REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 20 OF 2019

IN THE MATTER OF THE ESTATE OF FRANCIS ANDABWA NABWANGU (DECEASED)

RULING

1. The application for determination is the summons for revocation of grant, dated 26th November 2017. It principally seeks revocation of the grant of letters of administration with the will annexed, dated 13th November 1991. There are other prayers, such as deposit of moneys in court, revocation of certificate of confirmation of grant dated 25th November 1991, filing of accounts, a declaration that the undated written will was invalid, a fresh grant of representation to issue in intestacy, prohibitions and cancelation of titles.

2. The grounds on the face of the application are; that the proceedings were founded on an invalid will; the will was undated, and the original was never produced in court; the will was improperly executed and attested, as the signature of the testator was forged, and so were those of the witnesses, who were unknown; the court was misled that the same was made by JM Wafula, Advocate, and that the original had been misplaced; the will did not disclose 14 beneficiaries; it purported to bequeath assets which had already been transferred to other beneficiaries *inter vivos*; it was incoherent null and void; the ;the signatures of the other beneficiaries were forged; there was lack of diligence in administration; parties were not called to court at confirmation of the grant; among other many grounds. .

3. The affidavit in support of the application is sworn by Bernadinah Nabwangu Mutsembi, the 1st applicant, a daughter-in-law of the deceased, being the widow of a son of the deceased known as Vincent Nabwangu Andabwa. She avers that she was unaware of the succession proceedings until when she saw the 2nd respondent, Effie Owuor, visit Idakho/Shikulu/393, with a view to have it transferred to the name of the James Nabwangu. She accuses her siblings-in-law of being hostile to her, and of colluding against her. When she did a search on Idakho/Shikulu/393, she established that the entire piece of land had been transferred to her brothers-in-law, and the title closed after subdivision, which resulted in the disinheritance of her children. She avers that none of the other respondents were privy to these developments, given that some resided abroad. She also avers that the children of the late John Ambani had been disinherited. She goes on to make averments relating to why she thought the will was invalid. She also avers that the executrix named in the will died 10 days after the testator, and the persons who applied for probate ought to have obtained the consents of all the other beneficiaries. She disputes the consent allegedly signed by her late husband. She also questions the reference of the matter to the Public Trustee for administration, and the filing of the cause in Nairobi. She also avers that liabilities were introduced into the cause, yet no such liabilities had been stated in the will.

4. There are responses to the application. One is by Charles Esalambo Nabwangu, the 5th respondent, who avers that he was unaware of the succession proceedings until he was served with the instant application for revocation of the grant. He asserts that he never signed any consents to have the Public Trustee administer the estate. He expresses shock that Idakho/Shikulu/393 was subdivided, and that he was allocated Idakho/Shikulu/4462, which was transferred to his name, despite him not consenting and providing particulars of his identity card. He asserts that the deceased had died intestate, and after his death some members of the family also passed on. He avers that the signature appearing on the alleged will was not that of the deceased, which he claims he knew very well. He avers that two of his brothers live abroad, and that the 2nd and 3rd respondents were taking advantage of their absence to frustrate the other beneficiaries. He states that the applicants were persons of limited means compared with the 2nd and 3rd respondents. He expresses surprise that the property situated within Kakamega Town was sold for Kshs. 42, 000, 000.00, without any disclosure, and without his consent and that of other beneficiaries. He supports the proposals that the sum of Kshs. 42, 000, 000.00 be deposited in court, and the respondents be called upon to account for their dealings with the estate. He expresses support for the application dated 20th November 2017.

5. The other reply to the application is by Raidon Nabwangu Andabwa, the 6th respondent, another son of the deceased. He avers that his true name is Raidon Nabwangu Andabwa, although he was referred to as Keya Nabwangu in the alleged will. He says that he did not know the administrator, that is to say the 1st respondent, the Public Trustee. He says he did not attend any Land Control Board meeting for consent to have a property of the estate transferred to his name, and that he had not been given a title document by the respondents, and that he never signed any transfer documents. Regarding the sale of the Kakamega town plot, he says he was unaware of the sale, and adds that he was not given any share of the sale proceeds. He asks for a share of the sale proceeds. He supports the application dated 20th November 2017.

6. The other response is by the 2nd respondent, Effie Owuor alias Justice Effie Owuor, taking the form of grounds of opposition, dated 6th March 2018. The grounds stated are: that the application was brought after a prolonged delay as the grant was made and confirmed in 1991; that there was gross and unreasonable delay to question validity of the will 27 years after confirmation of the grant; that the estate had been fully administered and the property transferred to the various beneficiaries as named in the will; that the allegations of fraud on the part of the

2nd respondent are spurious and malicious, and unsupported by any facts; that the 2nd respondent is a beneficiary under the will and not an administrator; that there was no evidence that the applicants were to be evicted from the subject property; that the application was premature as the authorities are yet to conclude investigations into the alleged forgery of the will and other documents; that the 2nd respondent had no money in her custody to warrant orders for deposit of the same in court; that the 2nd administrator was not obliged to give an account of the administration of the estate as she is not an administrator; and that Idakho/Shikulu/393 was transferred by the deceased to James Nabwangu in 1988, and that that transfer cannot be questioned now.

