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In re Estate of Reuben Musonye Kugu (Deceased) (Succession Cause 72 of 2004) [2021] KEHC 9747 (KLR) (24 June 2021) (Ruling)

Neutral citation: [2021] KEHC 9747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 72 OF 2004

WM MUSYOKA, J

JUNE 24, 2021

RULING

1. On 12th October 2015, Dulu J. confirmed the grant herein, as per a previous agreed mode of distribution. The exact words of Dulu J. are:

   > " I therefore hereby confirm the grant of letters of administration herein in the names of Shem MusonyeandJayne Musonye, with the previous mode of distribution as agreed, subject to compliance with the provisions of section 83(e) of the *Law of Succession Act* (cap. 160). A certificate of confirmed grant of letters of administration to issue."

2. The "the previous mode of distribution as agreed" that Dulu J. was referring to was that comprised in a letter that was drafted by Phoebe Munihu Muleshe & Company, Advocates, and which was the basis of the certificate of confirmed grant that was issued by the court, dated 14th May 2009. The application the subject of the ruling of 12th October 2015, was essentially for revocation of a grant that had been made to Paul Musonye and Shem Musonye on 14th May 2009. In that ruling the court removed one administrator and replaced him with another, and confirmed the grant made to them based on the "the previous mode of distribution as agreed," contained in the consent the subject of the letter by Phoebe Munihu Muleshe & Company, Advocates.

3. Subsequent to the ruling dated 12th October 2015, an application was brought by the administrators, seeking cancelation of titles, to facilitate execution of the certificate of confirmation of grant dated 14th May 2009. That application was allowed on 20th November 2019 as prayed. Another application was filed, dated 26th January 2021, it seeking substitution of beneficiaries. It was allowed on 28th January 2021.

4. What I am called upon to determine is a summons dated 13th October 2021. It is brought at the instance of Belinda Khalai Musonye, who I shall refer to hereafter as the applicant, and it seeks revocation of grant. It seeks that the grant made to Jayne Musonye on 28th January 2021, and confirmed on 12th October 2015, be revoked, and the administratrix, Jayne Musonye, be called upon to render accounts for proceeds of sale, rental income and all revenues received by her, on any dealing with the assets of

the estate, from the date of her appointment up to the date of revocation of her grant. The grounds on the face of the application are that the grant was obtained through a defective process, it was made fraudulently, among others.

5. In the affidavit sworn in support, on 13th October 2021, the applicant avers that she was a grandchild of the deceased, by virtue of being a daughter of one his sons, the late Ernest Indasi Musonye. She avers that representation to the estate was substituted on 28th January 2021 and subsequently confirmed, and that the administratrix was in the process of subdividing the estate. She avers that she and her siblings did not participate, and did not have knowledge of nor consent to the mode of distribution, as they were kept in the dark by the administrators. She avers to being given a document in September 2021, where she was required to append her signature against her name. It was after that she perused the court file and noted that the grant had been confirmed without her participation. She avers that the grant, I suppose she means the certificate of confirmation of grant, indicates only one property, being Kakamega/Soy/80, as being available for distribution. She states that some of the assets of the estate have not been included in the grant, and that the administratrix had failed to render accounts of her administration up to the date of revocation of the grant. It is further averred that Paul Saulo Busolo Musonye had previously sold estate assets and should not benefit from the remaining assets. She asserts that there was concealment of material from court and there were false statements. She has attached copies of a grant of letters of administration intestate issued on 24th March 2021, a certificate of confirmation of grant dated 13th August 2019 and showing the substitution of Jayne Musonye as the sole administratrix, and documents relating to subdivision of Kakamega/Soy/80.

6. The administratrix responded to the application, through her affidavit sworn on 1st November 2021, filed herein on 2nd November 2021. She states that the applicant had displayed only one page of the certificate of confirmation of grant, dated 13th August 2019, leaving out the other page which had listed the rest of the assets. She avers that if the applicant was aware of assets that were not included at distribution, she should bring them forth so that they can be distributed. She further avers that if Paul Musonye had sold estate assets, then the applicant ought to bring a separate application against him asking for him to account. She explains that the first grant was made to Agnes Khavai Musonye and Paul Musonye. After Agnes Musonye died, Paul Musonye began to intermeddle with the estate, Shem Musonye was appointed as an additional administrator to work with him. The grant to Shem Musonye and Paul Musonye was issued on 3rd June 2004 and confirmed on 14th May 2009. She states that the confirmation or distribution ordered by the court on 14th May 2009 was founded on a consent of the parties, of which the applicant was a party, comprised in a letter dated 1st April 2009. She avers that after her appointment by Dulu J., on 12th October 2015, she had not received any rents or sold any assets, and whatever had changed hands with third parties happened before her appointment. She reiterates that the assets are distributed as per the consent letter of 1st April 2009, to which the applicant was party.

7. The administratrix has attached, to her affidavit, three certificates of confirmation of grant issued over the years. There is one dated 13th August 2019, reflecting the substitution of the administratrix herein as sole administratrix, and displaying the two pages of the said certificate. The second is dated 4th June 2004. The last is dated 14th May 2009. Then there is the consent comprised in the letter dated 1st April 2009, under the letterhead of Phoebe Munihu Muleshe & Co. Advocates, proposing the distribution that is captured in the certificates of confirmation of grant dated 14th May 2009 and 13th August 2019, and executed by, among others, Belinda Musonye, the applicant herein.

