REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 31 OF 1997

IN THE MATTER OF THE ESTATE OF BENJAMIN ALBERT MULAMA OSUNDWA (DECEASED)

JUDGMENT

1. Benjamin Albert Mulama Osundwa, the deceased person to whom these proceedings relate, died on 16th June 1996. A letter from the Chief of Lumakanda Location, dated 21st January 1997, indicated that he was survived by one widow, twenty-two sons and fifteen daughters. He was said to have had own a property known as Kakamega/Lumakanda/510. The liabilities of the estate were listed as Fanuel Mukolwe, former Butere Station Master and Bukolwe Secondary School.

2. Representation to the intestate estate of the deceased was sought by George Chitechi Osundwa, Dickson Osundwa Gilbert and Beatrice Aduda Osundwa, in their capacities as sons and widow, of the deceased, respectively. They expressed the deceased to have had been survived by the individuals listed in the Chief's letter that I have referred to in paragraph 1 above. He was said to have had married three times and to have had children with the three wives, as well as having other children. The children of the first wife, the late Anna Shikanda Osundwa, were listed as Vincent Mumia Osundwa, George Chitechi Osundwa, Mary Otengo Amadi, Margaret Anyanga Osundwa, Hellen Amanya Munyendo, Lucy Angulu Khasiani, Francis Kadima Osundwa, George Mulama Osundwa, Catherine Shitandi Mwangi, Phanice Nyabera Mungondu, John Namai Osundwa and Rose Osundwa. The children of the second wife, the late Rose Miguda Osundwa, were listed as Josphine Nyaboro Etemesi, George Mulama Osundwa, Mary Oburu Mwasumba, Dickson Rapando Osundwa, Duncan Opembe Osundwa, Robert Nabongo Osundwa, Javan Shitawa Osundwa, Stephen Murunga Osundwa, Rebecca Osundwa, Maurine Osundwa and Anne Shikanda Osundwa. The third wife, Beatrice Aduda Osundwa, was expressed to be alive and her children were listed as Thomas Mulama Osundwa, James Ochieng Osundwa, Kennedy Musindalo Osundwa, Lilian Otengo Osundwa, Stella Anyango Osundwa, Edwin Shitawa Osundwa, Paul Okado Osundwa, Violet Osundwa, Robinson Tawa Osundwa and Joseph Milton Osundwa. Several others individuals are listed as other children of the deceased, born outside of wedlock. These are John Namai Osundwa, Gilbert Mumia Osundwa, Edwin Osundwa, Edwin Osundwa, Francis Netia Osundwa and Dina Osundwa. The deceased was expressed to have had died possessed of a property known as Kakamega/Shinamwenyuli/616 and 1260, Kakamega/Lumakanda/510 and Kakamega/Mabusi/118. Liabilities were listed as Fanuel Mukolwe – Kshs. 15, 000.00, former Butere Station Master – Kshs. 12, 000.00, Bukolwe Secondary School – Kshs. 12, 000.00 and others – Kshs. 20, 000.00. Letters of administration intestate were made to the petitioners on 18th April 1997, and a grant was issued to them, of even date. I shall hereafter refer to them as the administrators.

3. The grant dated 18th April 1997 was confirmed on 26th November 1998, on an application dated 24th October 1997. A certificate of confirmation of grant in those terms was issued, dated 11th November 2013. Kakamega/Lumakanda/510 was devolved upon Vincent Osundwa, George Chitechi, Francis Kadima, George Mulama, John Osundwa, Netia Osundwa, John Namai and the homestead. Kakamega/Shinamwenyuli/616 was devolved upon George Mulama Osundwa, Dickson Rapando Osundwa, Duncan Opemba Osundwa, Robert Kabongo Osundwa, Javan Shitawa Osundwa and Stephen Murunga Osundwa. Kakamega/Shinamwenyuli/1260 devolved upon Gilbert Osundwa and George Chitechi Osundwa, while Kakamega/Mabusi/118 passed to Beatrice Aduda Osundwa. A certificate of confirmation of grant, dated 26th November 1998, issued in those terms.

4. On 2nd May 2013, a Motion, dated 30th April 2013, was lodged at the registry by Vincent Mumia Osundwa, against the administrators, seeking to have then sign documents to facilitate transmission of a portion of Kakamega/Lumakanda/510, being his share, to his name, with the alternative prayer that the documents be executed by a court official. His case was that the administrators had filed or refused to cause the transmission of the assets after their grant was confirmed.

5. The application dated 30th April 2013, was responded to by one of the administrators, George Chitechi Osundwa. He denied that the administrators had occasioned delay in the transmission of Kakamega/Lumakanda/510, blaming the delay on outstanding family issues, which had derailed a smooth distribution of the estate. He averred that the deceased had settled each child on their land, and what remained was survey work to be undertaken once each of the affected children paid the requisite survey fees. He stated that he was opposed to piecemeal transmission, saying that the exercise should be undertaken by all, with each of the children paying their respective survey fees.

6. On 29th May 2013, the advocates for the applicant in the application dated 30th April 2013 and the advocates for the administrators compromised the said application through a consent lodged in court on 29th May 2013. The administrators undertook to sign the relevant

forms to facilitate transmission, in default of which the documents were to be executed by the relevant court officials. The said consent order was adopted by the Deputy Registrar as an order of the court, and an order was extracted in those terms, and issued on 30th May 2013.

7. On 25th June 2013, another application was lodged at the registry, this time a summons for revocation of grant, dated 24th June 2013. It sought a myriad of orders, ranging from a temporary injunction, stay of execution of the consent order of 29th May 2013, appointment of an administrator to take charge of the estate of the late Albert Mulama Osundwa, review or vacating of the consent order, revocation of the certificate of confirmation of grant and annulment of all transactions relating to the assets of the estate.

8. The revocation application was brought at the instance of Margaret Anyanga Osundwa, a daughter of the deceased, who I shall refer to hereafter as the first applicant. She averred that her father had died a polygamist, having married three wives, and left behind numerous children. She stated that he died intestate, for he had not left a valid will. He stated that the family has had numerous disputes over the management of the estate, and numerous meetings were held to try to resolve the matter. She stated further that during those meetings it was not disclosed to them that a succession cause had been initiated, administrators appointed, the grant confirmed and the estate distributed on paper. She said that she, and Lucy Angulu Osundwa and Catherine Shitandi Ndegwa, who she refers to as her co-applicants, had been in uninterrupted occupation of Kakamega/Lumakanda/510. She stated that she and her co-applicants were threatened with eviction, which forced her to lodge a caution against the register of Kakamega/Lumakanda/510. She mentioned that she was assaulted on 3rd June 2013 in an effort to have her evicted, and was informed that she and her co-applicants were not entitled to a share in the estate of the deceased since the property had been subdivided amongst the rightful heirs, who were the sons of the deceased. She made reports to the police and filed suits in court, where she obtained restriction orders. She further averred that on 28th June 2013, Vincent Mumia Osundwa had invaded the land, with a group of youths, and destroyed her fence and crops. She averred that it was after the consent orders of 29th April 2013 were obtained that she got to know of the succession cause and to learn that a surveyor was to come to subdivide the land and evict the non-beneficiary occupants. She obtained a copy of the certificate of confirmation of grant, and to her dismay she had been omitted from benefit. She averred that the grant was in the circumstances obtained fraudulently without her knowledge or consent or approval or authority or notice. She argued that the administrators were not appointed by the children of the deceased, the properties listed did not belong to the deceased, the correct assets had not been ascertained as at the date the grant was being sought, the shares held by the deceased in Mumias Sugar Company Limited were not listed and the confirmation of grant distributed assets that were registered in the names of third parties. She also faulted the confirmation of grant on grounds that it listed assets that did not belong to the deceased, survivors did not consent to the proposed distribution, the court was willfully misled, information was withheld from the court, it was not disclosed that the applicants were also entitled to a portion of Kakamega/Lumakanda/510 and there was an attempt to disinherit the applicants. She attacked the consent order of 30th April 2013, saying that the same was recorded secretly to the exclusion of some family members.