7. The other reply is by the 1st respondent, through Lucy W. Mugo, an assistant Public Trustee. She avers that the matter was referred to the 1st respondent by the 4th respondent, James Nabwangu, on 19th November 1990. The 1st respondent then submitted a copy of the will ,drawn by JM Wafula, Advocate, to court, and left determination of its validity to the court. The 1st respondent was subsequently appointed administrator of the estate by the court on 13th November 1991, and its grant was confirmed on 25th November 1991. It is confirmed that the late Vincent Nabwangu was reflected in the petition as a son of the deceased, but the 1st respondent avers that the 1st applicant herein is a total stranger, and, therefore, there was no obligation on the part of the 1st respondent to inform or convey any information to her about the proceedings, and that, in any event, the filing of the cause had been published in the *Kenya Gazette*. It is averred that the assets that were listed by the 4th respondent were Kakamega/Municipality/Block 1/163, Idakho/Shikulu/393, LR No. 6614/11 and money in the Standard Chartered Bank and Barclays Bank. Kakamega/Municipality/Block 1/163 was registered in the name of the 1st respondent, and was subsequently transferred to the names of the 2nd and 3rd respondents, in their capacities as trustees for the other beneficiaries. Regarding Idakho/Shikulu/393, the 1st respondent called for documents relating to it in vain. It is averred that the beneficiaries did not furnish the 1st respondent with the title for that property, and was, therefore, unable to transfer the same to the beneficiaries in the circumstances. The 1st respondent denies any acts of fraud with regard to Idakho/Shikulu/393. It is averred that the 1st respondent did not take part in the subdivision of Idakho/Shikulu/393. Regarding LR No. 6614/11, it is averred that the same had been charged by the deceased with the Agricultural Finance Corporation, and the debt had remained unsettled to date. It was initially a sum of Kshs. 658, 017.80, which has ballooned to Kshs. 2, 476, 418.00 as at 2002. The 1st respondent established that the accounts of the deceased with the Standard Chartered Bank held Kshs. 14, 893.00 and with the Barclays Bank had Kshs, 2, 440.00. The deceased was also found to have been indebted to the Kenya Grain Growers Cooperative Union, to the tune of Kshs. 390, 205.10. He was also said to be indebted to GA Owuor. It is averred that the 1st respondent had not entered into any agreements with any third party over estate assets, and had not received any amount of money from any party. It is further averred that the 1st respondent had not been informed of the demise of Vincent Nabwangu Andabwa and John Ambani, saying that she learnt of those facts from the instant application. It is, however, averred that the two late sons of the deceased had been reflected in the certificate of confirmation of grant, and had not been disinherited by the 1st respondent as alleged. On the validity of the will, the 1st respondent says that she had no power to declare a will invalid, and advises that the applicants ought to move the court appropriately. On the forging of the consents given to the 1st respondent, the 1st respondent avers that the applicants were advised to report to the relevant authorities, but they took no action. It is averred that the estate of the deceased has inadequate funds to cater for its fees and administration expenses, which has made it impossible for the 1st respondent to manage the estate. She avers that the 1st respondent acted with due diligence in administration, but the beneficiaries had not been in touch with her, and efforts to contact them have been futile. It is averred that the beneficiaries have not cooperated or assisted her with settling pending issues, which include provision of the title documents relating to Idakho/Shikulu/393, proposals on how pending loans were to be settled, follow up with lands office and provision of search certificates, and provision of logbooks for the motor vehicles. The 1st respondent avers that she did not collude with nor donate her duties to any of the beneficiaries, and was not responsible for the current state of affairs because the parties had stopped cooperating with her, making it impossible to finalize the matter. It is averred that the 1st respondent was not averse to the grant made to her being revoked, and that it had only responded, to the application, to set the record state.

8. The next response to the application is by the 2nd respondent, Effie Owuor, and she avers that she replies to the application on her own behalf and that of the 3rd and 4th respondents, that is to say Beatrice Lwosi Ongoma and James Nabwangu, as well as Joy Muliro, Kathleen Okatcha, John Nabwangu and Madeline Musindi Andabwa. She discloses that the 1st applicant, Bernadinah Nabwangu Mutsembi, had passed on. The applicants are accused of unreasonable delay in questioning the grant 30 years after it was made. It is averred that the said delay is unexplained. It is argued that it was incumbent on the applicants to tender evidence that the will of the deceased was forged, and that no evidence had been tendered to support the allegations that the will was forged or was invalidly made. It is further argued that the applicants had not properly anchored the application on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It is averred that the administration was committed to the 1st respondent, and that the other respondents, as beneficiaries, had nothing to account for. On Idakho/Shikulu/393, it is averred that the said property was transferred by the deceased in 1988, prior to his death, but the transfer did not take effect until 2016. The register for Idakho/Shikulu/393 was closed after the subdivision of the property. It is averred that the 4th respondent, the late husband of the 1st applicant and the 2nd applicant executed the relevant transfer forms for their respective portions. It is asserted that the issue of the disinheritance of the applicants did not arise. It is asserted that each of the sons of the deceased got their own portion from Idakho/Shikulu/393. The applicants are accused of failing to get titles processed in their favour by the lands registry. It is argued that the cancellation of the said titles would be untenable in the circumstances. The 1st applicant is said to have been enjoying the family home of the deceased since his demise, and of utilizing lands belonging to the siblings of her late husband. She is also said to have been collecting rents from some parcels of land situate at Mutaho. It is also averred that the applicant and her late husband had sold portions of LR No. 6614/11. On Kakamega/Municipality/Block 1/163, it is averred that the said property had been bequeathed to the wife of the deceased in his will. It is averred that the late wife of the deceased renounced her right under the will in favour of her daughters, which renunciation was communicated to all family members. On the basis of the said renunciation and wishes, the property was then registered in the name of the 2nd and 3rd respondent in trust for the other daughters, and to enable development of the property. The property was, after the demise of the deceased and his spouse, charged to raise money to complete construction of a building on it, and the 2nd respondent had to use her own money to salvage the property, and her husband also used his resources to complete construction of a building on the site. It is averred that the daughters, as beneficial owners, sold the property and divided the sale proceeds amongst themselves, and none of the sons objected. It is asserted that there was nothing unlawful about the transactions with relation to Kakamega/Municipality/Block 1/163. Finally, and in the alternative, it is proposed that all the beneficiaries or survivors of the deceased could return whatever they got from the estate, so that the same can be shared out equally amongst all the 13 children of the deceased.

9. The 2nd applicant, Pius Nabwangu Andabwa has responded to the replies by the respondents. I will start by his response to the reply by the

administrator, the 1st respondent. He avers that the 1st respondent was administering the estate illegally, given that she had not been named as the executor of the will, and her entry into the matter was false and unlawful. It is also averred that the 2nd, 3rd and 4th respondents usurped the roles of the 1st respondent, something which was condoned by the 1st respondent. It is further averred that the 1st respondent had a duty to scrutinize the alleged will and supporting documents and to reject them. He avers that he never signed a consent to the 1st respondent to transfer Kakamega/Municipality/Block 1/163 to the 2nd and 3rd respondents. It is argued that administration of the estate had not been concluded, and the matter was, therefore, open to further proceedings. The 1st respondent is accused of having been detached from her role as administrator and that her grant had become useless and inoperative. The 1st respondent is accused of neglecting her duties by failing to seek information from the parties. It is averred that the 1st respondent was aware all along that the documents supplied to it were not authentic, but she chose to ignore that and conspired with the 2nd and 3rd respondents to disadvantage the rest of the beneficiaries. It is argued that the 1st respondent had taken over an estate that had income generating assets that were sufficient to finance its expenses, and expresses surprise that there is now no money to cater for administration expenses, while the 2nd and 3rd respondents were busy selling a property at over Kshs. 42, 000, 000.00. The 1st respondent is accused of not making any effort to reach out to the applicants. It is argued that it was illogical for the 1st respondent to have been looking for the title to Idakho/Shikulu/393, yet the same was in the custody of the 4th respondent, who had referred the estate, in the first place, to the 1st respondent; who, it would appear, went about subdividing it illegally. It is averred that the 1st respondent surrendered administration of the estate to them without rendering a proper account.