8. The applicant responded to the application, by her affidavit, sworn on 12th January 2022. She avers that she and her siblings had obtained representation to their late father's estate. On distribution,

she avers that only Kakamega/Soy/80 is shared out, the rest of the assets are proposed to be jointly owned. She avers that there are other assets that were not included in the grant. She also asserts that the administratrix had been appointed to administer the entire estate and ought to have knowledge of all the assets, and ought to render an account in respect of all of them. She further avers that the administratrix was bound to compel Paul Musonye to account for his intermeddling with the estate. She further argues that Paul Musonye ought to be excluded from benefitting from the distribution. She denies being party to the consent letter of 1st April 2009. She avers that some of the assets were still generating income, such as the plots within Nangili market and the Nairobi house.

9. The applicant has attached a number of documents to support her case. There is a grant of letters of administration intestate, made in Nairobi HCSC No. 856 of 2006, in the estate of Ernest Indasi Musonye, and issued on 12th July 2006, to Joyce Anyona Musonye, Belinda Khalai Musonye and Sidney Ingalia Musonye. There are certificates of official searches for some of the landed assets. That for Kakamega/Soy/80 is dated 26th October 2021, it is registered in the name of the deceased, and it is encumbered to Agricultural Finance Corporation. That for Kakamega/Kongoni/656 is dated 26th October 2021, and the property is registered in the name of the deceased, and is encumbered to Barclays Bank of Kenya. That for Kakamega/Soy/257 is dated 26th October 2021, and shows that the property is registered in the name of Paul Busolo Musonye, since 2011. That for Kakamega/Kongoni/1786 is dated 26th October and shows that the property is registered in the name of Veronica Wekesa, since 2017. That for Kakamega/Kongoni/1787, is dated 26th October 2021, and shows that it was a subdivision from Kakamega/Kongoni/655, and was registered in the name of Agnes Khavai Musonye, since 1999. That for Kakamega/Kongoni/1790 is adted 26th October 2021, and shows that the same is a certain from Kakamega/Kongoni/655 and was registered in the name of Josephat Hillary Mayabi, since 2014. That for Kakamega/Kongoni/1788 is dated 26th October 2021, which is a creation from Kakamega/Kongoni/655, and is registered in the name of the deceased since 1998.

10. The applicant essentially raises two questions in her application. One is about the manner the grant was made to the administratrix, and two is about the distribution of the estate. I will start with the first issue, the appointment of the administratrix as such.

11. Representation was initially sought in this cause by Agnes Khavai Musonye and Paul Musonye, by a petition, which they lodged herein on 27th January 2004. Letters of administration intestate were accordingly granted to Agnes Khavai Musonye and Paul Musonye on 27th April 2004, and a grant in those terms was duly issued to them, of even date. That grant was confirmed on 3rd June 2004, and the entire estate was devolved to Agnes Khavai Musonye, absolutely. A certificate of confirmation of grant in those terms was issued, dated 4th June 2004. Agnes Khavai Musonye subsequently died, and was substituted as administratrix, by an order made on 4th May 2006, by Timothy Musonye, of course as a co-administrator with Paul Musonye. Although the initial grant had been confirmed, it was ordered, on 18th March 2009, that the administrators file for confirmation of their grant. A document was then lodged at the registry on 30th March 20 09, titled Consent on Distribution, signed by Timothy Musonye, Shem Musonye, Jayne Musonye and Rose Musonye, agreeing to distribution of the assets of the estate on an equal basis amongst all the six children of the deceased. Then on 8th April 2009, a letter was lodged at the registry, being a consent between the advocates on record, requesting the Deputy Registrar to record a consent according to terms spelt out in the consent of 1st April 2009. The said consent is that contained in the letter dated 1st April 2009, under the letterhead of Phoebe Munihu Muleshe & Co. Advocates, which proposes equal distribution of all the assets of the estate equally between all the six children of the deceased. A certificate of confirmation of grant was then extracted, dated 14th May 2009, in those terms.

12. A summons for revocation of grant was then filed herein, dated 27th January 2010, by Rose Musonye. There is a similar application, on record, dated 3rd August 2011, filed herein on 10th August 2011, by Jayne Musonye, the administratrix herein. There is yet another summons for revocation of grant by Jayne Musonye, dated 9th September 2011, and filed herein on even date. It is the said applications that ended up with the orders by Dulu J. that I have recited above, where Shem Musonye was retained as administrator, and Jayne Musonye, the administratrix herein, was appointed to join him as such. In the same ruling, the court confirmed the orders of 14th May 2009, which had confirmed the grant and ordered distribution of the estate. The court directed that the estate be distributed in accordance with those orders, based on the consent that the parties had recorded. The ruling was delivered on 12th October 2015. The administratrix, Jayne Musonye, then filed the application dated, 15th August 2019, indicating that her co-administrator , Shem Musonye, had since died, and that the subdivisions created out of Kakamega/Soy/80 be cancelled and reverted to the name of the deceased, to facilitate distribution of the estate in terms of the distribution ordered by the court on 12th October 2015. That application was placed before me on 20th November 2019, and I allowed it. The administratrix then filed another application dated 26th January 2021. She sought rectification of the certificate of confirmation of grant dated 12th October 2015, which had been amended on 13th August 2019, so as to substitute two beneficiaries, that is to say Timothy Musonye and Shem Musonye, with their respective survivors and successors. That application was placed before me on 28th January 2021, and I allowed it.