9. The first applicant swore another affidavit on 17th July 2013, which largely repeated the averments made in her affidavit in support of the application.

10. There is on record a reply to the application by Mary Otengo Osundwa, sworn on 27th July 2013. She asserted that she was the eldest daughter of the deceased and that the applicants, who were her sisters from the house of the late Anna Shikanda Osundwa, had brought the application without consulting her, nor obtaining the consent of the other daughters of the late Anna Shikanda Osundwa. She averred that the deceased, before he died, had called all his daughters from the house of Anna Shikanda Osundwa and expressed his wish that upon his demise the homestead, which comprised 5 acres of land be bequeathed to his seven daughters, being herself, the first applicant, Hellen Amanya Osundwa, Lucy Angulu Osundwa, Catherine Shitandi Osundwa, Phanice Nyabera Osundwa and Rose Opuya Osundwa. He was also said to have declared that all the children be allowed access to the burial site and the homestead. He was also said to have had distributed the land, Kakamega/Lumakanda/510, amongst the sons, in the house of the late Anna Shikanda Osundwa, who have since developed the land. The late Anna Shikanda Osundwa. She asserted that the deceased had distributed his property before he died and had settled his three houses as follows: the house of the late Anna Shikanda Osundwa on Kakamega/Lumakanda/510, the house of the late Rose Atieno Osundwa on Kakamega/Shinamwenyuli/616 and the house of Beatrice Aduda Osundwa on Kakamega/Mabusu/118. She also asserted that the applicants had been updated on the goings-on in the estate for she could recall meetings which they attended and where updates were given. She also discounted the claim that the first applicant had been evicted from Kakamega/Lumakanda/510, since the family had agreed that as a single mother she remain at the homestead to take care of it on behalf of the other daughters. She averred that Lucy Angulu Osundwa lived in the United States of America, visiting Kenya only occasionally, and she had never raised any objection with the manner the estate was distributed. She asserted that the application was not brought in good faith, but was designed to settle scores as between the first applicant and Vincent Mumia Osundwa.

11. The other reply is by Wycliffe Wamukoya Mulama, through an affidavit that he swore on 23rd July 2013. He was a brother of the deceased. He confirmed that the deceased had married three times, and, therefore, he was a polygamist. He stated that the deceased had consulted him on how he was to settle his three families. He settled the first wife on Kakamega/Lumakanda/510 in 1969, the second wife on Kakamega/Shinamwenyuli/616 in 1970 and the third wife on Kakamega/Mabusu/118 in 1980. When the first two wives died, they were buried on the parcels where they had been settled, that is to say Kakamega/Lumakanda/510 and Kakamega/Shinamwenyuli/616, respectively. The deceased was also alleged to have had consulted him on how he was to settle his children, and he detailed how the sons were settled on the land. He was also said to have informed them of how he wished to give the 5 acres that comprised the homestead to his daughters: Mary Otengo, the first applicant, Hellen Amanya Osundwa, Lucy Anguku Osundwa, Catherine Shitandi Osundwa, Phanice Nyabera Osundwa and Rose Opuya Osundwa. He asserted that the applicants, who were daughters of the deceased, did not seek the counsel of their uncles before filing the revocation application, and that they had not received any complaint from any of the children with regard to the administration of the estate. He averred that he did not support the application as it would undo what the deceased had done during his lifetime.

12. There is another reply on record, being an affidavit that George Chitechi Osundwa, one of the administrators, swore on 29th July 2013. He stated that he had the blessings of the other administrators to make the affidavit. He averred that the family had sat after the deceased died to agree on administration of the estate, and they nominated proposed administrators from each of the three houses and one to represent the children born outside the houses. They thereafter sat and agreed on the education of the minor children of the deceased. On distribution they agreed that Kakamega/Mabusi/118 be given to the surviving widow, for it was acquired with the joint efforts of herself and the deceased. It was also agreed, regarding Kakamega/Shinamwenyuli/1016, that any of the children was at liberty to pursue its registration. He asserted that the applicants had not raised any objection to whatever was being done right from gazettement to confirmation, and had in fact agreed on

what the deceased had allocated during his lifetime, including the 5 acres given to the daughters in Kakamega/Lumakanda/510, and that what the administrators did was just to go by the wishes of the deceased. He asserted further that the applicants were at all times kept updated of the progress in the administration of the estate. He averred that the deceased had even began the process of having certain parcels of land transferred to some of the survivors, such as Vincent Mumia Osundwa and Francis Mulama Kadima, and exhibited consents to subdivide Kakamega/Lumakanda/510 and transfer the same to the two. He stated that the consent entered into on 30th April 2013, with respect to Vincent Mumia was only intended to give effect to the exercise the deceased had started. He denied involvement in the alleged eviction of the first applicant from Kakamega/Lumakanda/510. He asserts that it would not be in the best interests of the estate to revisit the issue of administration and distribution. He further averred that the children born outside wedlock had not objected to the confirmation process.

13. The other response to the revocation application has come from Beatrice Mumia Osundwa, the wife of Vincent Mumia Osundwa, who swore an affidavit on 22nd October 2013, on behalf of her husband. She averred that the deceased had settled his seven daughters on the land before he died, and he had also given her husband 15 acres. She denied that her husband had ever threatened to evict the first applicant from the land. She asserted that the applicants were not disinherited as they were allocated the homestead during the confirmation process. She further averred that the applicants attended the family meetings where the confirmation details were worked out, and they should not be heard to complain that the exercise was undertaken in secrecy.

14. The said application was placed before Chitembwe J. on 25th June 2013, and interim orders were granted. Directions on its disposal were given on 9th April 2014, by Chitembwe J., for the disposal by way of oral evidence.