10. In his response to the reply by the 2nd, 3rd and 4th respondents, the 2nd applicant avers that the 1st applicant was murdered at her home within the estate in the month of January 2021. He expresses himself to be speaking on his own behalf, and that of Patrick Yabwetsa Andabwa G, Sarah Indoshi Andabwa, Eunice Bright Simani Ambani and Hellen Aluvisia Shiundu, who are children of the late John Ambani Andabwa. He avers that, from the reply by the said respondents, it was clear that the entire succession process was based on defective proceedings, false statements and concealment of matter from the court. He avers that after confirmation of the grant, the three respondents staged a coup against the 1st respondent, and stole a match in the estate against the rest of the beneficiaries, without the permission of the rest of the beneficiaries, and acted contrary to the wishes expressed in the will that they claim to be relying on. It is averred that, although the will gave Idakho/Shikulu/393 to the 6 sons of the deceased, the same was transferred to the name of the 4th respondent. He avers that if there were meetings on the subdivision of Idakho/Shikulu/393, he was not party to them, and expresses shock that there exists a transfer form allegedly signed by him. He says that he does not live on Idakho/Shikulu/393, after he was disinherited, and he had to acquire his own land, being Idakho/Shikulu/2872. On Kakamega/Municipality/Block 1/163, he asserts that the same had been bought and developed by the deceased, from his income as a teacher, as well as proceeds from sale of some parcels from his land in Kitale. It is argued that prior to its sale, the said property was rented and raised Kshs. 80, 000.00 monthly, which the respondents have not accounted for nor shared. He denies that he had any knowledge that the respondents intended to sell Kakamega/Municipality/Block 1/163. He says that the respondents had, in their reply, admitted intermeddling with the estate, and by their actions, they had disinherited him. He concludes by stating that the 2nd respondent had sold over 250 acres of LR No. 6614/11 Musoli, Cherangany, which she should account for.

11. The application was argued orally on 15th March 2021. Mr. Shivega for the applicants submitted that the 2nd, 3rd and 4th respondents had said that they had subdivided Idakho/Shikulu/393, into various subtitles, and wondered who was supposed to undertake that subdivision, between them and the 1st respondent, given that the 1st respondent was still waiting for the title document for Idakho/Shikulu/393 to enable him administer the property. He submitted that the said respondents had done things without the consent of the 1st respondent and the other beneficiaries. On Kakamega/Municipality/Block 1/163, he submitted that, according to the certificate of confirmation of grant, the same was supposed to be distributed to 16 beneficiariies, yet the 2nd and 3rd respondents went on to distribute it amongst just 2 of the 16 beneficiaries. He argued that the property was transferred to the name of the 2nd and 3rd respondents to hold on their own behalf and that of the other beneficiaries, yet when the property was sold the other beneficiaries did not get their share of the proceeds. He submitted that while the 2nd and 3rd respondents were saying that administration had been completed, the 1st respondent was saying that she was yet to complete administration. On the 1st respondent saying that she had no money to administer the estate, he wondered how that could be so, when the 2nd and 3rd respondents had sold an asset of the estate for Kshs. 42, 000, 000.00. He argued that the 1st respondent had lost control of the administration of the estate, and ought to be stripped of her position. On the application being time-barred, he submitted that that could not be because the 1st respondent had stated that administration of the estate was still incomplete, and has disclosed the assets she was holding and the liabilities that are yet to be settled. On the will, he submitted that the will was not dated, the original was not produced and the court relied on a photocopy. On attestation, it was submitted that the names of the witnesses were unknown, for they were not disclosed. He further submitted that the Advocate who drafted the will was not called to court to testify. He argued that, although the 1st respondent was aware of the complaints raised around these issues, she did nothing to address them.

12. Mr. Koech for the 2nd, 3rd and 4th respondents argued that the application was filed after inordinate delay, for grant had been made in 1991, more than 30 years ago, and no explanation was offered for the delay. He submitted that revocation of grants is done under section 76 of the Law of Succession Act, and the applicant must tender evidence to support their case. He said that the applicants were seeking revocation, on the basis that the will was invalid. He submitted that the will had been executed by the deceased before an Advocate and two witnesses, and, therefore, it was valid. He said that the only anomaly was that the will was not dated, but then the Advocate had sworn an affidavit, to say that the date of execution was 10th May 1986. On the issue of the original, he submitted that the Advocate explained that the same was misplaced, but confirmed that the copy produced was true. He submitted that no evidence was tendered to show that the will was forged. On Idakho/Shikulu/393, he submitted that that property was transferred to the 4th respondent by the deceased on 6th April 1988, that he died, but transfer was not effected until 2016. He was to hold the same in trust for the sons. He argued that the subdivisions were 6, and each of the sons was entitled to their share, including the applicants. He said that the family held meetings for the sons to agree on who was to take what portion. He submitted that the 1st respondent had no role to play in the matter of Idakho/Shikulu/393, since the same had already been transferred to the 4th respondent, during the lifetime of the deceased. He submitted that no effort had been made to evict the 1st applicant as alleged. On Kakamega/Municipality/Block 1/163, it was submitted that, under the terms of the will, the property had been bequeathed to the wife of the deceased. She survived the deceased, and, therefore, the property passed to her. He stated that the 2nd respondent had explained that the family sat and agreed that since the sons had benefited from Idakho/Shikulu/393, the wish of the widow was that Kakamega/Municipality/Block 1/163 goes to the daughters, and it was on that understanding that the 1st respondent transferred the same to the 2nd and 3rd respondents, to hold in trust for themselves and the other daughters of the deceased. He submitted that the letter by

the 1st respondent, dated 10th May 1994, which said that Kakamega/Municipality/Block 1/163 was meant for all 16 children was in error, and that it should have indicated that the same was for the daughters only. He said that the property was sold in 2016, and was shared equally amongst the daughters as per their mother's wishes. On prohibition, he submitted that any purchaser of the assets was protected under section 93 of the Law of Succession Act.

13. Mr. Kenduiwo, for the 1st respondent, submitted that the 1st respondent was not party to any illegality touching on the estate of the deceased. He said that the beneficiaries gave consent to the 1st respondent to administer the estate, the matter was gazetted, and a grant was issued. He stated that the 1st respondent was holding a mere Kshs. 14, 000.00. He denied any collusion between the 1st respondent and the other respondent to defraud any of the beneficiaries, and asserted that the 1st respondents administered the estate in accordance with the provisions of the law, and was ready to receive instructions from the beneficiaries. He said that the 1st respondent did not oppose the grant being revoked, if the court deems it fit to do so.