13. From the recitation above, it should be clear that the administratrix herein was not appointed on 28th January 2021, as such, for the orders made on that date related only to substitution of dead children of the deceased by their survivors or administrators of their estates. No appointment was made under those orders. Clearly, therefore, there is no basis for seeking revocation of a grant made on 28th January 2021, because no appointment of administrators was made on 28th January 2021. The administratrix herein was appointed by Dulu J, by the orders of 12th October 2015. She was a co- administratrix to Shem Musonye. The law says, at section 81 of the *Law of Succession Act*, Cap 160, Laws of Kenya, that upon the death of one or more of several administrators to who a grant of representation had been made, all the powers and duties of the administrators shall become vested in the survivors or survivor of them. That means that where there are two administrators, upon the demise of one of them, the grant is not revoked or rendered useless, on account of that death, instead the administration is automatically vested in the surviving administrator, and all what a court needs to do is to confirm the surviving administrator to continue the administration. The court need not involve the survivors and beneficiaries in such confirmation of the surviving administrator as the sole administrator. The grant of letters of administration intestate that was issued to Jayne Musonye, on 28th January 2021, dated 24th March 2021, should be seen in that context. The appointment of Jayne Musonye came on 12th October 2015. When her co-administrator died, on 20th June 2017, the grant was vested in her as sole administratrix, by virtue of section 81, with effect from that date. The grant of 28th January 2021, was not a fresh appointment, but a mere confirmation, that she was the sole administratrix, after her co-administrator died, for the name of the co-administrator should not have remained on the grant after his death. The second point is that the death of one of the administrators does not require that that dead one be substituted, for section 81 envisages that his powers and duties automatically vest in the surviving administrator. In this case, the co-administrator, Shem Musonye, died on 20th June 2017, his powers and duties naturally vested, by virtue of section 81, on the surviving co-administratrix, Jayne Musonye, and there was no need to appoint another administrator to take his place, in addition to Jayne Musonye. In any case, if any of the survivors of the deceased herein, including the applicant herein, desired to be appointed administrators to substitute him, they had all the time, between when he died on 20th June 2017 and 28th January 2021 when the administratrix

herein was confirmed as administratrix, to move the court appropriately. Nothing prevented them. There is nothing untoward about the appointment of Jayne Musonye as administratrix, as well as her confirmation as sole administratrix after the demise of her co-administrator. Clearly, the applicant has not made a case for revocation of the appointment of Jayne Musonye as administratrix based on that ground.

14. For avoidance of doubt, this what section 81 of the *Law of Succession Act* provides:

> "Upon the death of one or more of several executors or administrators to whom representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors of survivor of them…"

15. On the appointment of Jayne Musonye, this is what Dulu J. wrote, in the ruling of 12th October 2015:

> "… I am of the view that the court should only appoint one administrator to replace the 1st respondent. That replacement administrator will be Jayne Musonye … I thus appoint Shem Musonye and Jayne Musonye as the administrators herein."

16. Let me now go to the issues about distribution. The starting point is that the orders of 13th August 2019 and 28th January 2021 only resulted in the rectification or amendment of the certificate of confirmation of grant dated 12th October 2015, which was itself an amendment or mirror of the certificate of confirmation of grant dated 14th May 2009. Those orders did not make fresh distributions of the estate. They merely acknowledged Jayne Musonye as the sole administratrix of the estate, and removed the names of Shem Musonye and Timothy Musonye as beneficiaries, and substituted them with those of their survivors and successors. There were no new orders on the distribution of the estate, and the orders merely reiterated the distribution ordered on 12th October 2015, which was itself a reiteration of the distribution ordered on 14th May 2009. The only distribution orders that the applicant should be complaining about are those of 14th May 2009, as no other distribution orders were made thereafter, as the orders that followed only mirrored the orders of 14th May 2009. Making orders to review or set aside the orders made by Dulu J. on 12th October 2015 will serve no purpose, for they would leave those made on 14th May 2009 intact, yet the orders of 12th October 2015 were predicated on those earlier orders. There are only two sets of orders on distribution on record, made on 3rd June 2004 and 14th May 2009. We are here concerned with the orders of 14th May 2009. All the orders made after 14th May 2009, on distribution, merely mirror the orders of 14th May 2009. That said, it would mean there is no basis for me to set aside or vacate the orders of Dulu J. of 12th October 2015.