15. The oral hearing commenced on 4th November 2014, before Sitati J. The first on the witness stand was the first applicant, Margaret Anyanga Osundwa. She testified that the deceased, her father, had three wives, all of whom had children. The first wife had thirteen children, being seven daughters and five sons. The second wife had twelve children, two of whom have since died. The third wife had seven children. She stated that two of his brothers, Vincent Mumia and George Chitechi had, separately, wanted the applicants to move out of Kakamega/Lumakanda/510, and at one point they moved in, with other people and destroyed his crops. She stated that the deceased had told them, before he died, that the land was to be shared equally between all the children, daughters included. She further stated that the grant on record had been obtained in secret by the administrators, saying that she only got to learn of it after surveyors came on the ground to subdivide the property. She asserted that that was done in an effort by her other brothers to get hold of the land. She asserted that no family meetings were held on the distribution of the estate, adding that the signature in the documents lodged in court, alleged to be hers, was forged. She stated that the deceased had bought land for each of his wives. She said that the land at Butere was meant for her blood brothers, while the land at Matunda was for the third wife, and the one at Turbo was for the first wife. She said that the deceased did not hold a family meeting where he distributed his property. She stated that he died intestate for he had not made any will. She further asserted that all the assets were in the name of the deceased. She stated that she did not take part in deciding who was to apply for representation, and she did not consent to the distribution. She stated that she wanted the court to assist the family share out the property equally.

16. During cross-examination, she conceded that the deceased had settled his wives on separate parcels of land. The land in Moi's Bridge was given to the third wife, the first wife was settled on the land at Turbo, while the second wife was settled at Mumias. She identified the Turbo land as Kakamega/Lumakanda/510, she stated that she never signed any of the documents that were filed in court by the administrators, saying that she had reported the forgery of her signature to the police, but then again said she had not made any report to the police. She stated that she was not aware of the succession cause until surveyors came on the ground to subdivide the land. She asserted that there had been no family meetings both before and after the deceased's death. She said it was in 2013 that she got to know about the succession cause. She stated that her complaint was about the distribution, adding that she was for fair distribution, meaning equal acreage for all her blood siblings.

17. The other applicant, Lucy Angulu Osundwa testified on 17th December 2014. She stated that she had given consent to the first applicant to file the revocation application on her behalf. She said that no family meetings were ever held to discuss the land, and that she was not aware of any will made by the deceased or of any meetings where the deceased had expressed his wishes on the distribution of the property. She stated that she related well with the deceased, and that he was taken good care by her sister, Catherine Shitandi, to the extent of Catherine Shitandi contributing to the purchase of Kakamega/Lumakanda/510. She stated further that the first wife lived on Kakamega/Lumakanda/510 with the first applicant. She stated that they found out about the confirmation of the grant when the police stopped them from erecting a fence. Whereupon, they placed a caution on the land. She stated that she did not give her consent to anyone to petition for the grant or apply for the distribution of the property. She said that she was taken by surprise that succession proceedings had taken place. She complained that the deceased held shares in Nzoia Sugar Company, which were not listed in the petition. She urged the court to appoint someone neutral to administer the estate.

18. On cross-examination, she stated that she lived abroad, and, for that reason, she had electronically given consent to the first applicant to move the court for revocation of the grant made herein. She stated to have been in Kenya when dowry was paid for Catherine Shitandi. When shown come documents, she conceded to have had attended a meeting in 2011. She denied that the deceased had given any land to the daughters through their brothers. She said that she was surprised when she came back to Kenya to find that the family land had been subdivided. She stated that they did not involve Mary Osundwa in the application. She stated that when she saw the minutes of some of the meetings alleged to have been held by the family, she contested the contents of the said minutes. She stated that she was unaware that the grant had been confirmed in 1998. She stated that she was unaware that the deceased had stated in 1995 that the daughters ought to inherit part of the estate. When shown a document, she conceded that it was in the handwriting of the deceased and bore his signature, and it had allocated the daughters the homestead and the land around the homestead. She stated that the deceased had not given the sons their share, but conceded that they stayed in their own compounds. She stated that she was not aware of what the Constitution stated in 1995, and denied that she wanted to apply the 2010 Constitution retrospectively. She asserted that the confirmation did not capture the wishes of the deceased. She conceded that the deceased had seven daughters, and that it was only three of them who had mounted the revocation application. She stated that the other daughters had not given them authority to be represented in the application.

19. The case for the administrators opened on 18th December 2014, with Vincent Mumia Osundwa, a doctor based in Canada, on the stand. He testified that the deceased had allocated him land by the deceased after he got married. The land was, however, not transferred to him since the deceased died before that could be done, he had signed the relevant transfer documents. He stated that the deceased had started the process at the land control board, for him and Francis Kadima Osundwa. He stated that the portion awarded to him was the one that was the

subject of the consent order of 30th April 2014. He stated that the daughters of the deceased were catered for by being allocated the homestead and five acres around it. He stated that it was the first applicant who stayed on the homestead, but the other two applicants utilized the land, and he had no objection to the same. He said that he was only interested in being given what his father had allocated to him. He stated that he had filed his own application because the matter had taken too long. He stated further that the deceased had, before he died, pointed out parts of the land to his other sons, although he had only began the transfer process for him and Francis Kadima. He stated that the order that he had obtained was limited to his own portion and did not affect the rest of the land. He stated that none of the children had objected to the distribution of the property by the deceased, and that the objections were only raised in 2013 by the applicants. He asserted that the daughters had knowledge of the succession proceedings and they did not object at any particular time. He requested the court to allow him to complete the survey process so that he could obtain his title. He stated that the administrators had distributed the estate following the wishes of the deceased, adding that the daughters should only be given land in accordance with the wishes of the deceased. He asserted that, except of the three applicants, the rest of the daughters of the deceased were not complaining.

20. During cross-examination, he stated that under Luhya customs a son was shown land by his father once he got married to put up a home and to till. He stated that daughters were not entitled to land, but the deceased, in this cause, was magnanimous enough to allocate them eight acres. He stated that the deceased walked him round the piece of land he allocated to him and pointed out the boundaries. He stated that he wrote a letter to Mumias Sugar Company Limited about the shares the deceased held there. He stated that the deceased did not leave behind a will, but he had seen the letter that he wrote. He confirmed the deceased's handwriting and signature. He stated that the letter was written at the request of the daughters of the deceased, since the letter only addressed the matter of the daughters. He stated that he did not take part in the appointment of administrators, and he denied selling any portion of the estate land, saying that he was unaware that any of the sons of the deceased sold any portion of the estate. He stated that the letter by the deceased spoke for itself, adding that he had no objection to the daughters of the deceased being given more land. He stated that he had a permanent house on Kakamega/Lumakanda/510, which he put up two years before the deceased's demise. He stated that it was the deceased who fixed all the boundaries that were on the land. He stated that he was shown his portion in 1977. He stated that he did not attend the family meeting of 2011, but he added that he had seen its minutes.