14. The application for determination seeks revocation of a grant representation. The deceased died on 11th July 1988, which was after the Law of Succession Act, had come into operation in 1981. His estate, therefore, falls for administration and distribution in accordance with the provisions of the said Act.

15. The Law of Succession Act provides for revocation of grants under section 76, which 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."*

16. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the process was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, and where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become useless and inoperative, due to subsequent circumstances. This could be the case where the sole administrator has died, or has been incapacitated, whether physically or mentally, to the extent that he cannot possibly discharge his duties as such, and where a sole administrator has been adjudged bankrupt and loses legal capacity to administer an estate.

17. In the instant case, the applicants appear to anchor their case on the first general ground, that there were issues with the manner the grant was obtained. They have raised some arguments. One, they say the will was not valid, on account of several factors, which include the signature of the testator, the attestation, non-availability of the original of the will, the fact that the will was undated, among others. There are also arguments about consents of the beneficiaries not being sought to petition, or where it is alleged that they were sought, that the same were forgeries. There is also the argument that the grant has become useless and inoperative, as the 1st respondent has lost control of the process of administration to the other respondents.

18. Let me start with the issue of the validity of the will. The law which governs validity of written wills is section 11 of the Law of Succession Act, which provides as follows:

> *"Written wills*

No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

19. Under section 11 a will will be deemed valid, if it is properly executed by the testator, and it appears from the signature of the testator that he intended to give effect, by his signature, to the document as his will. Secondly, the will must have been signed by the testator in the presence of two or more competent witnesses, who should also sign the will in the presence of the testator. The document, that has been placed on record, as the will of the deceased, has a signature on the column for the testator, and there are two signatures for the two attesting witnesses. Superficially, there is compliance with section 11, and the presumption of due execution, or *omnia esse riteatta*, should arise, that the will appears on the face of it to have been properly executed in a manner that showed that the testator and his witnesses intended it to be his will. See *John Waguru Ikiki & 7 others vs. Lee Gacuiga Muthoga* [2019] eKLR (Musinga, Kiage and Murgor JJA), *Karanja and Karanja and another vs. Karanja* [2002] 2 KLR 22 (Githinji J), *In re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR (Githinji J), *In re Estate of Rhoda Ndini Nzioka (Deceased)* [2018] eKLR (Odunga J), *Iskorostinskaya Svetlana & another vs. Gladys Naserian Kaiyoni* [2019] eKLR (W. Korir J), *In re Estate of Lucy Wangui Muraguri* [2015] eKLR (Musyoka J), *In re Estate of Timothy Mwaura Ndichu (Deceased)* [2020] eKLR (Muchelule J) and *James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others* [2014] eKLR (Emukule J). The presumption is rebuttable, and can be displaced by evidence to the contrary.

20. So, has the presumption been displaced? The case by the applicants is that the will was not properly executed and attested, as the signature of the testator and those of the witnesses were forged. A will whose execution and attestation is founded on forged signatures is void. The explanation for this is that the contents of the will would not be an expression of the wishes and intentions of the deceased, and he would be deemed not to have known nor approved the contents of the document. The way to deal with allegation of forgeries of signatures on a will is to have them referred to handwriting experts or document examiners for comparison of the alleged forged signatures with the known signatures of the deceased, as was said and done in *In Re JNM (Deceased)* [2005] eKLR (Koome J). See also *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo and Tunoi JJA) and *In re Estate of the late Samson Kipketer Chemirmir (Deceased)* [2019] eKLR (Ndung'u J). The opinion of document examiners or handwriting experts is critical. In this case, the applicants did not place any opinions of handwriting experts or documents examiners before the court. It was said that reports had been made of the alleged forgeries to the police, but it would appear that no steps have been taken to so far have the relevant investigations done. The 1st applicant alleged that the signature on the will was not that of the deceased, and so did the 5th respondent. Making mere allegations without an effort to demonstrate what is alleged is not enough. No samples were placed before the court of any alleged known signatures of the deceased, and, in any case, that would not have sufficed as the court claims no expertise on handwritings nor document eaxamination. He who alleges must prove. See *Karanja and Karanja and another vs. Karanja* [2002] 2 KLR 22 (Githinji J). The applicants had the obligation to prove the alleged forgery, they failed miserably, as they placed no iota of evidence on the alleged forgeries. In any case, where serious allegations are made, such as those turning on forgeries, as they border on criminality, it is foolhardy for the parties to rely merely on affidavits and oral submissions. The standard of proof for forgery and fraud, being criminal offences, is, according to *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo and Tunoi JJA), higher than what is expected in ordinary civil cases. The proper course of action should have been to have a full-fledged trial, where oral testimonies were presented, and witnesses cross-examined.

21. Related to the matter of forgeries, is the claim by the applicants that the attesting witnesses were unknown to the family and they were not disclosed. It is not too clear to me what the applicants meant by this. The will on record shows that the first witness was Hon. Masinde Muliro, who affixed his signature, and the other was R. Shihemi, who wrote down his name as his signature. The writing of these names is quite clear. Anyone who wished to establish their whereabouts could make enquiries. I note that Hon. Masinde Muliro is a notable public figure of historical significance and a national hero, a fact that this court can take judicial notice of. In any event, it has not been claimed that the deceased did not know or was not acquainted with these alleged witnesses. Section 11 only requires presence of two or more competent witnesses. "Competent witness" is defined in section 3(1) of the Law of Succession Act to mean a person of sound mind and full age. The law does not place an obligation on the testator to disclose to the family who the witnesses to his will were, neither is there a requirement in the law that they be known to the family. It was said, in *In Re Estate of GKK (Deceased)* [2013] eKLR (Lenaola J), that the witnesses need not be the trusted friends of the deceased, they could be anyone, so long as they were capable of seeing the deceased sign the document and understood what they were doing. In, *In re Estate of Julius Mimano (Deceased)* [2019] eKLR (Musyoka J), it was said that the fact that the attesting witnesses were unknown to members of the family of the deceased did not affect the attestation and the validity of the will, and that section 11 did not make it a requirement that the attesting witnesses be persons known to the family of the deceased.

22. The other issue raised with regard to the will is the fact that the same was not dated. Section 11 of the Law of Succession Act, and indeed all the other provisions around the making of valid written wills, is silent on dating of the will at execution. That is not to say that dating the will is not critical. It is, for it cannot be valid if it appears to have been executed on a date after the demise of its maker. A written will is a document, and like all official documents, it must bear the date of its execution. Where it is not dated, evidence can be obtained of the date of execution. The mere lack of a date should not be fatal to its validity and legitimacy. The 1st respondent was, no doubt, alive to that, hence he procured the Advocate who drew the will, JM Wafula, to confirm the date when the deceased herein executed the same. That date was said to be 10th May 1986. The applicants have not provided any evidence that it was unlikely that the deceased executed the disputed will on 10th May 1986, for one reason or the other. Since evidence was provided of the date of execution of the will, by the person who drafted or drew the will, on the instructions of the deceased, and in whose presence the deceased signed it, there can be no doubt at all as to the date of execution of the will.

