file was in Kitale because the original petition was filed in that Court. When the current application for revocation came before that Court, the Learned Judge noted, *“that the parcels of land are all situate within the former western province or the counties that fall under it. It would thus be easier and cost effective to have this matter heard and determined in the respective courts.”*. As a consequence, the Cause was transferred to Kakamega High Court for hearing and determination. The Learned Judge also made orders for the status quo obtaining at the date of his directions to be maintained and specifically that no transfer and sale or charge be effected in any of the parcels of land which emanated from the deceased estate pending the determination of the objection proceedings.

9. On 2nd February 2021, the Application came before this Court as presently constituted. The Parties had been served with the appropriate notices and were either present or represented in Court. The Respondent “3rd Petitioner” sought an adjournment which was opposed for the reason, according to Counsel Ms Chunge, that *“Mr Mbororia was selling the land in disobedience of the Court Order for status quo made on 13th May 2019”*, notwithstanding the clear terms of that Order. This Court granted an adjournment and re-listed the Matter on 11th March 2021 with the consent of all the Parties. The status quo order was repeated thus:

“1. Joyce Kihamba be and is hereby forbidden from intermeddling with any property that forms part of the Estate [of Reuben Ndayala Ndolo]. In particular Joyce Kihamba is forbidden from selling and/or attempting to sell any of the properties belonging to the estate, including but not limited to (1) BUNGOMA/NDALU/105.

2. The Registrar of Lands is directed not to register any sale relating to the properties comprising this estate.

3. Orders to continue until hearing and determination of this Objection

4. Penal Notice attached to paragraphs 1 and 2

5. List for Hearing on 11th March 2021

10. On 11th March 2021, the Respondents/Interested Parties decided not to attend the Hearing. In the circumstances and in particular the urgency of the matter, this Court reviewed the Order for viva voce evidence and decided that the interests of justice lean in favour of an early resolution and therefore the matter was heard. The Applicants opted to rely on the evidence contained in the Affidavits that they had filed. In addition, the First Respondent had filed her Replying Affidavit and Witness Statement. The Matter has a long history and the various applications and pleadings are on the Court File. This Court has considered all those documents.

11. This Cause relates to the Estate of REUBEN NDAYALA NDOLO who passed away on 13th February 1995 in Kegoye Sub-Location. The Death Certificate No. 385591 records the death and the fact that the Deceased was, at the time of his death, resident in Kegoye Sub-Location which is in present day Vihiga County. He was survived by several children and possibly a widow (although the evidence is not clear on that detail). He owned several pieces of land, some of them large and valuable, none of which were situated within the jurisdiction of the High Court in Kitale. However, the sole, and according to the Objectors, self-appointed Petitioner, Duncan Kihamba Ndayala appears to have lived there during his life.

12. As is apparent from the above, the matter has a long and involved history. In order to decide what are the appropriate orders; revocation as sought; or some other less drastic order, the Court must consider the history of the Cause.

13. According to the Petition and the Chief’s Letter presented then, the Deceased was survived by the following Children:

1. Duncan Kihamba Ndayala

2. Rogers Kinganili Ndayala

3. George Osango Ndayala

4. Elkana Musatsi Ndayala

5. Margaret Mugala

6. Raphael Ndayala

7. Charles Mutange Ndayala and

8. Possibly, a widow, however the Chief's Letter states that she was by 2000, also deceased.

The Chief's Letter in support of the Petition was prepared by the Chief of Ndalul Location and is dated 19th July 2000. Notwithstanding that all the siblings were in their forties at the time, the Petition was presented by only one person, Duncan Kihamba (hereinafter referred to as "the Petitioner"). It is the First Objector's case that she is a daughter of the Deceased and she was completely excluded from the succession. That has not been denied by the Respondents.

14. The Petition was filed on or about 8th August 2000. The Affidavit in Support is dated 8th August 2000. The Petition and Affidavit list all the siblings. The Affidavit states that the Deceased was resident in Maragoli, however, **Gazette Notice No. 5719** suggests that he was resident in Ndalul Scheme Bungoma. In the Petition but not the Affidavit, the Petitioner states "*that every person having an equal or prior right to the grant of representation herein has consented hereto*". That statement is categorically disputed and denied by the Objectors now before the Court. The Objectors are saying that the family had made arrangements to agree the identity of the partitioners, the distribution and shares as well as to file a petition in one of the Courts where the land was situated. However, they say, the Petitioner, Duncan Kihamba went behind their backs and had himself appointed as the sole administrator and proceeded to dispose of the Estate mainly to himself but also to George (see Supporting Affidavit paragraph 9). The Respondents have not challenged that statement. There does not appear to be any document demonstrating that consent exhibited, either to the Petition, nor to the Supporting Affidavit.