21. He was examined by the court, whereupon he stated that the deceased had allocated land to each of the three wives, and that the dispute in court was limited to the children of the first house. He stated that if there was any land that remained unallocated, then the court was free to allocate the same to any of the daughters of the deceased who were in need of land. He stated that the land in question was sixty to eighty acres, there were four surviving sons, one son and one daughter had died. He stated that the sons had been allocated five acres each.

22. Patrick Wamukoya Mulama followed. He was one of the brothers of the deceased. He confirmed that the deceased had three wives and children with each of the wives. He stated that by the time the deceased died he had already shared out his land among his wives and children, and some of the children had put up houses. He said, regarding Kakamega/Lumakanda/510, that the deceased had given the daughters the homestead. He stated that the deceased told him so, but he did not see any document. He stated that the sons were given their share.

23. Mary Otengo Osundwa followed. She stated that they were seven daughters in the first house. She stated that the deceased had distributed his property amongst the three houses by the time he died. She stated that she was satisfied with the proposals at the time of confirmation of grant, and so was everybody else. During cross-examination, she stated that at one time the deceased called the daughters only and told them that they would get 5 acres out of the 90 acre Kakamega/Lumakanda/510. The deceased was said to have had done so through a document dated 3rd February 1995. She further testified that the sons and daughters agreed on appointment of administrators. She stated that she was present at the confirmation of the grant, and so was the first applicant.

24. The last witness on the part of the administrators was George Chitechi Osundwa, one of the administrators of the estate. He confirmed the testimonies of the earlier witnesses, to the extent that the deceased had three houses, and had settled the three houses on three distinct parcels of land. He stated that the family had sat sometime in August 1996 and agreed on administrators, and they also discussed other issues. He stated that only eight family members were at that meeting, representing the rest, who were not in attendance. He stated that he was aware that there was discontent in the family, which arose in 2013. He cited several court cases that had arisen since then. He stated that when he and his co-administrators applied for representation, they complied with all the relevant rules and procedures, and the grant was confirmed in 1998. He stated that the deceased had settled his family before he died, and had allocated the daughters the homestead and the five acres of the land around it. He said that the applicants never addressed him as administrator, complaining about the share that the deceased had given to him.

25. During cross examination, he stated that the applicants were not at the meeting which settled on the persons who were to apply for administration. He stated that the administrators followed what the deceased wanted or had done. He stated that when the grant was being confirmed in court in 1998, the applicants were not in court. He asserted that the deceased had distributed his property long before he died, but he conceded that the deceased did not call him so as to express his wishes to him. He stated that Kakamega/Lumakanda/510 was 80 acres in total, out of which 5 acres were given to the daughters.

26. At the close of the oral hearings, on 18th July 2017, the parties were directed by Sitati J. to file written submissions that were to be highlighted. The parties did comply with those directions and filed written submissions, but the same were not highlighted. It transpired that Sitati J. was transferred to the High Court station at Kapenguria, sometime in the middle of 2018. The filing of written submissions was confirmed by the parties on 16th October 2018 before Njagi J., who, on 12th November 2018, directed that the file be sent to Sitati J., who had conducted the oral hearing, for the purpose of writing the judgement. The court file herein was forwarded to the Deputy Registrar of the High Court at Kapenguria, vide a letter, signed by the Deputy Registrar of the High Court at Kakamega, dated 14th October 2018, which was received at the High Court at Kapenguria on 25th November 2018. In a curious twist of events, the file was returned to the High Court at Kakamega, through a letter, dated 26th November 2018, signed by the Deputy Registrar of the High Court at Kapenguria, stating that Sitati J. had instructed that the file be returned to the High Court at Kakamega, as she was not in a position to write the judgment, for she was "overwhelmed." Ideally, it is the Judge who handles a matter to its logical conclusion, like Sitati J. did, who ought to write the judgment. However, to avoid a back and forth over the matter, which would have been to the detriment of the parties hereto, in terms of delay, I directed the Deputy Registrar of the High Court at Kakamega, on 19th December 2018, to cause the matter to be mentioned in open court, so as to apprise the parties of the development. After several false starts, the mention happened on 19th November 2019. It is against that

background that judgement in the matter is being prepared by me, even though I did not have the benefit of handling the oral hearing. After explaining the position to the parties, I allocated to them 6th March 2020 as the date for delivery of the judgement.

27. Be that as it may, I have taken time to go through the written submissions that the parties have filed, together with the authorities attached, and I have noted the arguments advanced.

28. What I have before me, for determination, is an application premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It seeks revocation of the grant and the certificate of confirmation of the said grant.

29. Section 76 of the Law of Succession Act provides as follows:

> *"76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> *(I) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
>
> *(ii) to proceed diligently with the administration of the estate; or*
>
> *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

30. Before I get into analysis of the evidence as against the law, to determine whether there is merit in the application, let me start by saying that the application, in my view, with respect, is rather badly drafted. In principle, the applicants appear to be unhappy with the confirmation process. That is what comes out from the body of the application and the affidavits sworn in support of the application, as well as the oral testimonies of the applicants and the written submissions filed by the applicants. The principal prayer in the application is for revocation of the certificate of confirmation of grant, and the rest of the prayers appear to be consequential or ancillary to the said principal prayer.

31. The power or discretion given to the court by section 76 of the Law of Succession Act is for revocation of grants of representation. I perhaps should address what is meant by a "grant of representation." The Law of Succession Act does not define grant of representation, for the section that carries definitions or interpretations of terms or words used in the Act, that is to say section 3, does not include the word or term "grant." The Probate and Administration Rules, the subsidiary legislation made under the Law of Succession Act, does define the term, at Rule 2, in the following words:

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

31. Rather than dealing with the definition of the term, what the Law of Succession Act does, at sections 53 and 54, is to provide for the forms that the grant may take, which then gives us some sense of what a grant of representation is or means or refers to. The provisions say as follows:

> *"Forms and Grants*
>
> *53. Forms of grant*
>
> *A court may—*
>
> *(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—*
>
> *(i) probate of the will to one or more of the executors named therein; or*

(ii) if there is no proving executor, letters of administration with the will annexed; and

(b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.

54. Limited grants

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."

32. As stated above, the principal concern of the applicants is the confirmation of the grant. What they seek principally is revocation of the certificate of confirmation of grant. The question then is whether a certificate of confirmation of a grant is in fact a grant of representation intestate or the equivalent of a grant, to be revoked or annulled through section 76 of the Law of Succession Act. The answer to that question, appears to me, to be that a certificate of confirmation of grant is not a grant of representation.

33. Grants of representation take the forms stated in sections 53 and 54 of the Law of Succession Act. They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the Law of Succession Act, as evidence of the fact that a grant of representation has been confirmed. The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distributing it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to an order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the Law of Succession Act.