23. The other concern raised is that the original of the will was not produced, and that the court relied on a photocopy. In the minds of the applicants, that raised doubts on the legitimacy of the document. Section 5(3) of the Law of Succession Act and Rule 7(5) of the Probate and Administration Rules require that in cases of testacy, the original will ought to be filed simultaneously with the petition for probate or of letters of administration with will annexed. If the original will is lost or destroyed, otherwise than by way of revocation, or the original will cannot be produced, for whatever reason, then its authenticated copy should be annexed to the petition, or, in the alternative, the names and addresses of all persons alleged to be able to prove the contents of the will should be stated in the petition. Clearly, the fact that the original will is unavailable is not fatal, for it is permissible to prove the contents of the will by other means.

24. In the petition filed in the instant cause, the 1st respondent deposed that the original will could not be traced. He attached a copy of the will, and an affidavit sworn by the Advocate who had drafted or drawn if, and overseen its execution, to verify the said will. The affidavit was sworn on 21st August 1991, by James Wafula Masai. He explains that he was the personal Advocate for the deceased, and that he had been instructed to draw up his last will. He avers that the original will was misplaced and that the photocopy attached to the petition was a true likeness of the original will, and he certifies it as a true copy of the original. On the face of it, therefore, there is compliance with section 51(3) of the Law of Succession Act and Rule 7(5) of the Probate and Administration Rules. The mere fact that the original will was not produced was, therefore, not fatal to the matter.

25. There is also the claim that the court was misled to believe that the will was made by JM Wafula, Advocate. That would imply that the document was purportedly made by someone other than JM Wafula. Again, it is a cardinal principle of law, that he who alleges must prove. It is the applicants alleging that the document placed on record, as the will of the deceased, was not made by JM Wafula, Advocate. They have not placed before me any material or evidence to establish that the said document was not drawn by the said Advocate. I have nothing before me, therefore, from which it can be concluded that the court was misled into believing that the document was not drawn by the said Advocate. I have seen the two affidavits sworn by the said Advocate, on 21st August 1991 and 3rd September 1991. In both, he avers that he was an Advocate of the High Court of Kenya, that the deceased instructed him to draw the will, which he did, and the deceased signed it on 10th May 1986. The applicants have not provided material which contradicts those averments. They have not averred that such an Advocate did not exist, nor challenge the signature appearing in the two affidavits as his.

26. The validity of the will is also challenged on the grounds that it did not disclose 14 beneficiaries. The beneficiaries not disclosed are not identified in the body of the application and the affidavits. In the will, the testator mentions a total of 17 individuals as beneficiaries, being Jedida Lyavule, John Mwikhali Nabwangu, Vincent Nabwangu, Keya Nabwangu, Charles Lifwakhala, John Ambani, Pius Nabwangu, Robinson Okenye Nyamongo, Dr. James Nabwangu, Justice Effie Owuor, Beatrice Ongoma, Joy Muliro, Catherine Okacha, Madelyne Imbulani, Peris Simani, Mary Ayoti and Ruth Andabwa. In any case, it is not a requirement of the law that the will discloses all the members of the family of the deceased. There is freedom of testation, under section 5(1) of the Law of Succession Act, and the testator is not obliged to dispose of his assets to any particular person. The fact that a will does not name some family members, or make provision for them, does not render it invalid. See *In Re Estate of Gatuthu Njuguna (Deceased* [1998] eKLR (Githinji J), *James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others* [2014] eKLR (Emukule J), *Gulzar Abdul Wais vs. Yasmin Rashid Ganatra & another* [2014] eKLR (Lesiit J), *In re Estate of M'Muguna M'Kiambati (Deceased)* [2020] eKLR (Mabeya J) and *In re Estate of Timothy Mwaura Ndichu (Deceased)* [2020] eKLR (Muchelule J).

27. The other concern is with the will distributing assets that did not exist at the time of execution, and purported to distribute assets that had already been transferred *inter vivos*. The applicants have not elaborated on the assets that they allege did not exist or had been transferred *inter vivos*. Whether the will had purported to distribute assets which did not belong to the estate, or had been transferred *inter vivos*, is, without any other reason, not a ground for invalidation of a will. The primary function of a will is disposal of assets. So long as it purports to dispose of assets, it would be valid, whether or not the assets exist is a matter for handling at the stage of confirmation of grant and thereafter. It was said in *In re Estate of Kariuki Wahome Njunge (Deceased)* [2018] eKLR (Ndung'u J), that a bequest of a property not belonging to the deceased simply failed, without affecting the validity of the will. Similarly, the court, in *In the Matter of the Estate of Zipporah Njeri Mwaura (Deceased)* Nairobi HCSC No. 3002A of 2003 (unreported) (Musyoka J), said that there was nothing in sections 5, 6, 7, 8, 10 and 11 of the Law of Succession Act which suggested that disposal by will of property not belonging to the deceased invalidated the will, and that such a circumstance merely rendered the will ineffective, with respect to the property, rather than making it invalid. In *In the Matter of the Estate of Moses Kapoya Ole Mosiro (Deceased)* [1999] eKLR (Githinji J), it was stated that where a testator bequeathed property not belonging to him at the time of his death, such gift failed by the principle of ademption, and that did not affect the validity of the will. The courts, in *Eunice Mumbi Kimani vs. John Kamande Kimani & another* Nairobi HCSC No. 1298 of 2006 (unreported) (Lenaola J) and *Ellen Nyatetu Mugweru & another vs. Danson Weru & 7 others* [2017] eKLR (Ngaah J), took the position that that rendered the will invalid. However, with respect, the position stated, in *In the Matter of the Estate of Moses Kapoya Ole Mosiro (Deceased)* [1999] eKLR (Githinji J), is the correct statement of the law. See also *Wallace Kogi Mwaura & another vs. Tirus Kamau Mburu as the administrator ad litem of the estate of Miriam Muthoni Mburu (Deceased)* [2019] eKLR (Githinji, Visram and Mohammed JJA).

28. Finally, the applicants argued that the will was incoherent and, therefore, null and void. They have not, in the body of their application and their affidavits, sought to demonstrate in what respect the said will is incoherent. I have read and reread the will filed, and I am not persuaded that the same is incoherent. It revokes the previous wills, appoints the executrix, disposes of the chattels and money to the spouse, then disposes of the home, the grinding mill, the business plot, LR 6614/11 and the cattle. I find no incoherence at all, no ambiguity. There is no internal incoherence that would render the will invalid, in the circumstances.

29. Overall, the applicants, have not convinced me that the will, placed on record, was not valid for whatever reason or under whatever circumstances, and ought not to have been the subject of the instant proceedings. I, therefore, find and hold that the will of the deceased was valid, and was properly probated.

30. Having found that the will of the deceased was valid, let me now move to the next issue, how the 1st respondent was appointed administrator of the estate, with the will annexed. Several issues have been raised with respect to that. Firstly, it is argued that the 1st respondent had not been named in the will of the deceased as an executor, and, therefore, there was no basis for his appointment as administrator. Secondly, the manner of the reference of the matter to the 1st respondent was not inclusive. Related to that are the arguments that consents were not given to the 1st respondent to petition for representation, and that, if any consents were placed on record, the same

were forgeries.

31. Let me start by considering the issue of the reference of the matter to the 1st respondent. It is argued that the 1st respondent had not been named as the executor of the will by the testator, and, therefore, his coming into the picture is questionable. In the will, the deceased had appointed his wife, Jedida Lyavule, the executrix of the will. It is common ground that she died ten days after the death of the testator, and, therefore, she did not get to take up her duties as executrix, and to even petition for probate of the will. It was then that the matter was referred to the 1st respondent by the 4th respondent, through his letter dated 29th November 1990. The 1st respondent has not purported to have come into the picture through appointment by the testator through the will. He is very clear, in the affidavit of 4th October 1991, that the executrix named in the will was Jedida Lyavule Andabwa, who died ten days after the deceased's death, and that the 1st respondent was petitioning for representation with will annexed on the basis of a reference by consent the beneficiaries. Nothing really turns on the argument that the 1st respondent was not properly appointed because he had not been named in the will as executor. If the 1st respondent had been named in the will as executor, he would have applied for a grant of probate of the will as such. That he applied for a grant of letters of administration with will annexed is telling of the fact he had not been named as executor.

32. The more profound argument, in my view, is that some of the beneficiaries were not privy to the reference of the will to the 1st respondent. The applicants are saying that they were not privy to the decision to have representation granted to the 1st respondent. In his affidavit of 4th October 1991, in support of his petition, the 1st respondent avers that the beneficiaries of the estate had consented to administration of the estate by the 1st respondent. He purports to attach an annexure PT4, the alleged consent by the beneficiatries. The annexure in PT4 is a letter from the 2nd respondent, dated 3rd October 1991, addressing the issue of the consent, saying that the same had been overlooked when the family met the 1st respondent, and adding that it had been assumed that the consent given by 4th respondent, as the eldest child of the deceased, was adequate, and undertaking to place the consent by all on record in two weeks. I have closely perused through the record. It indicates that the beneficiaries named in the will were 16, including the late widow, Jedida Lyavule Andabwa. I have not come across any consent executed by all 16 or 15 of the beneficiaries, in Form 39, as required by Rule 26(2) of the Probate and Administration Rules. It would appear, from the filings, that the only persons involved in the reference of the matter to the 1st respondent were the 2nd and 4th respondents, and it would appear that the rest did not consent to the reference. That, of course, means that the allegation that the consents on record were forged, has no foundation, for there are no consents at all in the file.

33. Related to that is the argument that the cause was filed in Nairobi, with the sinister motive of taking the matter far away from the majority of the beneficiaries, who were located in western Kenya. The assets disposed of in the will are all situated within western Kenya, principally within the modern Kakamega and Trans Nzoia Counties. That would mean that there was not need to file the cause 400 kilometres away in Nairobi. The High Court has countrywide jurisdiction, but, where immovable assets are concerned, the law is fairly clear, the matter ought to be filed in the High Court within the local limits of which the assets are situated. By the time the deceased was dying in 1988, the High Court at Kakamega had been established, and the initiation of the succession cause ought to have been done here. It would appear that there was no consensus on where the cause was to be filed, hence the suspicion that the same was filed far away from where the assets are located so as to keep some of the beneficiaries in the dark. I do not wish to attribute any ill motive on any of the parties with respect to this, as the High Court has geographical jurisdiction throughout the country. However, the fact that the beneficiaries, who appear to have been in control of the process, and to have benefitted the most from the estate, were based in Nairobi, is something that ought to raise eyebrows, and give some credence to the case by the applicants. All is not lost, as the matter was eventually transferred to the court station where it properly belongs.

34. The other concern is with respect to the confirmation proceedings. Firstly, it is said that the applicants were not involved, and did not sign consents at confirmation of the grant of the 1st respondent. I have looked at the summons for confirmation of grant, dated 22nd November 1991. Although the same lists all the 15 children of the deceased, it is not accompanied by consents in Form 37, as required by Rule 40(8) of the Probate and Administration Rules. The record before me is an old one. Some of the handwritten notes of the Judges are missing, including that relating to the confirmation proceedings. There is a gap between 13th November 1991, when the file was placed before Dugdale J, for execution of the grant of letters of administration with will annexed, and 6th November 2017, when the matter was placed before Muigai J. I cannot, therefore, tell what transpired at the confirmation hearing, and especially who attended at that hearing. What should happen at the confirmation hearing is provided for in Rule 41(1) of the Probate and Administration Rules. It is envisaged that the confirmation application, together with the affidavits and protests, ought to be read out to the parties, and thereafter the court should hear the applicant personal representative, each protestor and any other person interested. That presupposes that the confirmation application ought to be served upon all the beneficiaries, so that they can decide whether to file affidavits of protest or not; and when the application is fixed for hearing, all the beneficiaries ought to be notified of the hearing, so that they can be heard in terms of Rule 41(1) of the Probate and administration Rules. I have not seen, from the record, any affidavits of service, demonstrating that all the beneficiaries were aware of the confirmation application, and of the date when that application came up for hearing. There could be credence, in the argument by the applicants, that they were sidelined from the confirmation proceedings, and that they were unaware that the grant was confirmed to pave way for distribution. But then again, without the notes on what transpired at the confirmation hearing, I am unable to decide one way or the other.

35. The applicants have raised the issue of lack of diligence in the administration of the estate. On whether there was diligence in administration, one has to look at the response by the 1st respondent. She gives a detailed blow by blow account of how the 1st respondent went about the task of administration. The 1st respondent was appointed on 13th November 1991, and caused the grant to be confirmed on 25th November 1991, which is a display of diligence. Thereafter, the 1st respondent received moneys due to the estate from the two banks, and established that the estate was indebted to various entities and persons. She also caused Kakamega/Municipality Block 1/163 to be transferred to itself, and thereafter to the 2nd and 3rd respondent as trustees. The 1st respondent was unable, thereafter, to deal with Idakho/Shikulu/393, as the beneficiaries did not avail the title document to that property to her. The 1st respondent states that administration of the estate has not been completed because of the lack of title documents, for the land and the motor vehicles. She pleads to have no money to complete administration.

36. Has the 1st respondent acted with diligence? Kakamega Municipality/Block 1/163 was bequeathed to the wife of the deceased, Jedida Lyavule. She died ten days after the deceased. The legal position is that a will becomes effective as from the date of the death of the testator.

So when the deceased died on 11th July 1988, the property in Kakamega Municipality/Block 1/163 passed automatically to his widow, who survived him for ten days. The gift did not lapse or fail. Upon her demise, the same formed part of her estate, and at confirmation the same ought to have been devolved upon her estate for distribution separately in that estate. The 1st respondent says that she caused the property to be transferred to her name as administrator, and thereafter to the 2nd and 3rd respondents to hold in trust for the other beneficiaries. It is not clear the basis upon which the 1st respondent acted when she did so, since that asset should have been devolved to the estate of the late Jedida Lyavule, as that was the beneficiary of the asset according to the will. Was there diligence on the part of the 1st respondent with respect to that asset? I do not think so. When the 1st respondent conveyed the property to the so-called trustees, instead of the estate of the late Jedida Lyavule, the property was not subjected to succession as an asset in the estate of Jedida Lyavule. Instead, the trustees sold the asset, and shared it out amongst a section of the beneficiaries. It was alleged that there was a family consent, yet the court record before me has no record of any such consent for the sale and disposal of that asset, and distribution of the proceeds amongst a select group of the beneficiaries, instead of having the same properly dealt with within a cause initiated in the estate of the late Jedida Lyavule. The property was disposed of outside of succession proceedings, in a manner that, no doubt, amounted to intermeddling with the estate of a dead person. That intermeddling was facilitated by the 1st respondent when it conveyed the property to the so-called trustees instead of the estate of the late Jedidah Lyavule or the administrators of that estate. Clearly, the 1st respondent did not act properly within the law. In the affidavit of 6th December 2017, the 1st respondent gives no explanation whatsoever as to why it adopted that course of action.

37. Kakamega Municipality/Block 1/163 was apparently distributed as an asset in the estate of the late Jedidah Lyavule, but that was done within a cause in the estate of another, that is to say the estate of her husband. That is not acceptable. A succession should not be conducted within another succession, so that estates of two different individual deceased persons are distributed in the same cause. A separate estate ought to have been initiated in the estate of the late Jedidah Lyavule, to handle the gifts made to her in the will of the deceased herein and any other assets that she owned in her own right. The 2nd respondent was well aware of that, as she said so in her letter, which is on record in this cause, dated 3rd October 1991, addressed to the 1st respondent, were she clearly told the 1st respondent that they were handling the estate of the deceased herein and that of the late Jedidah Lyavule. The handling of Kakamega Municipality/Block 1/163 outside of a succession process was wrongful, and the applicants are justified in saying that the same denied them a share in that property. The 1st, 2nd and 3rd respondents ought to account for it, for the said property was unprocedurally conveyed to the 2nd and 3rd respondents by the 1st respondent. The 2nd respondent cannot claim that they have nothing to account, for she and the 3rd respondent were not administrators of the estate of either the deceased herein nor that the late Jedidah Lyavule, they handled an estate asset in a manner amounting to intermeddling with it, they have an obligation to account for it, to the court and to the other beneficiaries. If it was sold, then the monies raised in that sale ought to be accounted for, and restored to the estate of the deceased herein for devolution to the estate of the late Jedidah Lyavule.

38. The need for an account is made more urgent by the flip-flop that the 2nd respondent has engaged in, in her attempt to explain herself. In her affidavit in response to the instant application, she claims that the beneficiary of that property, named in the will, had renounced her entitlement to it, and had ceded the same to her daughters. She has not explained when that happened. Was it within the ten days between the date of the death of the testator and her own demise, or was it earlier? What form did the alleged renunciation take? Is there is any evidence of the same anywhere? Her Advocate, during the oral submissions, made on 15th March 2021, did not refer to any renunciation of the gift by the late Jedidah Lyavule. Instead, he submitted that when the said beneficiary died ten days after the testator, the family sat and agreed that since the sons had benefitted from Idakho/Shikulu/393, then Kakamega Municipality/Block 1/163 ought to be given to the daughters, and it was on that basis that the said property was conveyed to the 2nd and 3rd respondents by 1st respondent. The 2nd respondent is, therefore, presenting two versions or explanations on how Kakamega Municipality/Block 1/163 came to be conveyed to her and the 3rd respondent by the 1st respondent. So, which of these two versions is the correct one, the one stated by the 2nd respondent or the one stated by her Advocate? Is there is any documentary evidence to support either of the two?

39. The other property is Idakho/Shikulu/393. The same is not clearly defined in the will. I suppose it is the property referred to as the land at home at Musoli. The homestead is given to John Mwikhali Nabwangu, with the rest being shared out equally amongst the other 5 sons of the deceased. The 1st respondent says that he called for the title documents relating to this property, but the beneficiaries have not, to date, availed those records. So, the property, according to the 1st respondent, has not been distributed. According to the other respondents, the property has been distributed. As at the date of the death of the deceased, the same had been transferred by the deceased to the name of the 4th respondent, and, therefore, it did not form part of the estate of the deceased. Consequently, the 4th respondent proceeded to distribute it amongst the sons as had been required of him by the deceased. One wonders why the other respondents did not find it necessary to inform the 1st respondent, as administrator, of that positon. It is plainly clear, from the record before me, that it was the 2nd and 4th respondents who procured the 1st respondent to petition for representation in this estate. The other beneficiaries do not appear to be properly in the picture. It would have been expected that the said 2nd and 4th respondents would have updated the 1st respondent as to the status of the said property. It smacks of bad faith, for them to proceed to distribute this property without at least informing the 1st respondent that the same no longer formed part of the estate of the deceased as at the date of his death. It begs the question, when did the 2nd and 4th respondent get to know that Idakho/Shikulu/393 had been transferred to the name of the 4th respondent, and how did the 1st respondent get to know the details of this asset, given that the same was not described as such in the will of the deceased. If the two knew of that fact when they were instructing the 1st respondent to take up representation to the estate, why did they not inform him that that property was no longer estate property. They listed the property to the 1st respondent as among those to be administered, and, surely, they cannot now argue that the 1st respondent had no role in it, when they had not notified him of that fact. The question, upon establishing that the property had been transferred to the name of the 4th respondent, is, did they share that information with the other children of the deceased, and, if they did, where is the evidence. This is a development that ought to have been brought to the notice of the administrator, as it had a consequence on the administration and distribution of the subject asset. The asset was described and distributed in the will, and if it transpired that the deceased had subsequent to making the will, made an *inter vivos* gift of it to someone else, the 1st respondent was entitled to know of that fact so as to take note of it and make an account of it to the beneficiaries.

40. I have seen copies of the documents in the affidavit of the applicants, which clearly show that prior to his death, the deceased had obtained consent of the relevant local land control board to transfer the said land to the 4th respondent, and that he subsequently executed a land transfer document to facilitate that. These date back to April 1988. The deceased died in July 1988. These are documents that are

annexed by the applicants, so it could be assumed that they also knew about the development, or it could that they stumbled on these documents recently. It was with the rights of the deceased to effect transfer of an asset that was also the subject of a gift in his will, since the existence of a will, disposing of the same asset, does not fetter the right of the testator to deal with it during his lifetime.

41. One may argue that the property had not been transferred to the name of the 4th respondent before the deceased died, and, therefore, the gift was not complete. The gift herein was in the nature of a gift *inter vivos*, such a gift is complete so long as the donor had done all what was necessary to effect transfer, so that only one last or final step was left outstanding. That appears to be the case here. The deceased obtained a consent to make the transfer, from the land control board. He then executed a transfer in favour of the 4th respondent. He had done everything to facilitate the transfer, and the only step remaining was the actual transfer. The gift was complete, and the asset in question was no longer estate property. The execution of the transfer effectively removed the property from the realm of succession, and it was available for disposal outside of the succession process. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J), and *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J). If the applicants have issues with the manner the property was subdivided and transferred by the 4th respondent, then they have recourse to the Environment and Land Court, but not in these succession proceedings, for the *inter vivos* transfer to the 4th respondent had the effect of removing the property from the realm of succession. If the applicants have issues with what happened in April 1988, when the property was transferred to the 4th respondent by the deceased, they similarly must move the Environment and Land Court.

42.The other property is LR No. 6614/11. According to the will, the deceased had sold 270 acres of the land to Robinson Okenye Nyamongo, and what remained as available for distribution was 367 acres. Out of the 367 acres, he gave 150 to James Nabwangu, 100 acres to Effie Owuor and 117 acres to his wife, now deceased, Jedidah Lyavule. The balance of the land was to be distributed amongst the 7 daughters listed. Curiously, after the distribution to James Nabwangu, Effie Owuor and Jedidah Lyavule there was no balance, for the shares given to them total 367 acres. The 1st respondent says that the said property had been charged to Agricultural Finance Corporation, and that there was an outstanding loan of Kshs. 2, 476, 418.00. The 1st respondent laments that the beneficiaries have not cooperated to work out a system of repaying the loans to pave way for distribution of the said asset. There are three motor vehicles, which are also pending distribution, but the documents of ownership are yet to be availed. The 1st respondent has not explained why she has not conducted searches on these motor vehicles, at least to establish ownership, even as she mulls on whether it would be worth the while to have their values assessed prior to their disposal. In any case, these were given to the wife of the testator and should be devolved to her estate.

43. My view is that the 1st respondent has completely failed in her duties as administrator. The estate herein ought to have been wound up a long time ago. It is unacceptable that the administration is still outstanding since 1991 when the grant was confirmed. There cannot be any good reason for the 1st respondent to remain as administrator. What has also emerged is that the 1st respondent has been, under the capture of the 2nd and 4th respondents. They initiated the succession proceedings, through the 1st respondent, without involving the rest of the family. The said respondents represent a section of the family of the deceased, and it would appear that the business of administration of the estate, and the distribution of the assets, have been confined to that select group, instead of the entire family. That position should not be allowed to continue.

44. The applicants have also raised the issue of liabilities. They argue that they were not identified in the will, and, therefore, they suspect that they are deliberately being introduced as part of the scheme to defraud beneficiaries. There is nothing in the law that requires testators to disclose debts and labilities in their will. A will is chiefly about disposal of property, it need not deal with debts and liabilities. It the duty of personal representatives, whether in testacy or intestacy, to ascertain debts and liabilities. It is a duty clearly set out in section 83(d) of the Law of Succession Act. There should, therefore, be nothing unusual about the debts and labilities that the 1st respondent has mentioned. It means that the administrator did the due duty of ascertaining debts and liabilities, and waits for the family members to agree with him on settlement of those debts and liabilities, for they must be settled first before the balance of the estate is distributed amongst the beneficiaries. That is the law.

45. It was argued that the application was brought after inordinate delay, of more than thirty years. Let me start by saying that the office of administrator is for life. It does not come to an end with completion of administration, for new assets may be discovered after that, and beneficiaries may still call the administrator to account even after he has completed administration. There is, therefore, no time limitation for filing an application for revocation of grant. It is a tool for accounting in administration. Furthermore, the 1st respondent has demonstrated that the estate herein has not been fully administered. LR No. 6614/11 is yet to be distributed. The debt attached to it has not been settled, and so are the other debts. The money from the bank has not been distributed, and so are the motor vehicles. There has been considerable lapse of time between the making and confirmation of grant and the filing of the instant application, but the same is still within time, and the orders sought in it are available for making.

46. I am persuaded that a case has been made out for revocation of the grant herein, and I hereby proceed to make the following orders:

(a) That I do hereby revoke the grant that was made to the 1st respondent on 13th November 1991 and confirmed on 25th November 1991;

(b) That I shall not appoint any administrators in this ruling, but I shall leave it to the parties to agree on the persons to be appointed, whose number should not exceed 4, and who shall be 2 men and 2 women;

(c) That the matter shall be mentioned, on a date to be given at delivery of the ruling or obtained at the registry, to receive the names of the 4 proposed administrators;

(d) That the administrators to be appointed shall proceed to address the matters that remain undone, according to the 1st respondent, in order to complete administration of the estate, especially settlement of the debts of the estate, and devolution of what is due to the estate of the late Jedidah Lyavule so that the assets due to that estate are distributed within a cause initiated in her estate;

(e) That I hereby call the 1st, 2nd and 3rd respondents to account for the disposal of Kakamega Municipality/Block 1/163, and for restoration of the said property, or its value in monetary terms, to the estate, so that the same can be devolved to the estate of the late Jedidah Lyavule for administration and distribution within a cause to be properly initiated in that estate;

(f) That the account in (e) shall be filed in court in the next 45 days;

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

(h) That I hereby grant leave, of 28 days, to any party aggrieved by these orders, to move the Court of Appeal, appropriately.

47. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST 2021

W. MUSYOKA

JUDGE