15. The Petition was for letters of administration Intestate. The Grant of Letters of Administration Intestate was issued in September 2001. In that document, the Deceased was recognised as having been *öf Kegoye Sub-Location*". The Letters of Administration were issued in Kitale High Court. Thereafter the application for confirmation of the grant was filed on 1st December 2004. I will come that that later.

16. The Affidavit in Support of the Petition lists the Estate as follows:

1. Plot No. 105 Ndalul
2. Plot No. 1029 Maragoli
3. Plot No 1039 Maragoli
4. Plot No. 1016 Maragoli and
5. Plot No. 159 Kisumu

The Affidavit omits the details contained in the Chief's Letter, which is important due to the size of the pieces of land, in particular, Plot 105 Ndalul Scheme was said to comprise 94 acres.

17. On 1st December 2004, the Petitioner, filed an application for confirmation of the grant. Filed alongside that application is a document entitled "*Consent to the Mode of Distribution*". The purport of that document was that the Estate would be distributed thus:

1. A property identified only as "A" would be divided so that Duncan would receive 46.5 acres, George would receive 46.5 acres and Margaret one acre only.
2. Property B described as Plot 1039 Maragoli – 5 acres was to be divided so that Elkana would receive 2.5 acres and Charles would receive 2.5 acres
3. Property "C" described as 1016 Maragoli – 3 acres was to vest solely in Raphael
4. Property "D" Plot No. 1029 Maragoli – 3 acres in Duncan, Rodgers Ndayala and George Osango.
5. Property "E" Plot No. 159 0.3 ha was to vest solely in George

The 'Consent' was said to have been sworn by Duncan in Kitale on 17th November 2004. There is no indication that the signatures signifying the "Consent" were affixed in the presence of the commission of oaths who commissioned the document. There is also a further "Consent" dated 27th December 2004 said to have been signed by all the beneficiaries using a combined address of Ndalul R.C. School Ndalul via Kitale.

18. Had this Court been satisfied that the heirs of the Deceased consented to the grant as well as the distribution, and that was what was effectuated, the application for revocation may not succeed, however, the Court is told that the Objectors and/or he parent or spouse into whose shoes they step, were not given any part of the Estate. The Court files shows that on 20th January 2005, the Petitioner signed the transfer documents in the presence of the Deputy Registrar Kitale, said to be with the intention to make the following transfers of the Estate pursuant to the Confirmed grant;

1. Ndalul Scheme 105 was transferred to Duncan Kihamba;

2. Ndalu Scheme/105 46.5 acres to Duncan Kihamba;
3. Ndalu Scheme/105 46.5 acres to George O. Kihamba;
4. Ndalu Scheme/105 1 acre part to Margarent Muhonja;
5. Maragoli 1039 to Duncan Kihamba;
6. Maragoli/1039 2.5 acres part to Elkana Musatsi;
7. Maragoli/1039 2.5 acres part to Charles Mutange (Charles Mutange is supporting the Objectors);
8. Maragoli/1016 to Duncan Kihamba,
9. Maragoli/1016 whole 3 acres to Raphael Kagiriru
10. Maragoli/1029 whole 3 acres to Duncan Kihamba, Rogers K. and George Osango jointly; and
11. Kisumu/159 first to Duncan Kihamba and then to George Osango

19. Notwithstanding the above, the Objectors forcefully complain that the distribution of the Estate was not done as suggested above. At Ground (d) of the Application the complaint is, “that... the 3rd petitioner and the interested parties/respondents have acquired registrations and ownership of the deceased parcels of land comprised in Kakamega/Kegoye/1016; Kakamega/Kegoye/1039; Kakamega/Lugovo/29 without letters of administration and certificate of confirmed grant. Exhibit PVM-1a comprises 3 green cards for the aforementioned properties. In relation to Kakamega/Kegoye/1039 0.5ha, the proprietor is shown as Bernard Onzere Indagula who acquired the Property on 21st August 1995 and was issued with a title deed on 22nd August 1995. In relation to the property Kakamega/Kegoye/1016 it is said to have vested in Raphael Gadiru on 28th October 1998 and was transferred to a Kennedy Susu Ilatsona on 25th August 2016. In relation to Kakamega/Lugovo/29 the property appears to vest in Charles Mutange on 29th May 1996. He then sold it on to Danson Mugeresa Kekena for K.Shs.160,000/- on 4th January 1999. And a title deed was issued on 18th December 2002. From those pages, it is clear that the properties were being distributed before the Letters of Administration had been issued. It is also clear that the property Kakamega/Lugovo/29 was not recognised as part of the Estate in Succession Cause No 105/2000 in Kitale High Court. It is also clear that the transfers of title signed and presented to DR Kitale in 2001 do not feature in the Green Cards exhibited.

20. The Objectors also complain of the conduct of the “Second and Third Petitioners”. The so called “Second Petitioner” and “Third Petitioner” were not petitioners per se. They were in fact administrators who were to step into the shoes of the Deceased Sole Petitioner/Administrator Duncan Kihamba Ndayala. They filed a Notice of Motion Application pursuant to **Rule 73** of the **Probate & Administration Rules** on 1st December 2009. The orders sought then, were “that the applicants be substituted as administrators to the estate of REUBEN NDAYALA NDOLO (Deceased) instead of DUNCAN KIHAMBA NDAYALA (Deceased). The Grounds as they appear in the Supporting Affidavit of George Osango were that there has been confirmation of the grant and there has been distribution. That statement is contradicted by the Green Cards produced. It is also said “THAT there has been confirmation and distribution no beneficiary has any complaint”. The gist of the application was that a third party has filed an application that is now pending and has to be prosecuted by somebody on behalf of the Estate. The Affidavit also asserts that both those Applicants were qualified to act as administrators. In the case of the son’s widow, Joyce Aseyo, that was not the case.

21. The Application which the Second and Third Petitioner/Administrators wished to defend was an application by a Tom Kisali Jusa, who claimed to be entitled to part of the Estate. In response to that claim the First Petitioner filed an affidavit stating “*that the Deceased who died on the 13th day of February 1995 in Kegoye Vihiga District left a will and last testament regarding his estate and its distribution*”, and “*That I have already distributed the estate of the late REUBEN NDAYALA NDOLO according to the will after obtaining Letters of Administration.*”. A handwritten document (which was not translated) is exhibited to the Affidavit. In relation to the Third Petitioner/Administrator; she applied for a limited grant of Letters of Administration Ad Litem for Duncan Kihamba who died on 6th October 2009, “*For the purposes of filing a civil suit to meet the necessities of the Estate of the Deceased*”. As a consequence, the Certificate of Confirmed Grant was rectified to name George Osango and Joyce Aseyo as Petitioners, however, they had wished to act as Administrators of possibly separate estates. That Certificate omits the Lugovo/29 Property and other properties that appear to be referred to in the purported will. Notwithstanding the sworn affidavit of Duncan Kihamba, his widow in her affidavit sworn on 18th December 2015 states, “*That immediately after the confirmation of grant the petitioner died when the process of execution was still pending*”. Although the grant was confirmed in January 2001, and she then says, “*That I will be honest and faithful to the property, execute and ensure that all beneficiaries have gotten their shares.*”. The current Application for Revocation contradicts that assertion. In the Rectified Certificate of Confirmed Grant, Joyce Aseyo transferred the purported share of Duncan to herself. She did so without becoming the Administrator of Duncan’s estate. That raises a question as to whether or not distribution was complete at that time.

22. At paragraph 30 onwards of the Supporting Affidavit it is deponed that;

“30. The proceedings to obtain the grants herein were defective and fraudulent in substance and making.

31. The grants were obtained and rectified by means of making false statements or by concealment from the court of something material to the case.

32. That the respondents to some extent have locked out and denied the objectors access to the suit premises to enable them to tend

on their crops and homes on the suit land...

36. That the objectors realized from aspiring buyers recently that the 3rd petitioner had secretly and exclusively gone to court without their consultation and rectified the grant in question in their absence....”.

23. In her Application, the First Objector makes three main complaints, firstly, that as a daughter and heir she had expected to be consulted and involved in the initial succession cause, she was not. Secondly, she had a legitimate expectation of inheriting part of the Estate alongside her sister Margaret, she did not. Thirdly, when the original Petitioner/Administrator of her Later Father’s Estate was replaced, she expected to have a say, she did not and as a consequence considers the process to have been conducted secretly. The First Objector has the support of her surviving siblings and the spouses of those who are deceased, save for Joyce Aseyo.