34. In any event, as the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application, the revocation of the certificate, if at all it is revocable under section 76, which I continue to assert that it is not, would be of little consequence, for it is only the certificate that would be affected by such an revocation order, since the orders on confirmation from which it is extracted would remain intact. The certificate is a mere extract, its revocation would not affect its source, the orders of confirmation of grant. A grant of representation is not equivalent to a certificate of confirmation of grant, it is not an extract from some order, and it is the order itself, appointing administrators, and it is the court granting representation. The orders on confirmation of a grant remain unaffected by a revocation or annulment of the certificate of confirmation of grant. The proper thing to do should be to have the confirmation orders vacated and thereafter the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life. Otherwise, failure to vacate the orders would mean that a fresh certificate could still be extracted from the same orders. The confirmation and the certificate are two separate or different things.

35. The certificate of confirmation of grant is provided for under Rule 41(5) of the Probate and Administration Rules, which says as follows:

"Where the court in exercise of its power under section 71(2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and …"

36. Section 76 of the Law of Succession Act has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application. The only connection between a confirmation of grant and a revocation of grant is that set out in section 76 (d) (i) of the Law of Succession Act. It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that very limited extent, not with respect to the confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the Law of Succession Act, for that provision does not envisage revocation of certificates of confirmation of grants.

37. I have very closely perused through the provisions of the Law of Succession Act, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the Law of Succession Act, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.

38. I reiterate that the power or discretion granted to the court by section 76 of the Law of Succession Act is for revocation of grants. The application that I am tasked with determining does not carry or contain a single prayer for revocation of the grant made herein on 18th April 1997. I doubt, therefore, whether I should go ahead to invoke the power to revoke the grant when there is no prayer for. A party is bound by its pleadings, and the court only decides a matter based on the pleadings before it. The affidavit and oral evidence is intended to breathe life to the pleadings. For life to be successfully breathed into the suit or cause or application, to enable the court grant the orders sought or met the prayers made, the evidence tendered must be in sync with the pleadings. The heading of the application purports it to be an application for revocation of grant, but there is no prayer for revocation of the grant, the evidence placed on record targeted the confirmation process, not the revocation of the grant.

39. For avoidance of doubt, the prayers in the summons dated 24th June 2013, say as follows:

> "1. That this application be certified as urgent and heard *ex-parte* in the first instance.
>
> 2. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an order of temporary injunction do issue restraining the Respondents either by themselves, there servants, employees or agents or any other person or group of persons whosoever from subdividing, selling , distributing , disposing or transferring all that parcel of land known as KAKAMEGA/LUMAKANDA 510 and/or destroying crops, trees, fences and any other fixtures or developments erected thereon or evicting the Applicants herein from the said parcel or in any manner interfering with dealing in and/or otherwise intermeddling in the said property and the affairs of the estate of the Late Albert Mulama Osundwa (deceased) or at all.
>
> 3. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an order of stay of execution of the Consent Order recorded by the respondents herein on 29/05/2013 and issued by the Honourable Court on 30th May, 2013.
>
> 4. That pending the gearing and determination of the application, the Honourable court be pleased to appoint an Administrator to manage the affairs of the estate of the late ALBERT MULAMA OSUNDWA (deceased).
>
> 5. That the Honourable Court be pleased to set aside, vacate, review and or lift the Consent Order issued on 30th May, 2013.
>
> 6. That the Certificate of Confirmation of Grant issued to the Administrators of the aforesaid Estate on 26th November, 1998 be revoked.
>
> 7.That all consequential orders and/or directions issued by the Honourable court in relation to the Administration of the Estate of the late Albert Mulama Osundwa be revoked and/or set aside.
>
> 8. That all and any subsequent subdivisions, alienation, transfers, transactions of or any dealings, transactions in the property Known as LR No. Kakamega/Lumakanda and any other property, assets or shares belonging to and /or owned by the estate of the late ALBERT MULAMA OSUNDWA be set aside, revoked or annulled and the said assets and/or property be reverted to and registered in the name of the estate of the late ALBERT MULAMA OSUNDWA.
>
> 9. That the costs of this suit be borne by the Respondents herein."

40. Clearly, therefore, there is no proper application before me for revocation of the subject grant.

41. Can I still consider the application on merits on the question of revocation of grant? I believe I can. Under section 76, the court may decide to revoke a grant either on "application by any interested party or of its own motion." The bulk of the evidence marshalled by the applicants addressed the confirmation process, but there was still some evidence which I can take into account with respect to exercise of discretion under section 76, on my own motion, as there is no prayer in the application for revocation of grant. It bears stating that section 76 is in permissive terms. The court does not have to revoke a grant even where there is material that supports a case for revocation.

42. Under section 76 of the Law of Succession Act, grants of representation are liable to revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court is misled in some way. Such would include where the grant is sought by a person who is not qualified to obtain representation to the estate of the deceased, or where certain facts as are required under the law have not been disclosed or are concealed from the court or are misrepresented. The second general ground is where the grant is obtained procedurally and properly, but subsequently the grant holder encounters challenges with administration, such as where they fail to apply for confirmation of grant within the period allowed in law or fail to proceed diligently with the administration of the estate, or fail to render accounts as and when required. The last general ground is where the grant has subsequently become useless or inoperative, usually in cases where the sole administrator dies or becomes of unsound mind or is adjudged bankrupt.

43. In the instance case, the applicants appear to raise issues that point to the first general ground, that the process of obtaining the grant herein was attended by challenges. Their principal argument being that their consents to obtaining of the grant by the administrators were not obtained, and that any purported signatures on alleged consent documents were forgeries to the extent that the signatures on it purported to be theirs were in fact not theirs. I will start by considering whether the administrators had obtained the consents of the applicants, and whether those consents were necessary in the first place.

44. The deceased died intestate, after the Law of Succession Act had come into force. Representation to his estate was, therefore, subject to administration in accordance with the provisions of the Act. The persons who qualify to apply for administration in intestacy are set out in section 66, which gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

> "*66. Preference to be given to certain persons to administer where deceased died intestate*
>
> *When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect."

45. According to section 66, the court ought to be guided by Part V of the Act, which settles the order of priority in entitlement to a share in the estate of the deceased. Priority is given to the surviving spouse, followed by the children of the deceased, followed by parents of the deceased in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter. The same applies with regard to entitlement to administration by dint of section 66. The surviving spouse has priority to administration, followed by the children, parents of the deceased, siblings, other relatives upto the sixth degree, the Public Trustee and creditors, in that order. When these provisions are applied to the instant case, it would mean that the surviving widow of the deceased, who is one of the administrators of the estate, had priority to appointment over the children of the deceased, the applicants included, and the other administrators, who are all sons of the deceased, had equal right or entitlement to administration with the applicants.

46. I note that the administrators lodged their petition herein on 13th January 1997. I have carefully scoured through the documents that were filed simultaneously with the petition, and I have not a consent signed by any of the children of the deceased who were themselves not seeking representation.