17. The orders of 14th May 2009 were based on a consent comprised in a letter dated 1st April 2009. The applicant renounces that letter, and says that she was not party to it, and basically that the signature on it was not hers. I note that it was dated 1st April 2009, the Fools Day.I hope that the applicant is not treating it as the Fool's Day prank or part of the foolery around 1st April. Anyhow, the distribution of 14th May 2009 was founded on that consent. A consent order has the same force as a contract. It binds those party to it. It can only be rescinded on grounds of fraud and illegality. See *Brooke Bond Liebig Ltd vs. Mallya* [1975] EA 266 (Law Ag P, Mustafa Ag VP & Musoke JA), *Wasike vs. Wamboko* [1988] KLR 429 (Hancox JA, Nyarangi & Platt Ag JJA), *Samson Munikah practicing as Munikah & Company Advocates vs. Wedube Sates Limited* [2007] eKLR (Tunoi, O'Kubasu & Githinji JJA) and *East African Portland Cement Company Limited vs. Superior Homes Limited* [2017] eKLR (Waki, Nambuye & Kiage JJA). Engaging in fraud and illegality suggests some element of criminality. The applicant suggests that her signature found its way into that consent letter by way of fraud or some illegality. That amounts to insinuating that the administratrix, or whoever was behind that letter,

indulged in some form of criminal activity. For a court to rely on allegations of fraud or illegality, the said allegations ought to be established at a standard of proof higher than preponderance of evidence or balance or probability, but lower than proof beyond reasonable doubt, that there was fraud or illegality. See *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo & Tunoi JJA) and *In re Lusila Wairu Waweru (Deceased)* [2020] eKLR (Nyakundi J). Has the applicant done that? I do not think so. She has not placed on record any material to show that her signature found its way into that document by way of forgery, which is in itself criminal activity. She has not presented any reports, by document examiners or handwriting experts, attesting to the fact that the signature on that document was not hers. She is the one alleging that it was not her signature; the duty is on her to prove it to the required standard. She has not done so. I can only find and hold, for now, that that signature, in the letter of 1st April 2009, was hers.

18. She complains that she and her siblings were not consulted in the process that led up to the orders of 14th May 2009, that is if one discounts the consent of 1st April 2009. The question to ask is whether the estate of her late father was prejudiced by the consent of 1st April 2009, and the subsequent orders of 14th May 2009. The consent letter of 1st April 2009 proposed that the assets of the estate, available for distribution, be distributed equally between the six children of the deceased. The reference to six children of the deceased include the estate of the late father of the applicant. The consent letter recognized that the father of the applicant was deceased, and proposed that his share should go to his four children: Belinda Musonye, Sydney Musonye, Elsie Musonye and Leroy Musonye. From the contents of that consent letter, it is clear, beyond peradventure, that the estate the late father of the deceased was taken care of, and the applicant and her siblings were recognized as his heirs and successors. Secondly, the distribution proposed was equal between the all six. That was in complete compliance with section 38 of the *Law of Succession Act*, which provides for equal distribution, where an intestate is survived by children but no spouse as in this case. Secondly, it was also in keeping with section 41 of the Law of Succesion Act, which allows children of dead children of an intestate to step into the shoes of their late parent. That is what was proposed here, for the applicant was to take the share that should have gone to her father, and she was to do so on her own behalf and that of her siblings, who are clearly identified in that letter. It could be that they were not involved or consulted when that consent letter was mooted, but the proposed distributed was in keeping with the law, and the setting aside of the confirmation or distribution orders will assist no one, for ultimately the estate will have to be distributed strictly in terms of sections 38 and 41 of the *Law of Succession Act*. Setting aside of the orders of 14th May 2009, and the subsequent orders mirroring them, would serve no purpose, and would only needlessly delay the finalization of distribution of the estate. I am not persuaded that I should revisit those orders based on the arguments that the applicant has advanced.

19. Again, for avoidance of doubt, sections 38 and 41 of the *Law of Succession Act* say as follows:

> “ . Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall … devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.
>
> 39 …
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> 40 …
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> 41. Where reference is made in the Act to the “net intestate estate” or the residue thereof devolving upon a child or children , the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or wo, being female, marry under that age, and for all or any of the issue of any child

of the intestate who predeceased him and who attain that age or so marry, in which case the issue shall take through degrees in equal shares, the share which their parent would have taken had he not predeceased the deceased."

20. Let me now advert to the other miscellaneous issues that the applicant has raised. About joint distribution, assets not distributed, accounts not rendered, among others.

21. One of the arguments advanced is that the certificate of confirmation of grant, dated 28th January 2021, only distributed Kakamega/Soy/80, for each of the six children are allocated 9.3 acres; while in the remaining assets, that is to say the plots at Nangili market, LR Nairobi 209/1800/2 and the plot within Soy market, are not shared out in similar manner, instead it is proposed that they be held jointly by all the six survivors. Let me say a number of things about this. Firstly, all these assets are distributed according to that certificate. Distribution does not denote the splitting of the land into portions and then the dishing out of the portions to the beneficiaries. Devolution of property to the beneficiaries to be held jointly by them, or devolution to one beneficiary to hold on behalf of others, or devolution of an asset to the administrator to hold in trust for the survivors or beneficiaries for actual distribution at a later date, still amounts to distribution. So it is not true to say that the holding jointly of the remainder of the assets as between the six beneficiaries did not amount to distribution of the said assets. Secondly, the terminology "jointly" was not created by the administratrix, neither does it appear in the consent letter dated 1st April 2009, which is the foundation of the distribution in the said certificate. That letter of 1st April 2009 proposed that all the assets of the estate be distributed "equally." It does not use the word "jointly" anywhere. The use of "jointly" in the certificate is incorrect, and does not capture the spirit of the consent of 1st April 2009. It is a creature of the court, through the official who drafted and extracted the certificate from the consent letter of 1st April 2009. The correct word should have been "equally." It simply an example of a bad draughtsmanship by the court, dating back to 14th May 2009, which should not be attributed to the administratrix. The cure to the obvious mistake should be to rectify or amend the certificate, to remove the offending word, and substitute it with the correct word, "equally."