24. In her Affidavit dated 24 July 2018, Margaret Muhonja Ndayala states that she is “*one of the daughters of the deceased*” suggesting that there was more than one – contrary to what was set out in the original petition. At paragraph 4 she depones; “That I concur with the contents of the supporting affidavit of the first objector ... and the affidavit of my brother Charles Mutange Ndayala dated 23rd July 2018 and I wish the court to adopt them as my sworn statement in support of the revocation of the grant. In his Affidavit, Charles Mutange confirms that he did not consent to the Petition nor did he consent to the distribution as alleged by the First Petitioner and the Third Petitioner/Administrator. He confirms that the signatures on the documents are not his. He says that he was not aware of what was going on until December 2017, when he was informed by the 1st Objector. He states categorically that he did not consent to Joyce Aseyo being substitutes as an Administrator in the place of Duncan when the latter passed away.

25. The Third Petitioner/Respondent has filed a Replying Affidavit on 22nd March 2017. Its contents amount to a bare denial. She denies that the First Objector was not consulted during the initial succession cause. She states that the Estate has been distributed as intended and no it is too late for any application to be considered meritorious. The Third Interested Party/Fourth Respondent, Danson Mungeresa Kekena states in his affidavit that he purchased the parcel of land No Sourt/Masragoli/Lugovo/29 from Charles Mutange Ndyala. The Green Card shows that it was “gifted to Charles on 25th May 1996” (which is after his Father’s death). He then sold it on 4th January 1999, however the Fourth Respondent did not get his title deed until 18th December 2002 (after confirmation of the grant) but shortly thereafter there was a restriction place on the property following a dispute over ownership.

26. The Parties filed their Written Submissions before the matter was transferred from Kitale to the High Court at Kakamega. On the appointed day for hearing, the Respondents did not attend to either cross-examine or be cross-examined. Given the age of this case and the ferocity of the feelings and emotions of the persons involved, it is clear that the justice of this case requires an early resolution. This is particularly the case, where it is alleged that the first Respondent has been attempting to sell property notwithstanding a staus quo order from Kitale.

27. It is clear from the foregoing that the sons of REUBEN NDAYALA began selling off portions of his Estate long before any petition was filed. It is also clear that members of the family were excluded from that process. It is further clear that Duncan and George awarded themselves, the lion’s share of the Estate. That may or may not have been justified. It is also clear that Duncan and/or his wife (now widow) felt able to state on oath that there was no will and later, when it suited their purposes to state, on oath, the opposite, that there was a will. It is also clear that they would involve and/or include various members of the family when it suited their purposes. As a consequence, it is readily apparent that Joyce Aseyo Kihamba is not a fit and proper person to act as an administrator of this Estate.

28. For the reasons set out above, it is Ordered that:

- a. The Letters of Administration issued to Duncan Kihamba Ndayala and/or George Ndayala and/or Joyce Aseyo Kihamba be and are hereby **all** revoked and nullified.
- b. The Certificate of Confirmed Grant and/or Rectified Certificate of Confirmed Grant relating to the Estate of Reuben Ndayala Ndolo or any part of it, be and are hereby all revoked;
- c. The Public Trustee is appointed as the sole Administrator of the Estate of Reuben Ndayal Ndolo;
- d. The Public Trustee shall take all the necessary steps to ensure that the grant is confirmed with the minimum of delay;
- e. In preparation of filing a summons for confirmation of grant, the Public Trustee shall take into account the interests of:
 - i. Each one of the Children of the Deceased
 - ii. If any Child has subsequently passes away, the interest shall pass to his/her family including spouse and/or children
 - iii. Kennedy Susu Ilayioga
 - iv. Bernard Onzere Indagula
 - v. Danson Mungeresa Kekena and
 - vi. Tom Kisali Jusa and/or any heirs

(f)The Registrar of Lands is directed to file with this Court copies of all transfer documents; application for title deeds and green cards relating to any and/or all properties that were owned by Reuben Ndayala Ndolo before his death of 13th February 1995;

(g) In so far as the various parts of the Estate of Reuben Ndayal Ndolo are occupied, such occupation to continue as was the case in October 2009 and prior to that date, pending confirmation of grant. The status quo at that point is to be maintained until final resolution.;

(h) The County Surveyor is directed to visit various parts of the Estate of Reuben Ndayala Ndolo and prepare and file a report setting out the size of each portion and identifying the individual who occupy the land, within 28 days.

Order accordingly,

FARAH AMIN

JUDGE

DELIVERED, SIGNED AND DATED IN KAKAMEGA ON THIS THE 31ST DAY OF MAY 2021 BY MEANS OF MS TEAMS PLATFORM AND A DEVICE SET UP IN COURT 2 FOR THE LITIGANTS IN PERSON.