47. Was the said consent necessary in the circumstances? Rule 7 of the Probate and Administration Rules sets out the procedure for applications for representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitioner to apply. The provisions of section 66 of the Act, which have set out above, should be read together with Rule 7(7) of the Probate and Administration Rules, which states as follows:

"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

48. Rule 26 of the Probate and Administration Rules is also relevant. It states as follows:

"26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

49. Rule 26(1) (2) applies where representation is sought by a person with equal or lesser right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with superior or equal entitlement with notice. The individuals with superior or equal entitlement, who have not applied for representation, would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly addressing these issues, that is by indicating that notice was given to all the other persons equally entitled and with prior or equal right, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

50. The administratrix in the instant cause, being a surviving spouse of the deceased, had a right or entitlement to administration which was superior or prior to that of a children of the deceased; while the other administrators, being surviving children of the deceased had a right or entitlement to administration that was equal to that of their surviving siblings, going by section 66 of the Law of Succession Act. That would mean that whereas no consents were required with respect to the surviving spouse, the administratrix, consents were required with respect to the other administrators, who were sons of the deceased with equal right to administration with the rest of the children. A reading of section 66 of the Law of Succession Act and Rules 7(7) and 26 of the Probate and Administration Rules would mean the said surviving spouse of the deceased did not need to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. She did not, therefore, have to obtain the consents of the children to apply for representation to the estate of her late husband. However, since the other three administrators were surviving children, there was need to comply with the provisions, and, therefore, consents in Form 38 should have been filed.

51. To that extent, therefore, there was non-compliance with those provisions, and that amounted to a defect in the process. Was it fatal? I do not think so. The deceased died a polygamist. From what is on record, all the children of the deceased, including the applicants, were

disclosed. Indeed, the applicants do not complain about that. Their principal complaint is not so much the appointment of administrators, but distribution. I believe that that is a defect that can be overlooked. This is a large family with many survivors. All were disclosed, and the appointment of administrators, to the extent that all three houses were represented, including those children who were not born within wedlock. I am not persuaded that I should exercise the discretion in section 76 to remove the administrators for that reason.

52. The applicants invite me to appoint an administrator. I find the prayer curious. In the first palace there are administrators in place. Secondly, those in office are four, the maximum number, as per section 56(1) (b) of the Law of Succession Act. There is, therefore, no room for appointment of another administrator. Thirdly, I could only appoint an administrator after I have removed the current administrators through revocation of their grant. I have found that there is no prayer in the application for revocation of the grant herein, so I have no basis for revoking their grant. I have also found that even if I were to proceed *suo moto*, in the absence of the prayer for revocation, I am not persuaded that the defect that emerges from the record is sufficient reason for me to revoke the grant, looking at the matter globally. There is, therefore, no sufficient case made out for appointment of an administrator.

53. There are prayers with relation to the consent order that was recorded on 30th May 2013. I am invited to stay its execution and to vacate or review it. The consent order is intimately linked to the confirmation orders that I have extensively dealt with above. The consent order was meant to facilitate the implementation of the confirmation orders. It is an appendage to the confirmation orders, since it rides on the back of the said orders. I have already found that I cannot exercise the power under section 76 to interfere with the confirmation orders. I can only deal with them if there was a review application before me of those orders, or an application to vacate or set them aside. Since no such application or applications is or are before me, and, ideally, is should not venture to address the matter of the consent order. I should not venture to deal with the confirmation orders, and, by extension, the consent orders, without appearing to prop myself up as an appellate court on orders made by a Judge of this court. the ideal situation should have been that the applicants should have challenged the confirmation orders on appeal at the Court of Appeal, or moved this court for a review or setting aside of the said orders.

54. Regarding the prayers for the consequential order being set aside, I have no evidence before me that any consequential orders were ever made for the applicants moved to court immediately the consent was adopted and stopped its enforcement. It has not been demonstrated that there have been any subdivision of the subject property, let alone any transfers. I do not, therefore, find any foundation upon which I can make any of the orders sought.

55. Let me revisit the issue of revocation of the certificate of confirmation of grant. I have already concluded that the revocation application before me is not proper. I have also indicated that the applicants ought to have filed an appeal against the orders on confirmation, or sought review or setting aside. In view of Article 159 of the Constitution, sections 1A and 1B of the Civil Procedure Act, Cap 21, Laws of Kenya, and particularly because confirmation is the heart and soul of the succession cause, I shall revisit the issue, to ascertain whether the administrators followed the correct procedure in procuring the confirmation orders, in order to assess whether or not I should set them aside. I shall, therefore, treat the revocation application as either a review application on or an application for the setting aside of the confirmation orders on record.

56. Confirmation of grants is provided for at section 71 of the Law of Succession Act, which says:

> *"Confirmation of Grants*
>
> *71. Confirmation of grants*
>
> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
>
> *(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*
>
> *(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*
>
> *(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*
>
> *(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*
>
> *(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*
>
> *Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."*

57. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. I shall not consider the issue of appointment of administrators, for the applicants are not strictly unhappy about the appointment of administrators, or even about how they have gone about the administration of the estate. Their principal complaint is with respect to the manner the estate was distributed at confirmation. The only issue, therefore, for me to consider is on distribution.

58. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 is that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2) of the Law of Succession Act, if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4).

59. For clarity and emphasis, the proviso and Rule 40(4) state as follows:

> "71(2)(d) … *Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."*

> "*40(4). Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined."*

60. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? Have all the persons beneficially entitled to the estate of the deceased been identified and their respective shares at distribution been ascertained?

61. I will start first by considering whether the beneficiaries have been identified. I have recited the letter from the local Chief at paragraph 1 here above, it has ascertained all the survivors of the deceased, including widows, sons and daughters. The same individuals are also listed in the petition, and in the affidavit that the administrators swore in support of their confirmation application dated 24th October 1997, sworn on 27th October 1997. I believe that there has been in compliance with the proviso in section 71(2) of the Law of Succession Act.

62. The next consideration should be whether the assets of the estate have been ascertained. This is critical as the succession cause is all about distribution of the property that the deceased died possessed of. From the revocation application, the applicants do not appear to have serious issues with the ascertainment of the assets of the estate. They appear to be content with the assets disclosed as belonging to the estate of the deceased, save for shares in Nzoia Sugar Company Limited and Mumias Sugar Company Limited.

63. The third consideration, under the proviso and Rule 40(4), is about how the assets of the estate should be distributed amongst the persons that have been identified as survivors of the deceased. The law requires that the court be satisfied that, after the persons beneficially entitled have been properly ascertained, the administrators should next satisfy the court that their shares to the assets have been ascertained. That would require them to show or indicate the share or shares that have been allocated to the persons identified as having been ascertained as the persons beneficially entitled.