22. Perhaps I should say more on these "jointly" and "equally" concepts, which some legal practitioners in Kenya treat as meaning the same thing. The two terms mean different things, and there should be no occasion at all to presume that they bear or carry the same meaning. "Equally" is used in connection with tenancies in common, where a property is held by several individuals, where each one of them is entitled to a separate discernible share in the whole. "Jointly" connotes joint ownership, where several individuals corporately own indivisible shares in the same property. It would mean that they do not each have a separate share in the property, but all of them own the whole property. Their interest in the property are united, as opposed to being separate, and the joint owners are in a position of a single owner of the property. See sections 61, 91 and 93 of the *Land Registration Act* , No. 3 of 2012; sections 50 and 51 of the *Land Act*, No. 6 of 2012; *Kivuitu vs. Kivuitu* [1991] KLR 248 (Gachuhi, Masime JJA & Omolo Ag JA,); *Peter Mburu Echaria vs. Priscilla Njeri Echaria* [2007], *In the Matter of the Estate of Edditar Wairimu Kamiru* [2012] eKLR (Azangalala J) and *Isabel Chelangat vs. Samule Tiro Rotich & 5 others* [2012] eKLR (Munyao Sila J).

23. Let me pick up something else in connection with the bad draughtsmanship that I have mentioned above. It is with regard to the share that is devolved to the applicant herein, with respect to the plots at Nangili market, LR Nairobi 209/1800/2 and the plot within Soy market. Whereas the share due to her father in Kakamega/Soy/80 is shared out between her and her siblings, that is to say Sydney Ingalia Musonye, Elsie Andaye Musonye and Leroy Kugu Musonye, the said siblings are omitted from the sharing of the plots at Nangili market, LR Nairobi 209/1800/2 and the plot within Soy market, which is against the spirit of the consent letter of 1st April 2009, where the applicant was to take the share due

to her father on behalf of and in trust for her siblings or all the four children have to take equally the share due to their father. That should have been captured by the draughtsman in the extraction of the certificate of confirmation of grant. Their omission suggests that they have been disinherited from the plots at Nangili market, LR Nairobi 209/1800/2 and the plot within Soy market, and that the share due to their late father in those assets has been devolved exclusively and absolutely to the applicant. That certificate ought to be amended to project the correct position with respect to the plots at Nangili market, LR Nairobi 209/1800/2 and the plot within Soy market.

24. The applicant raises the issue of certain assets which she says have not been included in the distribution. The assets in question are those that I have referred to in paragraph 9 of this ruling. They are Kakamega/Kongoni/656, 1786, 1787, 1788 and 1790. Kakamega/Kongoni/656 is registered in the name of the deceased. Kakamega/Kongoni/1786, 1787, 1788 and 1790 appear to be subdivisions from Kakamega/Kongoni/655, which might have been registered in the name of the deceased, for no evidence was presented on its ownership. However, out of the four subdivisions, Kakamega/Kongoni/1788 is reflected as being in the name of the deceased, while Kakamega/Kongoni/1787 is in the name of his now deceased wife, Agnes Khavai Musonye. The other two are in the names of individuals who do not appear to be related to the deceased, that is to say Veronica Wekesa and Josephat Hillary Mayabi. The other property is Kakamega/Soy/257. It is registered in the name of Paul Busolo Musonye, a son of the deceased.

25. From the material on record, it is evident that Kakamega/Kongoni/656 and 1788 are in the name of the deceased. There is a possibility that Kakamega/Kongoni/655, which gave rise to Kakamega/Kongoni/1786, 1787, 1788 and 1790, was registered in the name of the deceased. However, let me confine myself now to that which is registered in the name of the deceased. When representation was initatlly sought herein in 2004, by Agnes Musonye and Paul Musonye, Kakamega/Kongoni/656 and 1788 were not listed in the schedule of the assets of the estate of the deceased. When the estate was first distributed on 3rd June 2004, and a certificate of even date issued, Kakamega/Kongoni/656 and 1788 were not among those assets distributed in those proceedings. After the widow of the deceased, that is to say Agnes Musonye, passed away on 30th March 2005, there were tussles over the administration of the estate, which culminated in the consent letter of 1st April 2009, the foundation of the distribution orders and certificate of 14th May 2009. That consent letter makes no reference whatsoever to Kakamega/Kongoni/656 and 1788, and consequently, the orders and certificate of 14th May 2009 bear no mention of the two. The certificate of confirmation of grant on record is that founded on the said consent letter. The only assets referred to in that letter were Kakamega/Soy/80, the plots at Nangili and Soy markets, the plot at Koibarak and LR No. 209/1800/02 Nairobi.

