REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 144 OF 1983

IN THE MATTER OF THE ESTATE OF JOHN AKWEMBA AKUBANIA alias JOHN KHAYINGA AKUBANIA (DECEASED)

JUDGMENT

1. The deceased person, to whose estate this cause relates, died on 1st November 1981. Representation to his estate was sought by Richard Nandi, in his purported capacity as brother of the deceased, through a petition, dated 18th August 1983, and lodged herein on 19th August 1983. In the petition, the deceased was expressed to have had been survived by Mmasi Kwamba. He was said to have died possessed of property known as Isukha/Shirere/829. Samuel Atsiaya Jirongo, Thomas Mmbwabi Mutongoi and Philomenah K. Lugale are listed as liabilities. Letters of administration intestate was accordingly made to the petitioner on 3rd October 1983, and a grant duly issued of even date.

2. An application was filed herein in 1984, on a date which is not clear from the record, dated June 1984, by the administrator, for confirmation of the grant. He identified Mmasi Kwamba as the surviving of the deceased. While identifying himself, the administrator as the sole person beneficially entitled to the sole asset of the estate, Isukha/Shirere/829.

3. The application was placed before Aganyanya J., on 15th May 1985, when it emerged, apparently after the Judge interviewed the administrator, that the deceased had been survived by a widow and a son, Rose Okwemba and Mmasi Okwemba. The court directed that their views be heard on the proposed distribution, and stood the matter over to 22nd May 1985. On that date, the administrator did not attend court, but the widow, Rose Okwemba, was present, and so were the son, Mmasi Okwemba, the area Assistant Chief, Thomas Mutongoi, and a purchaser, Samuel Atsyaya. After discussions with the parties present, the court noted that according to the widow, she was only aware of one purchaser, Samuel Atsyaya, but not the rest, who included the Assistant Chief, Thomas Mutongoi. The court ordered that the grant be confirmed in the name of the widow, to hold the land in trust for Mmasi Okwemba, who was still a minor. It was directed that questions relating to purchases of parts of the land by other person, including Atsyaya and Mutongoi, be decided in another forum. A certificate of confirmation of grant was subsequently issued, bearing the date of 22nd May 1985. I shall hereafter refer to Rose Okwemba as the administratrix.

4. The application that I am called upon to determine is the summons of revocation of grant dated 4th December 2014. It was brought at the behest of Elias Moard Mategwa, who I shall hereafter refer to as the applicant. He seeks revocation of grant on grounds:

> (a) That the succession cause was *res judicata* as the matter was the subject of Kakamega RMC Award Suit No. 4 of 1983 in the Chief Magistrate's Court at Kakamega;
>
> (b) That the administration of Rose Okwemba , as the confirmed administrator, be investigated as she was the administrator of the estate of the deceased;
>
> (c) That there had been blatant frauds and forgeries which needed investigation, and prosecution of those found culpable;
>
> (d) That the mutations on Isukha/Shirere/2554 and 2555 be revoked and restored to Isukha/Shirere/829; and
>
> (e) That the orders in Kakamega RMC Award Suit No. 4 of 1983 be adopted as the orders of the court.

5. The said application is premised on several grounds that are set out on the face of it. One of them is that the administratrix had surreptitiously become occupant of that office without having filed any objection or protest. The second one is that the confirmed administrator, Richard Nandi Akubania, was not recorded anywhere on Isukha/Shirere/829. The final ground is that Isukha/Shirere/829 was not listed in the petition, with the sinister motive of taking away the purchasers interests as ordered in Kakamega RMC Award Suit No. 4 of 1983.

6. In the affidavit that the applicant swore in support on 4th December 2014, he avers that Kakamega RMC Award Suit No. 4 of 1983 had been initiated in the Chief Magistrate's Court by one Philomena Khaluyi Lukale through an application in that cause dated 26th January 1983. A ruling was delivered on that application on 22nd February 1983, which he asserts was not contested by either of the parties. On the

basis of that ruling, the said Philomena Lukale took possession of a portion of Isukha/Shirere/829, and developed it. She died on 28th September 1990, before the order in Kakamega RMC Award Suit No. 4 of 1983, could be fully implemented. The applicant herein then filed an application in Kakamega RMC Award Suit No. 4 of 1983, seeking to substitute the late Philomena Lukale as applicant, and his application was granted. After the substitution, he extracted the orders made in Kakamega RMC Award Suit No. 4 of 1983 and obtained an order for the executive Officer of the Chief Magistrate's court to execute transfer documents. After the transfer documents were executed by the Executive Officer of the court, he obtained consent to subdivide Isukha/Shirere/829. When he presented his documents to the District Surveyor, he was advised to procure a certificate of official search on Isukha/Sh-irere/829. When he applied for the certificate of official search, he discovered that the property had been transmitted to the administratrix as successor of the deceased. He avers that the property was transmitted in suspicious circumstances, and he urges the court to investigate. When he made further enquiries, he established that one of the mutated portions, that is to say Isukha/Shirere/2554, was registered in the name of a retired Assistant Chief. He laments that the Land Registrar for Kakamega has not cooperated in furnishing with clear information on what might have transpired.

7. The documents annexed to that affidavit include an application that the applicant had filed in Kakamega RMC Award Suit No. 4 of 1983, seeking adoption of the award and execution of documents by an officer of the court. there is also a copy of proceedings conducted on 22nd February 1983, by EM Githinji, SRM, where the court ruled that the elders had found that Isukha/Shirere/829 belonged to the deceased herein, and directed that the same be shared between an unmade brother of the deceased, a purchaser identified as Patromayo Liwa and an unidentified son of the deceased. Richard Nandi, Philomena Lugale and Mmasi Okwemba were declared heirs to the land. The property was to be subdivided and shared out between the three in the manner indicated in the ruling. There is an order made on 22nd March 2012 and issued on 21st December 2012, by JS Wesonga, Resident Magistrate, substituting the applicant herein for the late Philomena K. Lukale in Kakamega RMC Award Suit No. 4 of 1983. There is another order made on 22nd November 2012 and issued on 21st December 2012, by JS Wesonga, Resident Magistrate, giving directions to the Provincial Surveyor and the District Land Registrar with respect to subdivision of Isukha/Shirere/829. There is an order made on 15th July 2013 and issued on 11th September 2013, by the magistrate in Kakamega RMC Award Suit No. 4 of 1983, adopting the award of the elders in Lurambi Land Disputes Tribunal of 4th January 1983, in relation to Isukha/Shirere/829, as an order of the court, and directing the officer of the court to sign the relevant transfer documents in the event the transfers declined to do so. There is a green cared in respect of Isukha/Shirere/829, showing that the deceased was registered on 4th May 1973 as proprietor of the said property. The same was subsequently registered in the name of the administratrix in that capacity on 13th August 1987, and the said title was closed on even date. There is also copy of a letter of consent dated 3rd October 2013, addressed to the High Court, by the Chairman of the Kakamega Municipality Division Land Control Board for subdivision of Isukha/Shirere/829. Finally, there is copy of the application for the consent of the Land Control Board, dated 20th June 1996, ostensibly signed by the administratrix.