64. The affidavit sworn on 27th October 1997 in support of the confirmation application, does not deal with distribution. It has not allocated the assets to the survivors identified as the persons beneficially entitled to the estate. That is done in another affidavit that the administrator swore on 21st October 1998. It distributed Kakamega/Lumakanda/510 to seven sons of the deceased's first wife, Anne Shikanda Osundwa, at varying degrees, the son with the largest share getting 15.5 acres and the smallest share being 2.0 acres. There is an allocation of 3.0 acres going to what is described as the homestead. Kakamega/Shinamwenyuli/616 was shared between six sons of the deceased's other wife, Rose Miguda Osundwa, equally, with each son getting 3.1 acre each. Kakamega/Mabusi/118 was given to Beatrice Aduda Osundwa in trust for her children. Kakamega/Shinamwenyuli/1260 was allocated to Gilbert Osundwa and George Chitechi Osundwa to hold in trust for other dependents of the deceased, who were to include Edwin Osundwa. The grant was confirmed in those terms, but not exactly. Although Beatrice Aduda Osundwa was to hold Kakamega/Mabusi/118 in trust for her children, and Gilbert Osundwa and George Chitechi Osundwa to hold Kakamega/Shinamwenyuli/1260 in trust for other dependants of the deceased, the certificate of confirmation of grant that was subsequently issued on 26th November 1998 did not say so, for it devolved the two assets absolutely to those individuals. It is not clear who was intended to benefit from "the homestead," and I doubt whether the lands office would issue a title deed in the name of "the homestead."

65. The proviso to section 71(2) and Rule 40(4) require that the court be "satisfied as to the respective identities and shares of all persons beneficially entitled." Put differently, that is to say that the administrators should "satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined." My understanding of it is that once the persons beneficially entitled are ascertained, the administrators should go ahead and identify the shares of each of those persons in the estate.

66. Has that been done in this case? I do not think so. According to the affidavit sworn in support of the confirmation application, the administrators had ascertained 40 individuals as the persons beneficially entitled to the shares in the estate. Out of the 40, according to the supplementary affidavit, only 14 individuals are allocated shares in the estate, and that number tallies with the names that appear in the certificate of confirmation of grant. The administrators in their supplementary affidavit do not explain the fate of the other 26 persons who they had identified as persons beneficially entitled to a share in the estate, yet they did not in the end allocate them any shares at all in the estate. Clearly, therefore, it cannot be said that the administrators complied with the proviso to section 71(2) and Rule 40(4). A large number of the persons beneficially entitled were not allocated anything from the estate, no explanations were given and it would appear that their concurrence was not obtained, neither did they attend court on the day allocated for hearing of the confirmation application as shall become clear shortly. There is no concurrence between the persons listed as survivors of the deceased and the shares allocated.

67. Rule 40(8) of the Probate and Administration Rules, is relevant to this discourse. It requires administrators, when applying for confirmation of their grants, to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Such survivors or dependants include daughters of the deceased. It says as follows:

> "*Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons*

who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit."

68. Rule 40(8) envisages that a consent, in Form 17, be signed by all the persons beneficially entitled to the estate of the deceased. In the context of this matter the persons who should have signed Form 17 are the 40 persons that the administrators had identified in their affidavit of 27th October 1997. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased.

69. My understanding of Rule 40(8) of the Probate and Administration Rules is that requires administrators, when applying for confirmation of their grants to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Under that provision, a confirmation application may be disposed of by the court without hearing any party so long as no affidavit of protest has been filed and all the persons beneficially entitled have executed consents in Form 17. However, where there is an affidavit of protest on record or where any person who is beneficially interested in the estate has not signed the consent in Form 17, then the court should not proceed to give orders on distribution before it has heard such persons. That is the purport of Rule 40(8).

70. In this case, I have very closely perused the application for confirmation of grant that was filed herein, sometime in October 1997, and I have not seen any document in the nature of the consents in Form 17. It is Form 17 which should trigger the court to allow the application without hearing the parties if all have signed the form, or to hear them under Rule 41(1), where some of them have not signed the form. The fact that no Form 17 was filed, duly executed by the persons beneficially entitled would suggest that the said persons were not aware of the proceedings. That would lend credence to the claim by the applicants that they were not consulted nor involved in the process. The requirement for execution of consents in Form 17 is meant to ensure that all the persons beneficially entitled are brought on board. Where Form 17 is not filed at all, strongly suggests that the process was not at all inclusive. It was only democratic, just and fair that all the persons beneficially entitled to a share in the estate of the deceased got to be heard on the distribution of the assets of their late father. That is what the law expects, and the process would be fundamentally undermined where opportunity to be heard was not afforded to all the persons beneficially entitled.

71. The confirmation hearing happened on 26th November 1998. From the record it would appear that the Coram comprised only of the Judge, his clerk and the advocate for the administrators. The advocate informed the court that the application was unopposed, and the application was allowed. Clearly, the proceedings happened in the absence of the survivors. Rule 41(1) of the Probate and Administration Rules envisages that at the hearing of the confirmation application, all those beneficially interested would attend, so that they can be heard. The mere fact that no protests were filed should not be read to mean that there was no objection, since protests can only be filed where the survivors are aware of the filing of the application. The execution of Form 17, under Rule 40(8), as I have stated above, is intended to bring the fact of the filing of the confirmation application to the notice of the survivors. Where Form 17 is not filed it should be no surprise that no protests are filed, as there would be likelihood of the survivors being unaware of the fact of the filing of the confirmation application.

72. Confirmation of grants are at the heart and soul of the succession cause. The reason succession causes are initiated is so as to have the estate of the deceased distributed. That then makes confirmation so critical, since it is at that point that the estate is distributed. It must be done right. It must involve everybody who is beneficially entitled to a share in the estate of the deceased. If the process is not handled well, such as in this case, where a large group is left out, many would be left unsatisfied, and that would mean having to go back on the process to ensure that everybody is satisfied.

73. The deceased herein died on 16th June 1996. That was after the Law of Succession Act had come into force on 1st July 1981. He died intestate, and, therefore, his estate is subject to distribution under Part V of the Law of Succession Act, which governs intestacy. The Luhya customary law of intestacy does not apply by virtue of section 2(1) of the Law of Succession Act. Section 40 of the Law of Succession Act governs distribution of the estate of a polygamist. That provision has to be read together with section 38, for the purpose of the first house. Going by section 38, the daughters in that house are entitled to a share of the estate equally with their brothers. They do not have to take a share if they do not want to, subject of course to them renouncing or waiving their interest in the property. They cannot be excluded from benefit, merely because they are women or because they are married. They have a right to the property, and the only reason they will not access the estate would be where they have renounced or waived their rights to inheritance, and their views are documented.

74. For the sake of clarity, sections 2(1), 38 and 40 of the Law of Succession Act state as follows:

"2. Application of Act

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons."

"38. 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, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

"40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."

75. Overall, the safeguards put in place by the law to ensure that the confirmation process is all inclusive were not observed, and the applicants were disadvantaged. I believe the right way forward should be to get the process started afresh.

76. Before I conclude this judgement, let me address a matter that is at the heart of it. It came out from clearly from the position that was taken by the administrators, and the other persons who swore affidavits in opposition to the application, and those who testified on the administrators' side. It is about the rights of daughters to inherit from their father's estate.