26. The administratrix herein was not among those who petitioned for administration in 2004, and she was not an administratrix on 1st April 2009 nor on 14th May 2009, and was not appointed until 12th October 2015. She cannot, therefore, be responsible for the events in 2004 and 2009, when process was filed in court which omitted Kakamega/Kongoni/656 and 1788. When she came on board, in 2015, as administratrix, she only relied on the material that was already in place, the certificate of confirmation of grant generated from the consent letter of 1st April 2009. She cannot, therefore, be blamed for the omission of Kakamega/Kongoni/656 and 1788. The omission of assets from the schedule of the assets of the estate at the time representation was sought and at distribution is not a ground for seeking revocation of grant, unless it is established that there was fraud. It is not suggested nor proved that the administratrix had any hand in the non-disclosure of the two assets. The remedy for the anomaly should not be through revocation of the grant or cancellation of the certificate of confirmation of grant or through the setting aside of the confirmation orders. It should, instead, be through review of the

confirmation orders, to include those omitted assets, and to have the shares in them allocated, after which the certificate of confirmation of grant is amended to accommodate the changes.

27. The administratrix has pleaded ignorance of the existence of these assets, at least before the applicant disclosed them. She did not file a response to the further affidavit by the applicant, which made the disclosures, and I cannot tell what her position is after that. What she should do, as administratrix, is to follow up with the relevant registries to establish whether there is truth in what the applicant is saying, and if it turns out to be true, that these assets are in the name of the deceased, then it would be her duty, as administratrix, by virtue of sections 79 and 83(b) of the *Law of Succession Act*, to place the said assets before the court, by way of an application for review of the confirmation or distribution orders, for the purpose of distribution, and subsequent amendment of the certificate of confirmation of grant.

28. In disclosing most of the assets of the assets that she claims were omitted, the applicant has listed some that are not in the name of the deceased. It did not come out clearly, in her papers, but the underlying argument appears to be that some of these assets were in fact in the name of the deceased but passed to the names of other individuals through means that were not altogether regular or even legal. Am talking about Kakamega/Soy/257 and Kakamega/Kongoni/1786, 1787 and 1790. The case about Kakamega/Kongoni/1786, 1787 and 1790 appears a little straightforward. The same arose from subdivision of Kakamega/Kongoni/655. It is not disclosed who the original owner of Kakamega/Kongoni/655 was, but it would appear to be the deceased, for he or his estate benefitted from that subdivision, and he owned the adjoining Kakamega/Kongoni/656. Some of the registrations of some of the sub-titles were done after the demise of the deceased and some before then. The administratrix has an obligation to follow up and establish the history of Kakamega/Kongoni/655, and its subdivision and the subsequent registrations, and should it turn out that this was estate property that was not properly handled, restore it to the estate for distribution amongst the heirs entitled. Regarding Kakamega/Soy/257, other than the fact that it is registered in the name of Paul Busolo Musonye since 2011, there is nothing to suggest that it was ever in the name of the deceased prior to its registration under Paul Busolo Musonye. There is need for the administratrix to trace the title, and if it relates to the deceased, have it recovered. Restoring estate assets to the estate is what section 83(b) of the *Law of Succession Act* is about, that is tracing, collecting, getting in and gathering what belongs to the estate.

29. On accounts, the applicant accuses the administratrix of not rendering accounts, to which the administratrix has countered that she has nothing to account for, for she has not been receiving any income from any of the assets of the estate. Section 79 vests the estate of an intestate in the administrators. Estate property does not belong to the administrator, for it belongs to the estate. The administrator is a mere custodian and trustee of the same, for the purpose of its management and administration, pending distribution to the persons who are ultimately entitled to it, and that would be the survivors of the deceased and other beneficiaries of the estate, such as any genuine creditors. A trustee or holder of any property for the benefit of another, in equity and trust law, bears an obligation to account for how he handles or manages that property. He is said to be a fiduciary or to be in a fiduciary position with respect to the property, and in his relationship with the beneficiaries, being the persons who would ultimately benefit from the property. He has a duty to account to the beneficiaries. As administrators are appointed by the court, they incur a duty to account to the authority that appointed them, that is the court. See *Paul Tono Pymto & another vs. Giles Tarpin Lyonnet* [2014] eKLR (F. Ochieng J), *In re Christom Kinuya Wainaina (Deceased)* [2014] eKLR (Musyoka J), *Rupal Shah & another vs. Ramesh Bhagwami Shah* [2015] eKLR (Ougo J) and *In re Estate of Njue Kamunde (Deceased)*[2018] eKLR (Limo J).

30. In this case, the administratrix was appointed on 12th October 2015. Effective from that date, the assets of the estate of the deceased herein vested in her. She became a trustee and a fiduciary with respect to

the said assets and in her relationship with the beneficiaries, including the applicant. She was brought, upon appointment, under a duty to account to the beneficiaries and the court for her handling of the assets of the estate. That account should cover all the events relating to the estate, right from the date of the death of the deceased to the date of the account, as the obligation to trace, collect and gather the assets of the estate should take her back to the date of the deceased, and even before then. She cannot argue that that background is irrelevant. It is her duty to get into the history of the assets, how they were acquired, and if they have changed hands, establish how that happened, why it happened and whether the assets should be restored to the estate. It is her duty to trace assets and to recover them. So, she cannot say that she cannot render accounts about what obtained before she was appointed. Accounts are not just about money, for what vests in the administrator, under section 79 of the *Law of Succession Act*, is not just the funds of the estate, but all the assets of the estate, and the administrator has to handle all the assets and account for them in every conceivable way. Pleading ignorance about any of them in any respect should be equated with failure of administration. However, an administrator can only be held liable for the assets that came into her possession after her appointment. She cannot be liable for assets mishandled prior to her appointment. She has a duty, though, to seek and obtain accounts from those who, previous to her coming to office, had mishandled the assets, so that she can then a render an account, based on that information, to the beneficiaries. Upon getting accounts from persons who had intermeddled with the estate or mishandled the estate prior to her appointment, she should take steps to recover and safeguard the mishandled assets. She cannot fold her hands and say that such matters have nothing to do with her. The spirit in section 45(2)(b) of the *Law of Succession Act* makes such persons answerable to the administrator of the estate.

31. In this case, I note that the administratrix has never rendered any account ever since her appointment on 12th October 2015. I have also noted that no order has ever been made to require her to render any such account, and none of the beneficiaries has ever asked the court to order her to render any account, save in the instant application. She has never sought confirmation of her grant, for her appointment, on 12th October 2015, came together with confirmation of her grant, and, therefore, there was no grant available to be confirmed. The confirmation process should go hand-in-hand with rendering of accounts, according to section 83(e) of the *Law of Succession Act*, but since her grant was not to be confirmed, for it was confirmed on 12th October 2015, there was no opportunity for her to account. So, in a sense, it cannot be said that she has failed to render accounts. Of course, if she has completed administration, by distributing the assets as per the certificate of the confirmation of her grant, dated 12th October 2015, then, under section 83(g) of the *Law of Succession Act*, she should render an account on the completed administration. The applicant was, however, not clear on whether she was seeking an account under section 83(g) or otherwise.

32. I have seen in the response, that the administratrix has said that she has nothing to account for, because she has not handled money, for she has received no income from the estate. I should start by stating that rendering of accounts for the purpose of probate is not limited to giving a financial statement. An account for probate purposes is about all the assets of the estate, both movable and immovable. An administrator is not appointed to only deal with the finances of the estate, but all the assets, including those that are not generating income. The administratrix herein was appointed on 12th October 2015, and on the same date her grant was confirmed. The estate was to be distributed as per the distribution of 14th May 2009, founded on the letter of 1st April 2009. Going by section 83 of the *Law of Succession Act*, the life of a certificate of confirmation of grant should be not more than six months, except where there are continuing trusts, that is where there are minor children and life interest in favour of surviving spouses, as required by sections 83(g) and 84 of the *Law of Succession Act*. That would mean that the administratrix herein was appointed to complete administration of the estate, going by the terms of the distribution ordered on 14th May 2009. It also meant that she had six months, from 12th October

2009, to complete administration. Completing administration means executing or implementing or carrying out the distribution ordered at the confirmation of the grant, as expressed in the certificate of confirmation of grant. For landed assets that means transmission of the assets in accordance with the provisions of the *Land Registration Act* and the *Land Act*. The process of transmission entails having consents obtained to subdivide the land, having mutations done for the proposed subdivision, and ultimately causing the sub-parcels registered in the names of the beneficiaries named in the certificate of confirmation of the grant. That should happen within six months. See sections 60, 61 and 62 of the *Land Registration Act* and sections 49, 50 and 51 of the *Land Act*.

33. The administratrix herein was appointed on 12th October 2015. She had six months from that date to have the assets, listed in the certificate of confirmation of grant, transmitted to the persons listed in the said certificate. That exercise should have been over by 12th April 2016, and an account should have been rendered to court, in terms of section 83(g), of the completed administration within those six months, and that would mean by the 12th April 2016. That was a duty that the administratrix incurred as from 12th October 2015. She cannot, therefore, say that she had no duty to render any accounts. If she had completed administration by 12th April 2016, and was yet to render accounts, then there was a duty for her to account to court and the beneficiaries, in terms of presenting material showing that transmission of the lands had happened in accordance with the certificate of confirmation of the grant, and to give a financial statement on how much it cost the estate to effect the transmission, where the money was raised from for that exercise, and how that money was spent. If transmission has not happened, and, therefore, the administration has not been completed, there is also a duty to account. She has to explain why she has not complied with section 83(g), by completing administration within the six months allowed by that law. What challenges has she faced? What steps has she taken to surmount those challenges? From what is before me, it is clear that the administratrix has a lot to account for. It is now six years since the lapse of the time when her administration should have been completed. Transmission of the landed assets has not happened. Surely, the administratrix cannot say that she has nothing to explain to the court and to the beneficiaries. She cannot afford to treat the applicant as a mere busybody, who has no business asking questions about how the estate is being administered, when the administratrix has failed to complete administration seven years after her grant was confirmed.

34. The administratrix stands in a fiduciary position with respect to the property she administers and with respect to the persons beneficially entitled to it. One such beneficiary is the applicant. The only remedy a beneficiary has is to ask for accounts, and, if they are not forthcoming, to apply for revocation of the grant. One of the grounds upon which a grant may be revoked, under section 76(c) of the *Law of Succession Act*, is the failure of administration. Administration fails on account of failure to proceed diligently with administration and failure to render accounts as and when required by the law or by the court. Failure to complete administration six years after the grant was confirmed, when the same should have been done within six months of the confirmation of the grant, is a monumental failure of administration. Failure to render an account as to why it has taken the administratrix six years to complete administration, when a beneficiary suggests that one should be rendered, and resisting such an account, when one is clearly due, is a mark of a failed administration. It calls to question the competence of the administratrix to administer the estate, and raises questions as to whether she has any understanding of what administration entails, and the duties that the law has imposed upon her as a holder of that office.

35. The other issue the applicant raises regards Paul Musonye, a son of the deceased, and one of the initial administrators. He is accused of intermeddling with the estate, by way of selling estate assets. Two issues are raised from here. One, it is argued that the administratrix should compel the said Paul Musonye to render an account of his intermeddling with the estate. Two, that the said Paul Musonye

should not benefit from a share in the estate on that account. On the first issue, it is true that an intermeddler is accountable to the subsequent administrator, by dint of section 45 (2) (b) of the *Law of Succession Act*. That would mean that Paul Musonye should be answerable to the administratrix herein to the extent of his intermeddling. The administratrix has countered that Paul Musonye should be asked to render that account. However, under section 45, she still has a duty and power to call upon him to render an account, and if he does render one, use it as a basis to take action against him. An application should only be placed before the court to compel him to render such an account where the said Paul Musonye has failed to answer to any calls by the administratrix to account. Failure to call him to account, when the record has material suggesting that he should account for his activities as administrator, when some assets were disposed of, in seemingly questionable ways, would suggest that the administratrix is shielding the said Paul Musonye from scrutiny, and she is failing in her duty to safeguard the assets of the estate by so doing. On the issue of Paul Musonye being excluded from benefit, that can only be determined, after an account has been rendered, which clearly points to Paul Musonye having benefitted from disposal of estate assets. If there are assets that are income generating, then the administratrix should have taken them over, started collecting rent from them, and accounting for it. This issue of income being generated which is not accounted for should not be arising, had the administratrix done her duty of distributing the estate, for these assets, would have been sold a long time ago, going by the consent of 1st April 2009, and the proceeds shared out equally. It is a lingering problem because the administratrix failed to discharge her duty.

36. I think I should not say more, for there is adequate evidence of failure by the administratrix to discharge her duty diligently in the administration of the estate herein, and that is why the estate herein remains undistributed seven years after the grant was confirmed, and no reasons have been given for that failure. She does not merit continuing to remain in office, and her grant should be revoked. The applicant appears to have some understanding of what it would entail to be an administrator of an estate, and I believe she should be a competent one. The fact that she is a grandchild rather than a child of the deceased, and has a lesser entitlement to appointment, should not arise. Firstly, her own father is dead, section 41 of the *Law of Succession Act* elevates her to the position that her father had as a child of the deceased. Two, she is one of the administrators of the estate of her late father, and, therefore, she qualifies to represent his estate in the administration of the estate of his father. Three, the children of the deceased have proved to be totally incompetent and incapable of administration of the estate herein, and that is why, nineteen years after their father died, the distribution of his estate remains outstanding. I do not see why a grandchild of the deceased, who has the competence to administer the estate, should be overlooked, with respect to appointment, in favour of a child of the deceased, who is incompetent and incapable.

37. In the end, these are orders that commend themselves to me:

    (a) That I hereby revoke the grant that was made on 12th October 2015 to Jayne Musonye, and appoint in her place, Belinda Khalai Musonye as administratrix;

    (b) That I shall not set aside the confirmation orders of 12th October 2015, which confirmed the earlier ones of 14th May 2009, and I confirm that the estate herein share be distributed on the terms set out in the said orders;

    (c) That the certificate of confirmation of grant extracted from the orders of 14th May 2009, and amended subsequently, shall be amended in the manner indicated in the body of this ruling, to align it to the consent of 1st April 2009;

    (d) That I direct Paul Musonye and Jayne Musonye to separately render accounts of their handling of the estate, in affidavit form, supported by adequate documentation;

(e) That the matter shall be mentioned after forty-five days to confirm whether a new grant has been issued, whether the two former administrators have filed accounts, whether the new administratrix will have taken steps to bring into the estate the assets that had been omitted, and to recover those that had been either illegally or wrongly disposed of, among others;

(f) That further directions on the finalization of the matter shall be given at that mention date;

(g) That each party shall bear their own costs; and

(h) That any party, aggrieved by these orders, has leave of twenty-eight days, to move the Court of Appeal, appropriately.

38. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF JUNE 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Nandwa, instructed by Nandwa & Company, Advocates for the administratrix.

Mr. Ayieko, instructed by Lumumba & Ayieko, Advocates for the applicant.