8. There is a reply to the application, by Richard Nandi Akubania, through an affidavit he swore on 22nd December 2014. He avers to be the younger brother of the deceased, who he says died single, but survived by a son, Mmasi Okemah, who subsequently died. He avers that the deceased had, during lifetime sold a portion of his property, Isukha/Shirere/829, to Philomena Lukale. He asserts that Isukha/Shirere/829 was ancestral land, having belonged to their father, before he passed the whole of it to the deceased, and that he was entitled to it also. He states that when the deceased died, the elders took the matter to the Land Disputes Tribunal, which rendered a verdict, which he has attached, which is the same award that the applicant is relying on. He states that it was after the deceased's son died that he initiated this cause to the estate of the deceased. He says that he was unable to process the award because he had no money. However, when the money was raised, he discovered that the property had been given to Mbwavi Mutongoi and Atsiaya Jirongo. He states that as administrator he did not know what had happened to cause the property to be passed to Mbwavi Mutongoi and Atsiaya Jirongo. He denounces Rose Okwemba, saying that the woman that the deceased had a child with was Judy Khamei. He urges that the Land Registrar be compelled to restore the property to the name of the deceased. He also renounces any other succession cause apart from HCSC No. 144 of 1983. He has documents similar to those attached by the applicant.

9. The applicant. Elias Moard Mategwa, swore a further affidavit on 1st October 2015. He avers that the identity card used to effect transfer was that of Judy Khameyi Madegwa, and not Rose Okwemba. He invites the court to address how Rose Okwemba came to become administratrix of the estate of the deceased.

10. Directions were given on 18th March 2015, to the effect that the application, dated 4th December 2014, be disposed of by oral evidence, and that the parties do file and serve written statements. Sitati J. took oral evidence on 26th January 2016, and while I heard the matter on 11th December 2018.

11. The applicant was the first on the witness stand. He stated that the deceased had, during his lifetime, sold a portion of Isukha/Shirere/829 to his aunt, Philomena Lukale, who was also deceased. He became the administrator of the estate of the said Philomena Lukale through Succession Cause No. 4 of 1983, through a substitution by an order of the court made on 22nd March 2012. He got orders for the executive officer of the court to execute certain documents. Using the order he applied to the Lurambi Land Control Board for consent to transfer. His application was approved on 3rd October 2013. When he sought a certificate of official search as demanded of him by the surveyor, he discovered that Isukha/Shirere/829 had been mutated into two portions, Isukha/Shirere/2554 and 2555, and conveyed to Thomas Mmbwavi Mutongoi and Samuel Atsiaya Jirongo, through Succession Cause No. 144 of 1995. He explained that according to the green card the property was initially passed to Rose Okwemba, from the name of the deceased, in 1987. He visited the court's registry, only to establish that Succession Cause No. 144 of 1995 did not relate to the estate of the deceased, but a totally different person altogether, but he eventually established that the proper was HCSC No. 144 of 1983. He established from the court file in HCSC No. 144 of 1983 that the administrator was one Richard Nandi Akubania. He managed to get in touch with the person who were the eventual beneficiaries of the subject property. He stated that he confirmed that Rose Okwemba never filed any objection nor protest and therefore he did not understand the circumstances under which she became administatrix. He established that the grant was confirmed to her, to hold the property in trust for Mmasi Okwemba.

12. During cross-examination, he confirmed that his application did not seek a prayer for revocation of grant, even though it was headed summons for revocation of grant, neither was the application specific on the date the grant was made and to whom it was made. He stated that the grant that he wanted revoked was that which had been made to Richard Nandi Akubania. He stated that he was claiming on behalf of his aunt, Philomena Lukale, in respect of whose estate he had been appointed administrator in Kakamega HCSC No. 1267 of 1996. He testified that after his aunt and entered into a sale transaction with the deceased, consent to subdivide and transfer had been sought and

obtained from the relevant authorities, in January 1983, but the deceased died before the land had been subdivided. He asserted that he wanted the order in Kakamega RMC Award Suit No. 4 of 1983 adopted. He said that he was not aware that his aunt, Judy Khamei Madegwa was a wife of the deceased, nor that she was also known as Rose Okwemba. He asserted that he was arguing that the cause herein was *res judicata* as it was after the cause in Kakamega RMC Award Suit No. 4 of 1983, for while the succession cause in Kakamega HCSC No. 144 of 1983 was filed in court in May 1983, Kakamega RMC Award Suit No. 4 of 1983 had been filed in February 1983. He stated that he had not read through the proceedings in Kakamega HCSC No. 144 of 1983, but he knew that Richard Nandi Akubania was the original petitioner in that cause. He stated that he was not aware whether the said Richard Nandi Akubania had a co-petitioner and whether he informed Aganyanya J. that the deceased had a wife called Rose Okwemba, the administratrix. He further stated that he was not aware that the estate property was awarded to Rose Okwemba by the court. After being shown the relevant order, he said that in his layman's view, the court did not direct that the land be given to Rose Okwemba. He stated that he was unaware that it was the administratrix who sold the land to Thomas Mmbwavi Mutongoi. He stated further that the deceased had already died by the time the proceedings in Kakamega RMC Award Suit No. 4 of 1983 and Kakamega HCSC No. 144 of 1983 were being conducted. He stated that his cousin's children were on the portion of Isukha/Shirere/829, that was sold to his aunt, and that the family of Thomas Mmbwavi Mutongoi was also on the same land. He said that Isukha/Shirere/829 was subdivided into Isukha/Shirere/2554 and 2555.

13. The applicant called Godfrey Andobe Shipimiu as his witness. He testified that Philomena Lukale was his grandmother, and she had bought land from the deceased. He said he did not know the reference number for the property. He stated that he knew the applicant, who he described as a brother of the late Philomena Lukale. He asserted that the land belonged to his grandmother and he had been living on it for the last 25 years. He stated that his grandmother had bought the land from the deceased and not from Thomas Mmbwavi Mutongoi, who he described as another buyer. He asserted that he did not know how Thomas Mmbwavi Mutongoi obtained a title deed to that property. He stated that the deceased died before he could transfer the land to his grandmother, and pleaded with the court to get Thomas Mmbwavi Mutongoi to explain how he got to have the property registered in his name. During cross-examination, he stated that he was a child when the deceased entered into the sale agreement with his grandmother. He said that he was not a witness to the sale agreement. He said that he did not know the reference number of the property, nor the acreage of the portion bought by his grandmother, nor the purchase price paid for the portion. He said that the deceased had a wife, but he said he did not know the name. He stated that the said wife was alive when his grandmother bought the land. He stated that the deceased and his wife had one child, called Mmasi Okwemba, who has since died. He said that he was not aware that the matter had been brought to court. He testified that Richard Nandi Akubania was a brother of the deceased, and he had his own land separate from that of the deceased.

14. Richard Nandi Akubania testified next. He identified the deceased as his elder younger brother. He identified the applicant as a brother of Philomena Lukale, who was buying the land of the deceased, from both him and the deceased. He stated that he wanted the applicant to be given the land. He asserted that he had been given the land, then he was pushed aside. He said that after being pushed aside he got accommodated by an elder brother. At cross-examination, he said that he did not file a succession cause over the land. He stated that Philomena Lukale had bought the land from him and the deceased, and he said that he signed the sale agreement as a witness. He confirmed that the land was in the name of the deceased at the time, and by the time he died, the land had not been subdivided. He stated that the court had given him permission to subdivide the land amongst the buyers. He stated that the deceased died not have a wife, but used to live at Eldoret with female friends. He stated that he filed the succession cause because of that. He said that he had a child called Mmasi Okwemba, who had since died. He identified Rose Okwemba as a friend of the deceased. He stated that the two used to live at Eldoret but separately. He stated that he could not recall informing Aganyanya J. on 14th May 1985 that the deceased had a wife and a child. He further stated that he could not recall that Aganyanya J. directed him to bring the wife and child to court. He further stated that he could not remember bringing Rose Okwemba and Mmasi Okwemba to court. He also stated that he could not recall the court saying that it would not give the land to buyers but to the wife and child of the deceased. He further stated that he was not aware that the land was given to Rose Okwemba by the court.

15. Thomas Mmbwavi Mutongoyi was the next on the witness stand. He identified Richard Nandi Akubani as a brother of the deceased. He stated that the deceased had a wife known as Rose Okwemba, who was also known as Judy Khameyi Mategwa. They had a child known of Mmasi Okwemba. He testified that both Rose Okwemba and Mmasi Okwemba had since died. He stated that the succession proceedings herein were brought by Richard Nandi Akubani and Rose Okwemba, and that he came to court after that, and Aganyanya J. asked them to get out of the matter, as he was going to give the land to Rose Okwemba and the child. He stated that Richard Nandi Akubani was sent to Eldoret by the court to bring Rose Okwemba and the child. He stated that the court ruled that it was giving the land to Rose Okwemba, and after that the buyers were to talk to her. He testified that the grant came out in the name of Rose Okwemba, and he approached her, she subdivided the land into two parcels, Isukha/Shirere/2554 and 2555. He then bought Isukha/Shirere/2554, which was in the name of the deceased. He stated that Isukha/Shirere/2555 went to Samuel Jirongo Atsiaya, who had bought the land earlier. He stated that at the time he was buying the property, Mmasi was still alive. He produced an agreement of sale between himself and Rose Okwemba, dated 20th June 1996. He clarified that Rose Okwemba had caused Isukha/Shirere/829 to be initially transferred to her name, before the subdivision and transfer to him and Samuel Jirongo Atsiaya. He confirmed that he got a title deed for Isukha/Shirere/2554. He stated that the certificate of confirmation of grant was never changed, and that the administratrix was never replaced as the personal representative of the deceased. He asserted that he got Isukha/Shirere/2554 through due process, and said it would be wrong for it to be taken away from him. He said Philomena Lukale was among the original petitioners, but said he was unaware that she had a case at the land disputes tribunal. He said that he was not party to that suit. He asserted that Richard Nandi Akubani was not entitled to the land since the deceased had been survived by a wife and a child.

16. During cross-examination, he stated that the administratrix had taken the land through the instant succession cause. He described her and Richard Nandi Akubani as the original petitioners. He stated that Isukha/Shirere/829 was subdivided and that there was a green card to that effect. He stated that it was the administratrix who did the subdivision. The two resultant parcels were transferred to her and Samuel Atsiaya, she later sold her land to the witness. He stated further that the administratrix had other names apart from Rose Okwemba. According to him, the name that she used during the transactions was Rose Amenya Mategwa, although in the petition the name used was Rose Okwemba. He stated that it was the court that realized that the deceased had a wife and a child, and made an order asking that she be brought into the matter. He confirmed that there was no protest nor objection. He stated that it was he and other buyers who sent Richard Nandi Akubani to look for Rose Okwemba. He stated that the property was not passed to Mmasi Okwemba, because she did not have an identity card, hence it was devolved to Rose Okwemba as trustee. He stated that he was not aware of Kakamega RMC Award Suit No. 4 of 1983.

17. Rehema Naliaka Busasili followed. She was a sister-in-law of the administratrix, having been married to her younger brother. She

testified to have been party to the sale of the land to Thomas Mutongoi, and witnessed the exchange of the sale money. She confirmed that the administratrix had since died. The last witness was Lawrence Kuhanji Madegwa, a sister of the administratrix. He stated that she was married to the deceased, and that they had had one child, Mmasi. He stated that she sold her land to Thomas Mmbwavi. During cross-examination, he stated that the deceased had paid dowry for the administratrix, and at the time of his and her death she was still his wife and widow. He stated that she was buried at their homestead as she had been living with them before she died because Richard Nandi Akubani had become hostile to her, after her child, Mmasi died and was buried on the deceased's land.

18. At the close of the oral hearings, the applicant applied to have the land registrar responsible for Kakamega County come to court to testify on issues relating to Isukha/Shirere/829. The Deputy Land Registrar, Ms. Korir turned up in court on 30th April 2019, but sought adjournment saying she needed to access some documents relating to the said property. She never turned on subsequent dates, that is to say 24th June 2019 and 24th September 2019, which is characteristic of the office of the land registrar, forcing the court to close the matter without her input. It was directed that the parties do file written submissions. That has been done. I have read through the affidavits sworn by the parties, and noted the arguments made in them.

19. What is before me for determination, is what is styled application for revocation of grant. However, it is not clear which grant is sought to be revoked. Whether it is the grant in this cause, Kakamega HCSC No. 144 of 1983, or a grant in another cause. The application is drafted in an incredibly vague manner. There is therefore uncertainty as to which grant is sought to be revoked, if at all. This is what the application says:

> "LET ALL PARTIES CONCERNED attend the Judge in Chambers on this 18th day of March 2015 at 8.00 o'clock ibn the forenoon on the hearing of an application on the part of Elias Moard Mategwa the administrator of the estate of Phelomena Khaluyi Lukale who died on 29th September, 1990 be revoked or annulled or be inclusive on the grounds…"

20. Quite clearly there is no application for revocation of grant before me in the circumstances. However, going through the affidavit of the applicant, it is discernible that he desires to understand how the administratrix herein got to hold office, as he insists the administrator to be the brother of the deceased herein, Richard Nandi Akubania.

21. I am surprised that the applicant raises that question. One would have expected that the applicant would have perused the court file thoroughly before he embarked on the exercise of filing the summons dated 4th December 2014, lest he risked wasting his time and money in the process. If, after perusing the court file, he did not understand the proceedings, he should have sought assistance of staff at the court registry, to interpret them to him, or otherwise instructed an advocate or just sought legal advice from an advocate on the said proceedings.

22. I have recited, in the opening paragraphs of this judgement, the events from the date of the deceased's death up to 5th December 2014, when the applicant lodged his summons dated 4th December 2014 in court. I have done so in order to provide a background to the dispute at hand. The petition that initiated this cause was lodged at the registry by the brother of the deceased, Richard Nandi Akubania, and a grant was duly made to him. He then applied to have his grant confirmed. His application was placed before Aganyanya J., on 14th May 1985. If the applicant had perused the court file, he would have noted that it was from that court appearance that the issue of the administratrix herein, Rose Okwemba alias Judy Khameyi Mategwa, first came up.

23. The minutes of the proceedings that Aganyanya J. recorded, on 14th May 1985, say as follows:

> *"14/5/85*
>
> *In chambers*
>
> *Coram: D.K.S. Aganyanya J*
>
> *Petitioner present*
>
> *Salmo c/c*
>
> *Court: According to Petitioner deceased left a wife and son. This being so, it is important court gets views of these two.*
>
> *Names Rose Okwemba; and Mmasi Okwemba*
>
> *Application stood over to 22nd May 1985*
>
> *D.K.S. Aganyanya J"*

24. There is only one petitioner in this cause, and that is to say Richard Nandi Akubania, who was appointed administrator, by the grant that was made on 3rd October 1983, by JE Gicheru J. What was for hearing before Aganyanya J., on 14th May 1985, was Richard Nandi Akubania's application for confirmation of grant, dated June 1984. The matter proceeded in chambers. According to the record, only three people were present – (a) the Judge, DKS Aganyanya J, (b) the petitioner, the then administrator of the estate, Richard Nandi Akubania and (c) the Judge's assistant or court clerk, Salmo. What the Judge recorded must be what the petitioner must have communicated to him, that the deceased had left a wife and a child. I have noted, from the oral hearing that I conducted that Richard Nandi Akubania pretended that he could not remember the events of that day. It obviously cannot be that Aganyanya J. recorded material from his own mind, and, so far, no one has come forward to say that that record was incorrect. It would only mean that what Aganyanya J recorded on 14th May 1985 was

information that Richard Nandi Akubania gave to him.

25. I believe it would be useful to give some context, for the benefit of the applicant especially, to what Aganyanya J was doing. The \Judge had before him an application for confirmation of grant. Such applications are filed and disposed of in accordance with section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. That application serves two purposes, one, and it confirms administrators and two, it gives orders on distribution of the assets of the estate. for purpose of clarity, section 71 states as follows:

> "*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."*

26. Let us stick to the events of 14th May 1985. A Judge faced with a confirmation application is bound to take into account the provisions of the proviso to section 71(2) of the Act. That proviso ought to be read together with Rule 40(4) of the Probate and Administration Rules. These two provisions are to the effect that before the court considers the confirmation application its merits, that is by doing any of those things that are mentioned in section 71(2)(a)(b)(c)(d) of the Act, it must satisfy itself that all the persons who are beneficially entitled to a share in the estate have been ascertained, and if that has been done, that is if they have been ascertained, that it be satisfied that their shares in the estate have been ascertained. How does the court satisfy itself of that? I am not persuaded that the court can satisfy itself that that has been done by merely looking through the petition, the Chief's letter and the application. It can be misled. The duty that the court be satisfied of that matter would require that the Judge interviews the applicant, that is the administrator or petitioner, on whether he has involved, and listed in the application, all the parties who ought to be privy to the conformation application in the matter.

27. The proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, provide 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."*

28. So when the then administrator, Richard Nandi Akubania, placed his confirmation application before Aganyanya J. for hearing, the Judge was bound to comply with proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, by getting first of all satisfied that Richard Nandi Akubania had ascertained all the persons beneficially entitled to the estate. One detail that must have excited the attention of the court was the fact that Richard Nandi Akubania had listed a child of the deceased as a survivor, yet in the section where he was meant to list the persons beneficially entitled to the estate, he listed himself rather than the child of the deceased. Secondly, in the affidavit in support of the application, Richard Nandi Akubania had not detailed what had happened to the mother of the said child, nor sought to explain why he was proposing to inherit the entire estate while excluding the child of the deceased. No doubt those issues made the Judge have a conversation with Richard Nandi Akubania, leading to the said Richard Nandi Akubania disclosing to the Judge that the deceased had indeed been survived by a wife and a child, and he proceeded to give the names of the wife and child, and that was how Rose Okwemba alias Judy Khameyi Madegwa came into the picture. There was nothing sinister, as suggested by the applicant with what the Judge did, or how Rose Okwemba alias Judy Khameyi Madegwa got into the matter, it is in the law.

29. After those disclosures, Aganyanya J. indicated that the views of the wife and the child be obtained. The application was stood over to 22nd May 1985, ostensibly so that the two, the wife and child, Rose Okwemba and Mmasi Okwemba, are availed to state their position on the application. The record of 22nd May 1985, in the hand of Aganyanya J. , says as follows:

> *"22/5/85*
>
> *In chambers*
>
> *Coram: DKS Aganyanya J*
>
> *Petitioner Nandi – present*
>
> *Deceased wife – Rose Okwemba – present -*
>
> *Samuel Atsyaya – purchaser of portion of the land – present*
>
> *Assistant Chief: Thomas Mutongoi present*
>
> *Deceased son – Mmasi Okwemba – present:*
>
> *Court: After discussing the matter it was discovered the petitioner was only presented by the succession papers for signature otherwise he knew of the deceased wife and son. The wife said she knew only Samuel Atsiaya as purchaser of part of her husband's land but not the rest including the Assistant Chief Thomas Mutongoi who claimed to have purchased part of the land from the deceased. In the ultimate result it was agreed that letters of administration be confirmed in the name of deceased wife Rose Okwemba to hold the land in trust for Mmasi Okwemba who is still a minor. Questions of purchasers of parts of the land by other persons including Atsiaya and Mutongoi to be decided in another forum.*
>
> *DKS Aganyanya J*
>
> *Order: Land Registan requested to confirm issue of grant of letters of administration made on 3rd October 1983 in the name of Rose Okwemba as trustee of Mmasi Okwemba.*
>
> *DKS Aganyanya J*
>
> *22/5"*

30. From those orders of 22nd May 1985, a certificate of confirmation of grant was extracted , for the signature of the Judge, in the following terms:

> *"CONFIRMED GRANT OF LETTERS OF ADMINISTARION ISSUED PURSUANT TO SECTION 71(2) (b) OF THE ACT TO A PEROSN OTHER THAN THE ORIGINAL GRANTEE*
>
> *BE IT KNOWN that on the 3rd October , 1983 letters of Administration intestate of all the estate of JOHN KHAYINGA AKUBANIA deceased late of Uasin Gishu District who died on the 1st November , 1981 at Eldoret which by law devolved to and vests in his personal representative were granted by this court to RICHARD NANDI of P.O Box 83, Kakamega.*
>
> *AND BE IT KNOWN FURTHER that upon the said grant of representation coming before this court for confirmation of grant this 22nd May, 1985 and the court not being satisfied that the said grant should be confirmed the court did direct that a confirmed grant in respect of the estate of the said deceased do issue to ROSE OKWEMBA of P.O Box 83, Kakamega she having undertaken faithfully to administer the same according to law and render a just and true account thereof wherever required by law so to do.*
>
> *Issued by the High Court through the Registry at Kakamega this 22nd day of May, 1985*
>
> *(Signed)*
>
> *JUDGE OF THE HIGH COURT."*

31. I need to summarize the events of 22nd May 1985, since some of the parties are unrepresented. On that day, the administrator/petitioner, Richard Nandi Akubania, showed up in court, in the company of Rose Okwemba and Mmasi Okwemba, the individuals whose names he had given to the court on 14th May 1985, as wife and son, respectively of the deceased. There were also two other individuals, who are listed in the petition as liabilities, in attendance. The record by the Judge indicates that they had discussions, after which the court confirmed Rose Okwemba as administratrix and ordered that the property would devolve upon her to hold in trust for Mmasi Okwemba. The persons who attended court on that day attended upon being invited and brought to court by Richard Nandi Akubania. So he cannot later feign ignorance of what transpired he is the one who brought Rose Okwemba into the picture.

32. Richard Nandi Akubania and the applicant insist that Richard Nandi Akubania is still the administrator of the estate. The events of 22nd May 1985 are very clear that Richard Nandi Akubania ceased to be administrator of the estate from that day because he was removed by Aganyanya J, and replaced with the administratrix, Rose Okwemba. The applicant complains that Rise Okwemba had not filed any objection or protest, ostensibly to facilitate the removal of Richard Nandi Akubania as administrator and his replacement by her. What Aganyanya J did, in that regard, was in keeping with the law, especially section 71(2) of the Law of Succession Act. Let me repeat that at confirmation of grant, the court has two tasks. One, to confirm the administrator. That is does by considering whether the administrator was properly appointed, or whether upon his being so properly appointed went about administration of the estate in keeping with the law, or whether he should be confirmed so that he can go ahead to finalize administration of by way of distributing the estate as per the schedule approved by the court.

33. I have set out the entire section 71 above, but for emphasis let me reproduce the relevant portions of section 71(2)(a)(b) of the Law of Succession Act, which say:

> "*(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…"*

34. These are the provisions that Aganyanya J applied in making the orders that he made on 22nd May 1985. He was not satisfied that the administrator, Richard Nandi Akubania, had been properly appointed as such, for reasons shall address shortly, hereunder. So in exercise of the discretion in those provisions, he chose not to confirm him as administrator, and confirm someone instead. That power, of effectively revoking the grant of the administrator who has brought the confirmation application, and appoint another administrator in his place and confirm on the sport, is in section 71(2)(b), and it is the power that Aganyanya J. exercised. The record is clear, Richard Nandi Akubania, was removed as administrator and substituted with Rose Okwemba, as administratrix. The court did not need any objection or protest to have been filed by her for it to take that action, because it is empowered to do so by section 71(2) (b) of the Act.

35. Why was Aganyanya J not satisfied with Richard Nandi Akubania? It does not come of directly from the ruling that he delivered. But from the language of the ruling and the orders made on 2nd May 1985, the court had not been satisfied with his appointment as administrator and with the mode of distribution of the estate that he had proposed.

36. Firstly, with respect to appointment of administrators in intestacy, for the deceased herein died intestate, section 66 of the Law of Succession Act has given guidelines on who has priority when it comes to appointment of administrators. Going by that provision, priority goes to surviving spouses followed by the children of the deceased, parents of the deceased and siblings of the deceased in that order. Section 66 of the Act needs to be read together with sections 35, 36, 38 and 39 of the Act, in Part V of the Law of Succession Act, which deal with distribution of intestate estates. They say in distribution upon intestacy the estate should devolve upon the surviving spouse and surviving children to the exclusion of all other relatives of the deceased. Where the deceased was survived only by a spouse but no children, then the spouse would take the property, subject to certain limitations. Where survived only by a child or children but no spouse, then the estate devolves upon the children exclusively. Where there were no children and or spouse, then the property devolves upon the parents of the deceased exclusively. Where the surviving parents are dead, then the property would go to the siblings of the deceased, his brothers and sisters.

37. That then meant that Rose Okwemba as a surviving spouse of the deceased, had prior right to administration of the estate over the brother of the deceased, Richard Nandi Akubania. So when it came to light that there was a surviving spouse of the deceased, that Richard Nandi Akubania had not disclosed to the court, his position as administrator became untenable.

38. For the benefit of the applicant and Richard Nandi Akubania I shall set out section 66 of the Act, it says:

> "*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."*

39. Section 66 of the Act should be read together with Rules 7(7) and 26 of the Probate and Administration Rules. These rules address situations where a grant of letters of administration intestate is being sought by a person with a lesser right to administration, such as was the case here with Richard Nandi Akubania, in the sense that he had a lesser right to be appointed administrator of the estate of his deceased

brother since he had been survived by a spouse, Rose Okwemba. Under Rules 7(7) and 26, such persons with a lesser right to administration are required to obtain the consents of the persons with prior right, allowing them to go ahead and apply for representation, or to get such persons with prior right to renounce or waive or surrender their right to be appointed administrators to them, or to get the court to issue citations requiring the persons with prior right to either petition for representation themselves or to renounce their right. Indeed, Rule 26 requires that the consents be given in prescribed form. That would mean that Richard Nandi Akubania should have complied with Rules 7(7) and 26 of the Probate and Administration Rules, since his right to administer the estate of the deceased herein was inferior to that of Rose Okwemba. He did comply with those requirements, which meant that he had not been properly appointed as administrator.

40. Rules 7(7) and 26 of the Probate and Administration Rules say 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. "*
>
> "*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."*

41. The other consideration that must have been prime in the mind of Aganyanya J, must have been section 51 of the Law of Succession Act, which provides for applications for grants of representation. Of particular interest should be section 51(2), which sets out the material that ought to be disclosed in the petition for letters of administration intestate. section 51(2) says:

> "*Application for Grant*
>
> *51. (1) …*
>
> *(2) Every application shall include information as to—*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*
>
> *(h)..."*

42. Section 51(2) (g) requires the person applying for letters of administration intestate to disclose all the surviving spouses and children of the deceased, among others. The provision is in mandatory terms. Richard Nandi Akubania, the petitioner in this cause, in his petition, did not disclose Rose Okwemba, the surviving spouse of the deceased, thereby created an impression to the court that the deceased had not been survived by a spouse or never had a spouse. Therefore, there was no compliance with section 51(2) (g).

43. From all the provisions of the law that I have referred to, it should be clear that the appointment of Richard Nandi Akubania was through a process that did not fully comply with the law. From that one can quite properly conclude that he was not properly appointed. That is what a court seized of a confirmation application is required by section 71(2)(a)(b) of the Law of Succession Act to take into account. Aganyanya J. no doubt took those into when he applied section 71(2) (a) (b) of the Law of Succession Act, and removed Richard Nandi Akubania as administrator and replaced him with the surviving spouse of the deceased, Rose Okwemba.

44. Section 71(2) (a) (b) of the Law of Succession Act is related to section 76 of the same Act, which provides for revocation of grants. For the purposes of this judgment, the relevant provisions are section 76(a) (b) and (c), where the proceedings to obtain a grant were defective in substance, the grant was obtained on the basis of fraud or misrepresentation, or was obtained on the basis of an untrue allegation whether innocently or not. The relevant portions of section 76 state 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 …"*

45. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. In this case the process through which Richard Nandi Akubania obtained his grant was defective. He did not comply with section 51(2) (g) of the Law of Succession Act and Rules 7(7) and 26 of the Probate and Administration Rules. He had no prior right to administration by virtue of section 66 of the Act, and therefore he ought to have complied with the Rules. The process was fraudulent to the extent that he concealed from the court the existence of the surviving spouse, which amounted to misrepresentation, making of false statements and of untrue allegations of fact. Aganyanya J would have been justified to revoke that grant, *suo moto*, of his own motion, were he to invoke section 76 of the Law of Succession Act. Section 71(2) (b) grants the court the court the same power as is in section 76 of the Act.

46. The other thing, of course, is that the proposed distribution was unsatisfactory, which was linked to the non-disclosure of the surviving spouse. The deceased herein died on 1st November 1981, that was after the Law of Succession Act had come into force on 1st July 1981. By virtue of section 2(2) of the Act, his estate was to be distributed in accordance with the Act rather than under customary law. Under the Act, the surviving spouse has prior right, not only to administration, but also when it came to distribution. Her rights to a share of the estate override those of the children. Although, succession or inheritance is intended to be transfer of wealth from one generation to the next, which means that the ultimate destination of the property of the dead person should be to his children, that should not be at the expanse of the surviving widow, hence the surviving spouse's entitlement to a life interest in the property that should go to the children. Richard Nandi Akubania proposed a distribution where the surviving spouse did not feature anywhere. Indeed, he proposed a distribution that would have given him the entire estate, to the total exclusion of the surviving widow and the surviving son of the deceased. That was completely unacceptable for it was contrary to the scheme of distribution, upon intestacy, set out in Part V of the Law of Succession Act. He could not, in the circumstances, be said to have had administered the estate according to the law, neither could he be counted upon to continue to administer the estate with due regard to the law. These are considerations required under section 71(2) (a) (b). Richard Nandi Akubania did not meet them. He could not, therefore, survive as an administrator.

47. I believe what I have said so far is sufficient for the applicant to understand how Rose Okwemba came to be appointed administratrix, displacing Richard Nandi Akubania as such. I believe it also serves to have Richard Nandi Akubania understand why he had to be removed as an administrator. There was nothing sinister, it was law at work.

48. In the forgoing paragraphs I have, at length, discussed what happened or transpired before Aganyanya J in 1985. It is important to point out that Aganyanya J was then sitting as a Judge of the High Court. He was exercising a jurisdiction complementary to mine. I cannot, and should not, be seen to be auditing his exercise of jurisdiction as an appellate court would. I am not looking at those decisions in the fashion of an appellate court, for I am not one. Mine is limited to explaining why Aganyanya J made the decisions and gave the orders that he did, since some of the parties, to the application before me, do not appear to be aware of the events of 1985, and if they are aware, they do not appear to appreciate or comprehend or understand their purport and effect.

49. It has transpired that Rose Okwemba, the administratrix, has since died. That appears to be common ground. Yet none of those who testified stated definitively when she died. It also came out quite clearly that no application has been made for her to be substituted. Two things. Firstly, her death would mean that her grant, which was made on 22nd May 1985, has become useless and in operative since it was only personal to her, and the same ought to be revoked under section 76(e) of the Law of Succession Act. Secondly, the said grant was confirmed, and the estate distributed, apparently while she was still alive. Consequently, there may have been no need to have her substituted as no further administrative action was anticipated that would have required the necessity of an administrator.

50. The applicant and his supports, principally Richard Nandi Akubania, appear to entertain the notion that Rose Okwemba was not a wife or spouse of the deceased. It is on that basis that the applicant would want the grant revoked, for he does not see or understand how she comes into the picture. With respect, the issue as to whether Rose Okwemba, alias Judy Khameyi Madegwa, was a spouse of the deceased is water under the bridge. Richard Nandi Akubania informed Aganyanya J that she was the spouse of the deceased, leading up to the decisions that Aganyanya J made on 14th May 1985 and 22nd May 1985. The decisions or orders of 1985 were critical. An administrator was removed from office or his grant was revoked, a new administrator was appointed and the grant of the new administrator was confirmed on the spot. All that happened principally on the basis that Rose Okwemba was the spouse of the deceased. Richard Nandi Akubania was at the centre of it all, for the information that she was a spouse came from him, he was the one who procured her attendance in court on 22nd My 1985 and he was present in court when those orders were made. If he was uncomfortable with them, he should have challenged them on review before Aganyanya J, or on appeal at the Court of Appeal. He did neither of those things. He cannot now be heard to renounce her, after her death, as a mere girlfriend of the deceased rather than his spouse. I cannot revisit that issue for I have no jurisdiction to.

51. The foundation of the applicant's case appears to be that the instant cause, Kakamega HCSC No. 144 of 1983, is *res judicata*, as against Kakamega RMC Award Suit No. 4 of 1983. *Res judicata* is essentially about a matter having been adjudicated upon by a competent court, and, therefore, not being available for adjudication again before the same or another court. It is, in short, a rule against a matter being heard twice by the same court or different courts. See *Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited* [2017] eKLR and *Keren Buaron vs. Sony Holdings Limited & 2 others* [2017] eKLR.

52. The applicant's case is that the issue of succession to the estate of the deceased had been determined in Kakamega RMC Award Suit No. 4 of 1983, and was therefore not available to adjudication in Kakamega HCSC No. 144 of 1983. What I should determine here is whether the issues that arose in the two causes were similar, and secondly whether the courts or tribunal seized of the two matters were of competent jurisdiction.

53. The instant cause was initiated on the basis that the deceased had died intestate after the Law of Succession Act had come into force. Sections 2(1) (2) of the Law of Succession Act are relevant. Section 2(1) applies the Act to estates of persons dying in Kenya after it came into force on 1st July 1981, subject to exemptions; while section 2(2) states that for those persons who died before the Act came into force, the law and customs that previously applied to estates of such persons shall continue apply, save that the administration of such estates shall be subject to Part VII of the Law of Succession Act. As stated elsewhere, the deceased herein died on 1st November 1981. By then the Law of Succession Act had come into force and his estate therefore was subject to distribution in accordance with that law. There were exemptions, that were made through Legal Notice No. 10 of 23rd June 1981, with respect to property in defined pastoral areas, but Kakamega District was not in the list. That meant that the estate of the deceased was not subject to those exemptions. The language of section 2(1) of the Act is such that no other mode of succession is contemplated, meaning that for any person dying in Kenya, after 1st July 1981, their estates were to be subject to the Law of Succession Act, unless they fell under any of the exemptions given in the Law of Succession Act.

54. Section 79 of the Law of Succession Act contemplates that the property of a dead person can only vest in a personal representative, whether an executor named in a will or an administrator, following the making of a grant of representation. Read together with section 45 of the Act, it would mean that no person should handle estate property unless they have been granted representation to that property. Section 45 makes it an offence to handle such property without a grant of representation. The act of handling such property without a grant is defined as intermeddling. That then makes in critical that representation be obtained, to vest assets in a personal representative, to avoid falling afoul of section 45 of the Act. So it means the only way to deal with the property of a dead person is through the Law of Succession Act. The initiation of the instant proceedings should be seen in that context. The ultimate aim of initiating a succession cause is distribution of the assets, which can only do through an order of the court made under section 71 of the Law of Succession Act.

55. For avoidance of doubt the said provisions state as follows:

> "*45. No intermeddling with property of deceased person*
>
> *(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*
>
> *(2) Any person who contravenes the provisions of this section shall—*
>
> *(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*
>
> *(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."*
>
> "*79. Property of deceased to vest in personal representative*
>
> *The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."*

56. The proceedings in Kakamega RMC Award Suit No. 4 of 1983 were not premised on the Law of Succession Act, but on the Land Disputes Tribunals Act, Cap 303A, Laws of Kenya, now repealed. The said Act established land tribunals all over Kenya. The members of the tribunal were to be elders, eyeing persons who belonged to and were recognized by custom of their communities, by virtue of their age, experience or otherwise, to be competent to resolve issues as between parties. See sections 2 and 4 of the Land Disputes Tribunal Act. By virtue of section 3(7), the tribunals were to adjudicate on the claims, placed before them, in accordance with customary law. The tribunal had jurisdiction, as set out in section 3 (1) of the Act, over:

> "*… all cases of a civil nature involving a dispute as to*
>
> *(a) the division of, or the determination of boundaries to land, involving land held in common;*
>
> *(b) a claim to occupy or work land; or*
>
> *(c) trespass to land…"*

57. Since the proceedings in the two causes were commenced under different statutes, it was not possible that the issue of *res judicata* could arise. The final outcome of the cause under the Law of Succession Act would be the distribution of the property of a dead person; while that under the Land Disputes Tribunals Act would be on division of land or determination of boundaries with respect to land held in common, trespass to land and the right to work or occupy land. Neither of the two tribunals could interchangeably address the issues set out in the two statutes. The jurisdictions expressed in the two statutes were separate and could only lead to separate outcomes or results. So I hold that the issue of *res judicata* does not apply at all with respect to the confirmation of grant in this case. The argument that Kakamega RMC Award Suit No. 4 of 1983 was filed earlier than Kakamega HCSC No. 144 of 1983 is neither here nor there, to the extent that the two tribunals were exercising different and separate jurisdictions, and whatever either of the two tribunals did could not possibly affect the work of the other.

58. I understand the applicant to be arguing that the tribunal in Kakamega RMC Award Suit No. 4 of 1983 correctly shared out the land of a dead person and, therefore, there was jurisdiction. From the language of the award of the tribunal it would appear that that tribunal purported to share out the estate. This is how EM Githinji, SRM, as he then was, for he later became a Judge of the High Court and Court of Appeal, translated the award of the tribunal into a ruling and order of the court. He said, on 22nd February 1983:

> *"The matter was before the elders who found that land parcel No. Isukha/Shirere/829 belonging to John Okwemba be shared between brother of deceased purchaser Patromayo Liwa and son of deceased. The parties agreed so before the elders. The first respondent has no interest in the land. It is only the 2nd respondent purchaser and son of the deceased who had an interest. As the parties are in agreement.*
>
> *Richard Nandi, Philomena Lugale and Mmasi Okwemba are declared the heirs to the land of* the *deceased. The said to be subdivided into three portions and Philomena Lugare be registered owner of a portion she is occupying measuring 35 x 70 yards. The remaining portion to be subdivided between Richard Nandi and Mmasi Okwemba in equal shares."*

59. The cases for handling by the tribuna , under the Land Disputes Tribunals Act, were limited to claims under customary law relating to the issues listed in section 3(1) of the Act. The Land Disputes Tribunals Act did not deal with matters that touched on succession, and, therefore, the tribunals had no jurisdiction to handle any succession matters, or make determinations with respect to inheritance. Indeed, the tribunals had no jurisdiction to deal with questions of ownership of property, whether the tenure was under customary or written law, such jurisdiction only vested in the courts.

60. That position has been stated in an innumerable number of cases, and I shall just cite a few of them. It was stated in *Republic vs. Mwea Land Disputes Tribunal* [2009] eKLR as follows:

> *"… it is now trite law that Land Disputes Tribunal do not have jurisdiction to arbitrate over matters of ownership of registered land."*

61. In *Republic vs. Homa Bay Land Disputes Tribunal & 3 others* [2017] eKLR, it was said:

> *"11. … the Homa Bay Land Disputes Tribunal would not have had the jurisdiction to deal with the dispute as it touched on and affected title to registered land. This was outside the scope of matters that the tribunal had jurisdiction to handle under section 3(1) of the Land Disputes Tribunals Act … The jurisdiction to determine ownership and/or direct the cancelation of a registered title was a jurisdiction that then lay exclusively with the High Court".*

62. There was also the decision in *Republic vs. Ndivisi Division Land Disputes Tribunal comprising of Harriet Sifuma & 2 others exparte Wilson Sarai Wasai* [2009] eKLR , where it was said:

> *"The claim before the Tribunal involves registered land. The copy of the land certificate is annexed to the application as proof of registration. It is only the High Court and the Resident Magistrate court which has jurisdiction to hear matters relating to registered land according to the provisions of section 159 of the Registered Land Act, Cap 300, and the interested party claimed part of the land and was indeed awarded part of it. That claim was not within the jurisdiction of the tribunal, the tribunal therefore acted in excess of its jurisdiction in hearing the said dispute. The decision of the tribunal was adopted by the SRM Webuye as order of the court. Such judgement which is based on null and void proceedings would have no legal force."*

63. The proceedings in Kakamega RMC Award Suit No. 4 of 1983 were initiated after the deceased herein had died. I have not seem the pleadings, nor the proceedings before the tribunal, for what was placed before me, was just the adoption of the award of the tribunal by the court. However, reading through the order by EM Githinji SRM, it is clear that the same was brought by alleged purchasers of portions of estate land from the deceased, seeking to have an order that the portions they had allegedly bought be conveyed to them. The tribunal then made a determination on how the land, Isukha/Shirere/829, was to be shared out between the alleged purchasers, Richard Nandi Akubania and Mmasi Okwemba. That determination was in excess of jurisdiction of the tribunal because the tribunal had no power to handle matters relating to a property of a dead persons. Secondly, the issues revolved around ownership of property. It was a case by persons who claimed to have had bought land. That meant they were asserting rights of ownership as a result of the sale and wanted the portions bought transferred to their names. That, again, was beyond the jurisdiction of the tribunal. In view of the decisions I have cited above, the said determination by the tribunal, as adopted by EM Githinji, SRM, was null and void, and conferred no rights whatsoever to any of the persons who were parties to that dispute. That decision was not enforceable, and it is not worth the piece paper on which it is written.

64. The proceedings that were conducted in Kakamega RMC Award Suit No. 4 of 1983 amounted to intermeddling with the estate of the deceased. By the time the said cause was initiated, the deceased had died, and representation had not been granted to his estate, for the same was granted only once, in the instant cause, Kakamega HCSC No. 144 of 1983, which was commenced after Kakamega RMC Award Suit No. 4 of 1983. So, none of the persons, party to the suit in Kakamega RMC Award Suit No. 4 of 1983, held letters of administration to the estate of the deceased herein. None of them could maintain a suit against the estate or even represent the estate. I have referred to section 79

of the Law of Succession Act here above, and, going by that provision, since no one held a grant over the estate, the assets of the estate did not vest in any of the parties. By virtue of section 82 of the Law of Succession Act, none of them could sue or be sued over the estate. This is what the court said in *Republic vs. Homa Bay Land Disputes Tribunal & 3 others* (supra), where a similar situation arose:

> "*10. The interested party could not properly initiate tribunal proceedings without first obtaining grant of letters of administration authorizing him to represent his late father's estate. Such proceedings if initiated without letters of administration are void ab initio and are of no legal effect. The interested party was under an obligation to obtain a grant of letters of administration to his father's estate and to the extent that he has not demonstrated he had obtained any he lacked the capacity and locus standi to go before the Homa Bay Land Disputes Tribunal purporting to represent the estate of his late father. The proceedings were a nullity.*"

65. Intermeddling is about dealing with property of a dead person without authority. That authority emanates from a grant of representation. I have cited sections 45 and 79 of the Law of Succession Act, hereabove, which are relevant to that and I do not wish to discuss the matter further than to say that the fact that one is a child or brother or spouse of a dead person does not authorise the relative to handle the property of the dead. Such property can only be legally handled by a person who holds a grant of representation. Any persons who handled the same without a grant intermeddled with it, whether he or she is purporting to sell or buy it, to distribute it, to lease it out or hire it, or to use it in any way. See *Gitau and Two Others vs. Wandai and Five Others* (1989) KLR 231. The courts have even held that commencing a suit without first obtaining a grant of representation, not only makes the suit null and void, it also amounts to intermeddling with the estate of the deceased by the person who has commenced the suit. See *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti* (2001) eKLR. Therefore, the proceedings in Kakamega RMC Award Suit No. 4 of 1983 were null and void, in the sense that they were commenced in respect of the property of a dead person, yet representation was yet to be granted to anyone over the estate, and the filing of the dispute itself was an act of intermeddling with the estate of the deceased herein.

66. On the question of the tribunal lacking jurisdiction with respect to registered land, let me start by saying that Isukha/Shirere/829 was indeed registered land. I have seen, on record, a certificate of official search on Isukha/Shirere/829, dated 18th August 1983. It shows that the property was registered under the Registered Land Act, 1963, also referred to as Cap 300, Laws of Kenya, and the registration in favour of the deceased happened on 4th May 1973. The Registered Land Act has been repealed by the coming into force of the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012, which have reproduced the provisions of the repealed Act. These statutes carry elaborate provisions relating to the rights of the owners of registered land, trespass to registered land, occupation of registered land, division of registered land, boundaries of such land and dispute resolution mechanisms relating to such land. When the Land Deputes Tribunals Act was promulgated in 1990, the provisions of the Registered Land Act were not amended to incorporate or entrench the tribunals established under the Land Deputes Tribunals Act, as one of the mechanisms for dispute resolution under the said Act. Consequently, where disputes arose with respect to registered land, such as Isukha/Shirere/829, the Land Deputes Tribunals Act would not apply, instead the applicable law would be the Registered Land Act. That is to say any disputes relating to land registered under the Registered Land Act would be subjected to the dispute resolution mechanisms set out in that Act, which did not include the land disputes tribunal.

67. The Land Deputes Tribunals Act was designed for land held under African customary law tenure, and, therefore, land held under written law, such as the Registered Land Act, could not be subjected to the Land Deputes Tribunals Act. Where it was, wrongfully, so subjected, the results were always disastrous, hence the overwhelming volume of decisions, some of which I have cited above, by the High Court, to the effect that the tribunals had no jurisdiction whatsoever over registered land. The conduct of proceedings in Isukha/Shirere/829 in Kakamega RMC Award Suit No. 4 of 1983 was a wasted effort as the tribunal that handled that matter had no jurisdiction whatsoever to handle any dispute relating to land that was registered under the Registered Land Act. Any party who felt that there was a dispute, of any character, relating to the registered land, should have placed it before either the relevant land registrar or the court, in terms of the mechanisms set out in the Registered Land Act.

68. The parties hereto may wonder why the magistrates, before whom the awards of the tribunals were placed, would entertain the matters if they knew that the tribunals, which had made the awards they were being invited to make an order of the court, did not have the jurisdiction to make the determinations made in those awards and that the awards themselves were worthless. The answer to that would be that under the Land Disputes Tribunal Act, the jurisdiction of the magistrates' courts was severely limited to just adopting the award as framed by the tribunal. There was no jurisdiction in the magistrates' courts to audit the awards to confirm whether or not they conformed to the law, the Land Disputes Tribunals Act. The hands of the magistrates' courts were tied to just adopting the award as an order of the court, the legality or lawfulness of the award notwithstanding. The adoption by the magistrates' courts then paved way for the challenge of the awards at the High Court, either on appeal or by way of judicial review.

69. The applicant dwelt at length on the challenges that he faced at the lands registry, when he sought to have the award, in Kakamega RMC Award Suit No. 4 of 1983, dated 22nd February 1983, and which he got adopted again on 15th July 2013, executed. He complained that when he presented his orders at the lands registry, he discovered that the confirmation orders, made in Kakamega HCSC No. 144 of 1983, had been implemented and Isukha/Shirere/829 had been subdivided and transferred to other persons, the original file closed and other files opened. He invited me to investigate. He wanted the court to audit that process, and it was with that in mind that he was seeking to have the land registrar summoned to court to give evidence on what had transpired.

70. I would like to reiterate the discussion above, and, state here and now, that the process that was lawful, and which should be upheld, is that conducted in Kakamega HCSC No. 144 of 1983. The proceedings in Kakamega RMC Award Suit No. 4 of 1983 were a complete nullity. The process that the lands registry carried out with regard to Isukha/Shirere/829 should be treated as lawful, if it was carried out in implementation of the confirmation orders that had been given by Aganyanya J in 1985. If there were any lapses or failure to comply with the relevant law or rules on transmission of property, I would say that I do not think this court would be the proper forum to raise the matter.

71. The exercise of transferring registration of proprietary rights from a dead person to the beneficiaries named in a certificate of confirmation of grant is called transmission. It is done by the land registrar. It is an exercise under land legislation. It is provided for in the Registered Land Act, Cap 300, Laws of Kenya, now repealed, the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012, but not the Law of Succession Act. If any party wishes to challenge the transmission process, the probate cause would not be the proper forum, for that process is not a probate or succession process, but a land transfer process. Under the Constitution and the land legislation, the High Court has no jurisdiction with respect to land matters, and the parties are better advised to move to the Environment and Land Court for

redress.

72. The transmission provisions in the Registered Land Act, the Land Registration Act and the Land Act are similar. I shall only cite the provisions in the Land Registration Act, since transmission is a registration process, and, of course, since the Registered Land Act has been repealed. The land Registration Act carries the provision at section 61, while the Land Act has it at section 50 and the repealed Registered Land Act at section 119. Section 61 of the Land Registration Act, provides as follows:

> "*Transmission on death of a sole proprietor or proprietor in common.*
>
> *61. (1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of ..... [deceased]" or "as administrator of the estate of ..... [deceased]", as the case may be.*
>
> *(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—*
>
> *(a) any transfer by the personal representative; and*
>
> *(b) any surrender of a lease or discharge of a charge by the personal representative.*
>
> *(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor."*

73. Both the Land Registration Act and the Land Act carry provisions to the effect that the Environment and Land Court is the court for the purposes of any actions, or disputes, or questions that arise with respect to transactions or processes undertaken under the provisions of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

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

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

75. The provisions in the Land Act state as follows:

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

76. My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention which revolve around transmission of land on death, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to "court" mean the Environment and Land Court and, any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter of the transmission of the property from the name of the deceased to that of any claimant.

77. The other relevant provisions are in the Constitution, 2010; which have taken away jurisdiction from the High Court to deal with issues around title and ownership of property or land. The Constitution directed Parliament to establish another court, with equal status to the High Court, to deal with such issues. Those constitutional provisions are in Articles 162 and 165. The relevant portions in those Articles state as follows:

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

78. Parliament complied with the constitutional command in Article 162(2) (3) of the Constitution, in 2011, by passing the Environment and Land Court Act, No. 19 of 2011, which established the Environment and Land Court. The purpose of the said Act is set out in its preamble, where it is said to be:

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

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

> "*13. Jurisdiction of the Court*
>
> *(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*
>
> *(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
>
> *(b) relating to compulsory acquisition of land;*
>
> *(c) relating to land administration and management;*
>
> *(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
>
> *(e) any other dispute relating to environment and land."*

80. The plain effect of all these provisions, in my view, is that the High Court no longer has jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court, and, it specifically has no jurisdiction or power to address itself to any of the disputes that arise over title and ownership of land, and any other dispute relating to land; which are the subject of the exclusive jurisdiction of the Environment and Land Court. The dispute that has been placed before me relates to title to Isukha/Shirere/829. The argument by the person laying a claim to it is that it was bought from the deceased by his predecessor, and that the same ought to be transferred to their name. That claim is resisted by others. The resolution of the dispute, as to who is entitled to that property, and also that relating to transmission of the title of the same property from the name of the deceased to other persons, are matters beyond the jurisdiction of the High Court. They are matters that are subject to Articles 162(2) and 165(5) of the Constitution.

81. Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction, a court cannot purport to exercise power without violating the principles as to rule of law and legality. It was with that in mind that the Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, said:

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

82. The upshot of everything that I have said is that there cannot be any merit in the application dated 4th December 2014, I hereby dismiss the same, with costs. The applicant has a right of appeal to the Court of Appeal, within twenty-eight (28) days.

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