77. The deceased person herein died intestate on 10th June 1996. According to section 2(1) of the Law of Succession Act, whose provisions I have reproduced in paragraph 74 of this judgement, the estate of any person dying after the said Act came into force is subject to administration and distribution under the provisions of the Act. The Law of Succession Act came into force on 1st July 1981. That is the effective date when the Act commenced or began to apply. The deceased herein died some fifteen or so years after the Act came into force, and that means that his estate fell for administration and distribution in accordance with the Law of Succession Act. The law stated in the Act envisages equal treatment of both the male and female genders. It treats sons and daughters equally when it comes to distribution of the estate of their dead parent. That comes out clearly in sections 38 and 40 of the Law of Succession Act, which I have also set out in paragraph 74, here above. The law is clear, sons are not allocated a status superior to that of daughters when it comes to apportionment of shares in the estate of a dead parent. They are treated equally. The have equal entitlement to the estate. The estate is not meant to devolve exclusively to the sons, and it is not available to the sons, to dole out to the daughters as they please.

78. There was reference to the Constitution 2010 and the retired Constitution, with respect to entitlement of daughters to inherit land from their father's estate. The entitlement of daughters to equal share in their father's estate did not come with the new Constitution in 2010. It was always stated in the Law of Succession Act, which was passed in 1972 and became effective in 1981. It has always been there. What the new Constitution did was merely to affirm what the Law of Succession Act had always provided, equal treatment of the genders in the distribution of the estate of an intestate. The new Constitution did not introduce anything new with respect to rights of daughters to their father's estate.

79. Even if the rights of daughters came with the new Constitution, which is not the case, the provisions in the new Constitution, in Article 27, would still apply both to a situation where the deceased died before or after the new Constitution was promulgated in 2010. The said provisions state as follows:

"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

80. In addition to the local law, international law bolsters those provisions, by asserting women's rights as equal rights. Article 2 of the Constitution, 2010, makes the instruments of international law, such as treaties and conventions, part of the law of Kenya, where Kenya has ratified such instruments. Ratification of such treaties and conventions makes such treaties and conventions part of the Kenyan law, without the necessity of having such treaties and conventions domesticated through local legislation. Among the treaties and conventions that Kenya has ratified is the Convention on the Elimination of All Forms of Discrimination against Women. Kenya is signatory to the said convention since 1984, and by it Kenya has condemned discrimination against women in all forms, and committed itself to eliminate discrimination against women.

81. Article 2 of the Constitution, 2010, states as follows:

"2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) …

(3) …

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

82. The relevant Articles of the Convention on the Elimination of All Forms of Discrimination against Women state as follows:

"*Article 1*

For the purposes of the present Convention, the term "discrimination against" women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of the ire marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2 …

State Parties condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women …

Article 3…

Article 4…

Article 5

State Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women , with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) …

Article 6…

Article 7…

Article 8…

Article 9…

Article 10…

Article 11…

Article 12…

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits …

(b) …

(c) …

Article 14…

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

Article 16 …"

83. The standards that are set by the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms Discrimination Against Women require that women be treated equally with men in all spheres of life, including succession. They frown on women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughters of the deceased, who are immediate blood relatives of the deceased, to be overlooked merely because they were women and because they got married. It would be contrary to the law, as stated in the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women, to sanction a devolution that would sideline them.

84. The Convention on the Elimination of All Forms Discrimination Against Women is part of the Kenyan law by virtue of Article 2 of the Constitution, and the courts, being part of the Kenyan state, have an obligation to effectuate the provisions of the Convention on the Elimination of All Forms Discrimination Against Women by fighting against gender discrimination. The application before me, no doubt, brings glaring gender discrimination, to the extent that the daughters of the deceased were not disclosed in the principal papers filed in the matter, the daughters were not involved in the process at all, and it was generally argued that they did not matter when it came to matters inheritance. That was and is contrary to the spirit of the Constitution and the Convention on the Elimination of All Forms Discrimination Against Women. I am enjoined to apply both the Law of Succession Act, the Constitution and the Convention on the Elimination of All Forms Discrimination Against Women to ensure that the daughters get justice by giving them a platform in the proceedings, to be heard in their quest to get shares in the estate of their dead father.

85. Related to that is the matter of the application of customary law. The sons of the deceased in this matter appear to entertain the notion that the estate of their late father was for distribution in accordance with customary law. The notion is misguided. The application was customary law of succession was ousted by the coming into force of the Law of Succession Act in 1981. Section 2(1) of the Act is specific that the Law of Succession Act was, from 1st July 1981 onwards, going to be the law to universally apply to estates of persons who died after that date. Exceptions were made, through various provisions, for application of customary law, the most critical being through sections 32 and 33, effected through Legal Notice No. 10 of 1981. None of them affected property situated within Kakamega County, then known as Kakamega District. That would mean that the estate of the deceased herein is not subject, in any manner, to distribution in accordance with customary law, but strictly in accordance with Part V of the Law of Succession Act, which states the law on distribution upon intestacy.

86. Customary law is generally discriminative against women. Under customary succession law, inheritance is patrilineal. Devolution is to male heirs, with exceptions being made, in limited instances, to unmarried women or their children. That is patently discriminatory. That form of discrimination is outlawed by the Constitution. Article 2(4), which I have reproduced in paragraph 81 of this judgment, makes any law which is inconsistent with the Constitution null and void. When customary succession law, which discriminates against women, is juxtaposed against Article 27 of the Constitution, it would be plain that such customary succession law would be inconsistent with Article 27, and thereby null and void. Article 2(4) of the Constitution is in the same article with Article 2(5)(6), which provide for application of international law, which recognizes women's rights as human rights, and which applies such treaties and conventions as the Convention on the Elimination of All Forms Discrimination Against Women as part of the Kenya law. When the provisions of the Law of Succession Act, the Constitution and the Convention on the Elimination of All Forms Discrimination Against Women are applied to succession law, it would be clear that customary succession law, which is discriminatory against women, would have no place at all.

87. In the end the final orders that I shall make are as follows:

(a) That I shall not revoke the grant of letters of administration intestate herein, instead I shall set aside the orders made on 26th November 1998 confirming that grant;

(b) That the certificate of confirmation of grant issued on the basis of the said orders is hereby annulled;

(c) That any transactions carried out on the basis of the said certificate are hereby cancelled;

(d) That the administrators shall file a fresh application for confirmation of their grant, in which they shall strive to comply with all the requirements set out in section 71 of the Law of Succession Act and the Rule 40 of the Probate and Administration Rules, inclusive of filing Form 17 executed by such survivors of the deceased as they be in agreement with the proposals in the confirmation application to be filed:

(e) That any of the persons who are beneficially interested in the estate who shall be unhappy- with the proposed distribution shall be at liberty to file an affidavit of protest;

(f) That the confirmation application shall be filed within forty-five days;

(g) That the matter shall be mentioned after forty-five days from date of delivery of this judgement for compliance and directions; and

(h) That any party aggrieved by the orders made herein, has twenty-eight days, to challenge the decision herein, at the Court of Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE