REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 92 OF 1997

IN THE MATTER OF: THE ESTATE OF FRANCIS WAITA MBAKI (DECEASED)

MARY WARUGURU WAITA...APPLICANT

VERSUS

GERTRUDE CHAO WAITA

STEPHEN MBAKI WAITA......ADMINISTRATORS/RESPONDENTS

JUDGMENT

INTRODUCTION

[1] By Summons for Revocation of Grant dated 15th day of July, 2013, the applicant, *MARY WARUGURU WAITA*, who is a daughter of the Deceased herein sued her mother and brother who are co-administrators of the Estate of the Deceased seeking revocation of Grant of Letters of Administration Intestate confirmed on 19th May 2006 by specific orders as follows:

> ***1. That the Grant issued by this Honourable Court on 19th May 2006 be revoked.***
>
> ***2. That Getrude Chao Waita and Stephen Mbaki Waita do provide Accounts of the Estate from the date they were appointed upto the date of their Revocation.***

[2] The Application is based on the grounds set out in the Summons as follows:

> ***"GROUNDS***
>
> *1. That the respondents here failed to proceed diligently with the Administration of the estate.*
>
> *2. That the Respondents have failed to provide Accounts of the estate from the date they were appointed upto now.*
>
> *3. That the Respondents have failed to protect the estate and have colluded with third parties to defraud the Estate.*

4. That the Respondents have failed and or neglected to collect income due to the estate.

5. That the Confirmation of the Grant was obtained through fraud.

*6. That the Respondents have failed to comply with the Law of Succession Act.***"**

[3] The application is supported by affidavit of the applicant MARY WARUGURU WAITA, in material particulars, as follows:

*"**AFFIDAVIT IN SUPPORT OF SUMMONS FOR REVOCATION OR ANNULMENT OF GRANT (RULE 44 (2)***

1. I, MARY WARUGURU WAITA also known as MARYAM KHERI SINDI a resident of 697 upper Wentworth street, Hamilton, Ontario, Canada, aged over 18 years make oath and say as follows;

2. The above named FRANCIS WAITA MBAKI died on 12th April 1996 and Letters of Administration intestate of the said FRANCIS WAITA MBAKI was made to GETRUDE CHAO WAITA and STEPHEN MBAKI WAITA by this Honourable court on the 6th April, 1998.

3. That the said grant was confirmed by the court on 19th May 2006. The confirmation of the said grant was obtained by the Administrators fraudulently. The said administrators namely GETRUDE CHAO WAITA and STEPHEN MBAKI WAITA swore a false affidavit on 4th May 2006 alleging that all the beneficiaries of the above estate including myself had agreed on the distribution of the property of the estate and annexed to the said affidavit an affidavit allegedly sworn by the beneficiaries at Mombasa on 4th May, 2006 before a Commissioner for Oaths. I annex hereto a copy of the said affidavit and mark 'MWW 1'.

4. That I did not sign the alleged affidavit on 4th May 2006 or at all. In fact I was not in Kenya in the entire year 2006 and could not have sworn the said affidavit as alleged. The signature on the affidavit is not my signature. It is a forgery and I never appeared before the commissioner for Oaths alleged to have witnessed the said affidavit.

5. The said grant was confirmed on 19th May 2006 but has to date remained un-administered save that the administrators have sold Plot Number KIINE/GACHARO/1030 for a price of Kshs. 1,650,000/= by an agreement dated 16th November 2005. The said administrators have failed to produce to the court any inventory or Account of the administration from the 6th April 1998 when the grant was made to them and neither have they explained to me how the sum of kshs. 1,650,000/= received by them on the sale of the aforesaid plot has been applied.

6. That the said administrators have deliberately omitted to include the following property of the estate of the Deceased in the inventory of the assets of the Deceased:-

a. 2 houses without land constructed on Plot No. 25192/VI/M.N

- *Magongo (MAGONGO DAY AND NIGHT – Rental House)*

b. 2 houses without land constructed on Plot No. 2463/VI/M.N.

  - *Bitikani (Rental) one has a School-Residential*

c. 1 house without land constructed on Plot No. 2398/VI/M.N.

  - *Changamwe Rented*
  - *Sagana 4A – Magongo Bar*

- *4B – Hardware.*

d. Nyali house kshs. 3,500,000/= rental

7. That the said Administrators have now proceeded to subdivide the property known as KIINE/GACHARO/396 which I was supposed to be given in accordance with the Respondents' Affidavit in support of the confirmation of grant (Annexed hereto is a copies of searches marked MWW2).

8. That the said Administrators have failed to include the following properties of the Deceased in the Inventory of the Assets of the Deceased:-

> *a. House on Plot No. 3902/I/M.N Nyali Mombasa.*
>
> *b. Two Houses at Magongo Plot No.2519/VI/M.N Magongo Day and Night Club and another being a rental House.*
>
> *c. Two Houses without land on Plot No. 2463/VI/M.N Birikani Changamwe, one rented out as a school and the other is rented out to residential tenants.*
>
> *d. House without on Plot No. 2390/VI/M.N, rented out.*
>
> *e. Property known as SAGANA 4A on which stands MAGONGO BAR.*
>
> *f. Property known as SAGANA 4B operated as a Hardware store.*
>
> *g. Rental income from plot No. 1027/VI/M.M Appollo Bar*
>
> *h. Rental income from the property known as plot No. 3902/1/M.N Nyali Mombasa.*
>
> *i. Utange Plot (Registration No. not known).*

9. That the Respondents have made several Agreements with Tenants over rental of the Properties of the Estate which income has not been disclosed to the Estate. ***(Annexed hereto are copies of the Agreements marked MWW3).***

10. That the House on Plot No. 3902/II/M.N. Nyali was registered in the name of GETRUDE CHAO WAITA who without any reference to the Estate sold the same to M/S ROSKY TRADERS LIMITED for Ksh. 8,000,000/=.

(Annexed hereto is a copy of the Agreement of Sale marked MWW4).

11. That prior to the sale of the House to Rosky Traders Limited, the said House was being occupied by a Director of the said Company, One PETER KINYUAMUCHENDU, who had rent arrears amounting to more than Ksh.3,000,000/=. The said rent was never recovered from the said PETER KINYUA MUCHENDU.

12. That the Respondents have failed in their duties as Administrators of the Estate and have shown open hostility to the Applicant, by refusing her information on the Administration of the Estate.

13. That the Respondents have failed to diligently administer the Estate and distribute the same to the beneficiaries many of whom have now died.

14. That the Respondents have to provide Accounts of the Estate from the time the Deceased died upto date.

15. That the Grant of Letters of Administration ought to be revoked and the Estate referred to the Public Trustee for final administration and distribution."

Directions for viva voce evidence

[4] The Court (Odero, J.) on 11th December 2013 in the presence of Counsel for the applicant and for the respondents gave directions for the hearing of the Summons for Revocation of Grant on the basis of ***viva voce*** evidence and for the parties filed and exchange witness statements ahead of the shearing when the witnesses gave oral testimony before the Court. Except the applicant who had filed the supporting affidavit the other witnesses filed statements ahead of the hearing.

Evidence of the parties

[5] The Applicant testified before the Court as PW1 and called one witness, Agnes Wamaitha (PW2) who claimed to be a co-widow of George Mukima Waita, late son of the Deceased herein. The Respondents testified respectively as RW1 and RW2 and called the deceased's daughter Lucy Msigo Waita RW3 in support of the defence case, and the Interested Party's director one Peter Kinyua testified for the Interested Party. The applicant relied on the affidavit in support of the Summons sworn by the applicant on 29th July 2013 and the annextures thereto.

[6] The respondents and Interested Party filed two supplementary Lists of Documents dated 16th July 2015 and 18th August 2015, whose documents were produced before the Court in originals and subsequently returned to the witnesses by Consent of the parties on 28th August 2015 the documents in the Respondents list of Documents dated 16th July 2015 were marked Respondent Exhibit Nos. 1-11 and after their testimonies the witnesses retained the originals and copies thereof retained by the Court as exhibits.

[7] The substance of the testimony of the respective witnesses in the proceedings may briefly be stated as follows:

PW1 Mary Waruguru Waita

The applicant Mary Waruguru Waita testified that she was the 2nd child of the deceased Francis Waita Mbaki who died on 12th April 1996 and that upon marriage she had become Mariam Kheri Sindi and was a resident of Ontario, Canada at 697 Wentworth Street, Hamilton, Ontario. She confirmed that she had sworn the affidavit dated 29th July 2013 in support of the application for revocation of grant which she adopted as her evidence before the Court. She said the 1st and 2nd respondent were respectively her mother and brother who had after the death of her father been appointed by her siblings to represent them as administrators. She listed the rest of the children of the deceased as George Waita (deceased); Esther Waita (deceased); Stephen Mbaki Waita; Jane Wandia Waita (Deceased) Gravce Njeri Waita (deceased); Lucy Musigo Waita; and Allan Waita (predeceasing the Deceased in 1994). Her principal complaints were that the administrators had in their affidavit in support of the application for confirmation of grant falsely indicated that she had consented to the proposed distribution of the estate and that the signature against her name on the alleged agreement for such distribution was not hers; and further that the confirmed grant included two grand children of the Deceased, Adam and Gertrude who were given property in Sagana. She also complained that the 2nd respondent had sold to third parties a property Kiine/Gacharo/396 which according to the confirmed grant had been given to her together with the 1st respondent

She said she had received her share of the estate property since confirmation of grant in 2006. She said that Kiine/Gacharo/1030 was sold by the administrators without accounting for the proceeds of sale at Ksh.1,650,000/-.

She testified that there were certain properties excluded from the list of the estate property as was

rent and goodwill of Ksh.500,000/- upon lease of Appollo Bar property on Plot No. 1027/VI/MN Port Reitz Hola received in 1999 but not accounted for by the administrators and the sale of house on plot No. 3209/I/MN to the Interested Party for Ksh.8,000,000/- in 2007.

On cross-examination by Counsel for the respondent and Interested Party PW1 accepted that she was a Canadian citizen with duo citizenship and she lived and worked in Canada and only able to came to Kenya during leave of between 5-7 weeks annually. It was clear that she did not enjoy good relations with her mother and other relatives stating that she had before the hearing in February 2015 last seen her mother in court during a court case before Tuiyott, J. in April 2013.

She said that after the death of the deceased in 1996 the family held a meeting when a list of estate properties was done but this was before official searches on the properties was done. She confirmed from a copy of Green card on property Kiine/Gacharo/396 that it was registered in the name of the 2nd respondent and not the Deceased herein.

She confirmed that before the administrators' affidavit of 4th May 2006 in which they indicate that "the beneficiaries have now agreed on the distribution of the property forming the Estate", she had been in Kenya for a meeting of the family at her sister Jane's house in Khamisi where they had discussed the distribution with the said Jane (now deceased) taking the minutes. She however, denied that the distribution schedule attached to the affidavit in support of the application for confirmation was what was agreed.

She also confirmed that after the meeting she "left Grace as my representative in the implementation of the agreement" and that Jane had sent her the document showing the distribution which indicated there was something wrong as it was different from what had been agreed.

She claimed that the meeting had agreed that she would get the Nyali house property LR 3209/I/MN after sorting out the problem with the property and paying my mother" and that she had filed the application for revocation of grant after judgment in a suit HCCC 361 of 2013 on 21st February 2013, in which Tuiyott, J. gave the house to the Interested Party. She testified that she is the one who had followed up on the title until it was issued in 2006 in the name of her mother the 1st respondent claiming that she wanted the mother, as administrator, to be registered as the proprietor but she could not explain why it was registered in the name of only one administrator. She also could not explain when she bought the house from her mother or why she would buy a house which already belonged to her according to her alleged distribution.

She could not give any details about the number and location of the Utange plot and Changamwe house which she alleged had been left out of the list of assets or demonstrate that it had been sold by the administrators.

She confirmed that she gave her consent to the sale by the administrators of the property Kiine/Gacharo/1030, which was done after the grant had been confirmed.

She said that having seen the title deed to the property Kiine/Gacharo/396 registered in the name of Stephen Mbaki Waita she could not complain about the particular property.

She denied that while on a visit to herein Canada in 2007, her mother had asked for the title deed to the Nyali house and offered to give her the house at Mskiti Noor; and that her husband had tried to get her to sign transfer documents for the property.

While confirming that her mother, the 1st respondent herein, was illiterate, she asserted that her brother Stephem Mbaki Waita had forged her signature on the affidavit in support of the application for confirmation of grant. She conceded that she had placed caveats on the estate properties and they had not been removed.

On reexamination, the applicant asserted that the property Kiine/Gacharo/396 had been shown as estate property on the Petition for grant for Letters of administration; that she had not been given her share to the estate property; that the bar businesses of Appollo Bar and Magongo bar were operated by the deceased and it was unclear how the two went to her brother Stephen and sister Lucy; that no record of rental income had been given by the administrators; that the Nyali property was built by the deceased but registered in the name of her mother 1st respondent because the deceased had died. She summarized her complaint in the application for revocation as one of objection to the confirmed grant and for accounts for the administration of the estate.

PW2 Agnes Wamaitha

In supporting the application for revocation of grant, consistently with her statement of 22nd April 2015, testified that she was a co-wife, and together with Edith Waita a co-administratrixes (under P&A 76 of 2012) to the estate of George Waita son of the Deceased herein and that the administrators had filed a suit in Mombasa HCCC Land Case No. 84 of 2013 seeking to recover property plot No. 627/VI/MN which was registered in the name of George Waita. She alleged that the 1st Administrator Gertrude Chao had secured registration in her name, and subsequently sold, a property plot No. 3209/I/MN, which was also the deceased's property and, consequently, should also revert to the Estate for distribution to the beneficiaries. She testified that despite confirmation of grant, the late George and his administratrixes upon his death had not been given their share of the Estate. She said that, according to the distribution, George was supposed to get one plot commercial building known as Sagana 4A but she had not been given the property. She conceded, however, that she was getting a rental of Ksh.7000/- on a property LR 2398/VI registered in the name of Stephen Mabaki Waita. She confirmed that she had obtained letters of administration to the estate of George jointly with his statutory wife Edith and subsequently transfer into their names of property at Changamwe plot No. 627/VI/MN which had been registered in the name of their deceased husband as a gift by the Deceased but the same had not been given to them by the administrators.

RW1 Gertrude Chao Waita

Following on her Statement of 18th February 2015, the 1st respondent **Getrude Chao Waita** testified that she was 81 years old, a widow and one of the administrators of her deceased husband's estate. She said she had eight children with the deceased of whom only three were living - the applicant, the 2nd respondent and Lucy Msigo Waita - having lost one child before and four of her (4) children after the death of the deceased, and consequently, being compelled to provide for their children, and her grandchildren.

She said the applicant by her application for revocation of grant only wanted to get the Nyali House but she had already given her a house at Mskiti Noor and a parcel of land at Kwale. She said that the Nyali house was built for her by her deceased husband and that the applicant had together with her late son George, helped her to obtain a titled deed for the property.

On the allegations of failure to distribute the estate, she said that some properties such as Appollo bar, Magongo day and Night Club and guest house as well as the Drive-in house had no title deeds and could, therefore, not be distributed; Mskiti Noor house was the family home where all her children were born and brought up, and the same was bought by the deceased in the name of their late son George Mwakima when he was still a child; and that she had not refused to distribute and collect rent from the Sagana shopping centre building 4A and 4B which she said was built by the Deceased but that she lived with her grandchildren on part thereof and had rented the other part and used the proceeds for her maintenance and that of her said grandchildren including education to university level. She said her deceased children had left children as follows: Esther 8 children, Allen 3 children and Jane 2 children, with Grace dying without leaving a child. She said the portion of land where the deceased and other family members have been buried is registered in the name of the 2nd respondent and it not available for distribution. With regard to titled property

registered in the name of the Deceased, such as the Sagana shambas, Mutithi land and the Kwale shambas, the witness said that the applicant had cautioned the property so that no dealings could be had with the property. The witness confirmed that she sold the Nyali house property to Kinyua for the Interested Party. She said that the quick succession of deaths in the family had also affected administration of the estate and cost the estate in the funeral arrangements and maintenance of the orphaned children. She said that she used the rental income to pay for school fees and maintenance for the children and nothing remained for distributing to the beneficiaries. She pointed out she also had three great grand children living with her. Saying that the remaining members of the deceased's family were only 4 – herself, Stephen, Lucy and Mary, the applicant herein who is resident in Canada, the witness asserted that the two administrators were still able to distribute the estate so long as the cautions placed by the applicant on the properties were removed. She said that the applicant had not sought any meeting with the administrators to resolve the dispute, and pinpointed the cause of their disagreement as the Nyali house which the applicant wanted for herself.

On cross-examination, she reiterated that their failure to distribute the estate for the 19 years since confirmation in 2006 was on account of cautions placed by the applicant on the properties. She also conceded that the deceased had owned and operated the bar businesses of Appollo Bar and Magongo bar and subsequently taken over by Stephen. She however asserted that one of the houses was bought by the deceased for the 2nd respondent after University so that he could use the proceeds to educate his children. She also admitted that she had been paid as shown in supporting affidavit MMW3 good-will of Ksh.500,000/- for Apollo Bar and that she had nothing to show that Appollo Bar was given to Stephen.

She also confirmed that the Mskiti Noor house had been given to George by the deceased and registered in the name of George in 1967 when he was only 17 years and that the deceased had not at the time of his death sought to be aid anything by George. She accepted that although the Khamis house had been occupied by Jane's child, the same had not been distributed. As regards the Nyali house she admitted that the title was obtained in 2003 but the house was built before that and Kinyua the person claimed to have bought it was a tenant before 2003. She also said that the deceased had bought the land from its original allottee Bedan Njoroge, and that the deceased had built the house for her and that the family had agreed at a meeting that the house be registered in her name and that after registration the applicant had taken the title with her to Canada.

On reexamination, she said that her efforts and those of her co-administrator and daughter Lucy in the course of this hearing to reconcile with the applicant when they offered her the Mskiti Noor house (which was not subject of the court case with administrators of the estate of George) and the Kwale plots were not successful as the applicant declined. She said that the property at Mskiti Noor claimed by the family of George was bought by the deceased in George's name but George and his family had never occupied it but it was her matrimonial home where she had lived with her deceased husband. She said she could not recall any property belonging to the deceased which had not been included in the petition. She said that the applicant had cautioned all properties except the property where she lived at the family home at Gacharo, Sagana. She said she had instructed an advocate to pursue the Mskiti Noor house which was registered in the name of George from the administrators of his estate. She confirmed that she had no claim against Kinyua (read the Interested Party) with regard to the Nyali house.

RW2 Stephen Mbaki Waita

The 2nd respondent had filed a Statement of 23rd June 2015 and he testified in Court that as his mother did not know how to write he was the administrator who documented any matters in their administration of the estate. He confirmed that the family had suffered a death crisis where many family members had died between 1996-2010, the family incurring great cost in hospital and funeral expenses. He explained that the administrator had started transferring the properties before encountering problems in that the estate of the deceased was made up of properties some which had certificates of titles and others without titles as follows:

1. Kwale – three properties plots 347, 135 and 149 Kwale Kidimu and Sagana Parcels of Land plots Nos. Kiine/Gacharo/736; Kiine/ Gacharo/1149, 1148, 1273.

2. Houses without land such as Magongo day and Night club and Drive-in house in Mombasa and in Sagana, the Sagana 4A and 4B plots.

He testified that he had inherited plot Kiine/Gacharo/396 from his grandfather who registered proprietor as at 19th May 1960. He stated that the land belonged to him and never to his father and the Grant should not have included the property. He however said that he had subdivided the property to his brother Allen's children. He said that the applicant had in 1996 after the death of the deceased put restrictions until the succession is finalized on the Kwale plots Kwale/Kidimu/135 and 149 registered in the name of the deceased and on plot 347 which was registered in the names of the deceased and a third party, Jans Gacheru. Property Mwea/Mutithi scheme had also been cautioned by the applicant. As regards the family home at Kiine/Gacharo/736, where the deceased and his sisters were buried, he said it belonged to the deceased but the administrators had transferred the property to him.

He said the Mskiti Noor house was the matrimonial home where his mother had lived with the Deceased but was registered in his brother George's name, and that consequently given instructions to their advocate Ms. Wangeci Munene, Advocate of Kerugoya to file for revocation of the Grant obtained by Agnes, the PW2, in George's estate P & A 72 of 2012. He explained that from 1996 to 2013 when judgment was given in the Nyali house case, the administrators could not deal with the assets as they were cautioned. They had tried to call the applicant several times but she had refused to meet them pointing out that the applicant had not visited their Sagana home for 10 years. He said that Appollo Bar never belonged to the Deceased at any time and that the Deceased had bought the superstructure for him from its previous owner Peter Odhiambo Justo and that he then entered into a Ground tenancy agreement with the owners of the land. He said that his father bought the property for him in consideration for his working for him shortly after he joined him in business after working in a bank for one year following graduation from the university. He explained that that is why the property was not included in the petition and that the property being earmarked vide Gazette Notice No. 1642 of 2015 with demolition for purposes of construction of Mombasa airport road, he had put a claim as an affected person with the Ministry of Lands (Ex.8). He said that the Magongo bar and the Mskiti Noor house were also affected by the road expansion.

He considered the applicant's case as baseless because apart from the cautions on the registered property, and the successive deaths in the family, the administrators had not obtained title deeds for the properties which do not have titles. He also cited his own ill-health the nature of which affected his reaction time and therefore his capacity, and required that he be admitted into hospital on and off for four consecutive years between 2010 and 2013, the same time when his mother was litigating the claims by the Interested Party to the Nyali house.

He denied any forgery to an agreement for distribution of the estate referred to in the respondents joint affidavit sworn on 4th May 2006 in support of the application for confirmation of grant, explaining that the exhibit was signed by his sister Grace Njeri Waita with the permission of Mary the applicant. He said the applicant had given her permission to Grace before all the other beneficiaries because she would be away. He also said that his sister Esther's place on the agreement was signed by her child as she was then deceased.

On cross-examination, the 2nd respondent accepted that he had inherited plot Kiine/Gacharo/396 from his grandfather but he had not filed succession proceedings for that purpose but he had obtained registration as owner thereof on 24th October 1981 by a letter dated 21/10/1981 seeking to correct the name of the registered proprietor indicating that Mbaki Waita was also known as Stephen Mbaki Waita. He conceded that rental income was not included in the petition but that the rent on the estate property was collected by the 1st respondent for paying expenses. He said that Allen who died before the deceased at 35 had a parcel of land plot No. 1142 purchased for him by

the deceased. He said that he had left the Appollo bar to his sister Lucy to run while he went to stay at Sagana. He said that the deceased had a commercial house at Bahati but had not details as to its rental income which he said was dealt with by the mother. He said that Port Reitz Appollo bar had been given by his deceased father to his sister Jane to run and with instructions that if she was not able to run it, she should return it to Stephen but that she had leased it to another person at Ksh.30,000/- per month for five years. He said that Magongo Day and Night Club had not been included in the petition because it had no title and the administrators wanted to get the titles first and then put the properties in the estate. He said at the distribution the Club was allocated to him and that before 2015 when he started operating it, the Club had been leased out at Ksh.25,000/- per month which was being received by the mother. He said that Appollo Bar building was bought for him by his father in 1995 and that his father had operated the bar prior to that, and the deceased left the business for him in 1995 before he died in 1996, and the same was the case with Magongo bar, which he operated until his death. He said that plot 627/VI/MN registered in the name of George was bought by his deceased father and his mother wished to get it back into the estate and that his mother was collecting a rental of Ksh.30,000/-. He confirmed that the Nyali house property was built by his father for his mother and that the Interested Party had in Mombasa High Court Civil case NO. 72 of 2003 sued the administrators for the house and they had counter-claimed for rent of Ksh.30,000/- per month. He confirmed that his mother had received the goodwill of ksh.500,000/- shown in exhibit No. MWW3 in the applicant's affidavit in support of the application of revocation.

On re-examination, the witness reiterated that Appollo bar, Plot Kiine/Gacharo/396 were not part of the estate of the deceased; that plot 627/VI/MN though registered in the name of his deceased brother George was the matrimonial home for his parents, where he and other children were raised and it was occupied by the 1st respondents orphaned grand and great grand children; that the family had agreed that all rental income should go the 1st respondent to support her dependent 17 grandchildren and 12 great grandchildren; that following the dismissal of the Interested Party's case on the ground that the Nyali house belonged to his mother and not the estate, the interested Party sued the 1st respondent and got Judgment in Mombasa HCCC 361 of 2010, which had not been set aside as appeals there from had been struck out; that the applicant herein Mary who was a defendant in the said suit had claimed a purchaser's interest as having purchased the house from his mother; that the applicant had cautioned the registered properties of the estate making distribution impossible; and that the applicant in cautioning the property and her refusal to meet the administrators to discuss the matter was the greatest obstacle to the distribution of the estate.

RW3 Lucy Msigo Waita, one of the three living children of the deceased filed a statement dated 11th December 2013 and testified she was aware her parents had sold the Nyali property to Peter Kinyua Muchendu as she was the one who was given the money to keep by her father, which they said they had received from Kinyua. She said that they had family meetings where Mary the applicant was represented by their sister Grace. Mary who was a Canadian citizen had not come and she had informed the rest of the family that she would be represented by Grace. She confirmed that the administration of he estate had been affected by the series of deaths in the family and that Mary the applicant herein had come to court for revocation of the grant in July 2013, when after the Court decision in February 2013, she was unable to get the Nyali house. She said that Mary had declined the assets distributed to her at the family meeting and considered that if she does not get the Nyali house, nobody should get anything. She confirmed on cross-examination that following the meeting for distribution of the estate all beneficiaries signed except Mary who was not present at the meeting: that although she had been allocated Kiine/Gacharo/1273 she had been put in possession. She asserted that the Nyali house was sold by her father and mother and she was given the money to keep but on reexamination was unable to say who between the father or mother was selling the property to Kinyua. She said because she was residing at Mombasa, she would receive ksh.30,000/- rent on some part of property 627/VI/MN and take it to her mother at Sagana.

IPW1 Peter Kinyua Muchendu, Director of Rosky Co. Ltd filed witness statement dated 11th December 2013 and testified on behalf of the Interested Party related events that led to his purchasing the Nyali house LR 3209/I/MN. He said that he had bought the property from the

deceased who was his friend and with whom he hailed from the same area in Kirinyaga. He said when discussing the sale, the deceased was with his wife the 1st respondent and at this time the property had no title and it was on bais of mutual trust and understanding. After the death of the deceased in 1996, the property having no title, he sued the administrators of the deceased's estate to give effect to the sale. He lost the case Mombasa HCCC No. 72 of 2003 on the basis that the property was then registered in the name of the deceased's widow, the 1st respondent herein. It was then agreed that the witness stays in the house for one year and then vacates but before that happened the 1st respondent and her sons George and Stephen with advocate Moses Mwakisha being an intermediary they offered to sell the property as Ksh.8,000,000/- which he fully paid to the 1st respondent. On completion, he was unable to register the transfer because the tile had a caveat which had been placed by the applicant herein Mary Waruguru Waita claiming a purchaser's interest on the said property. Consequently, he sued in Mombasa HCCC 361 of 2010 in the name of the Interested Party seeking to remove the caveats by the applicant. He got judgment in his favour and the property was vested in his company and the caveat was removed. The judgment was appealed by the applicant to the Court of Appeal at Malindi but the appeal was struck out. The witness considered that the application for revocation of Grant herein having been filed after the judgment of the Court and striking out of the appeal was a secondary attack on the judgment of the Court (Tuiyott, J.) in HCCC 361 of 2010, ***Rosky traders Compnay Limited v. Gertrude Chao Waita, Mary Waruguru Waita and the Registrar, Coast Registry,*** in which he had sued the 1st respondent as the registered proprietor rather than an administrator of the deceased's estate, and the applicant herein as person who had placed a caveat on the property together with the Registrar of Lands. On cross-examination he said that before the first sale he had been a tenant on the Nyali house at Ksh.25,000/-. He said at the meeting of 18th November, 1995 the 1st respondent was present but as she could not write it was the deceased who signed the agreement and he used to pay the money at the family house at Magongo, Mombasa. He confirmed that he had been distrained for arrears of rent in the sum of Ksh. 2.5 million after the deceased died by the 1st respondent who then had title to the land. His application for Injunction in HCCC No. 72 of 2003 was dismissed by Sergon, J. on the ground that the Property did not belong to Waita. He requested for 1 year to vacate the property but before expiry of the time he was approached to make peace and pay Ksh.8,000,000/- all inclusive which he said was distributed to cover for the rent before the deceased died and he did not have to pay any rent separately. When re-examined by his Counsel, he said that the issues as to whether he purchased the house in July 2007 and the rent arrears raised by the applicant had been before the High Court and determined in HCCC No. 361 of 2010. He said he had bought the property for 5million under the first agreement and Ksh.8.000,000/- under the second agreement making a total of 13 Million and whatever arrears there had been were compromised in the purchase price, and that it was agreed that the widow would keep the money that he had paid as rent and the initial purchase price. He read mischief in the applicant obtaining title for the property in the name of the 1st respondent to defeat his suit in Mombasa HCCC No. 72 of 2003 where he had sued the administrators of the deceased's estate. He asserted that the applicant sought to defeat justice as she had in the previous suit claimed in her defence that she had bought the property at Ksh.2,000,000/- and had now changed her position to claim that the property was part of the deceased's estate for distribution. He said the Interested Party was a family company with his wife as a co-director and the the property had been his home since 1994.

SUBMISSIONS BY THE PARTIES

[8] For the Applicant, Mr. Khatib urged the Court to revoke the grant of Letters of Administration confirmed on 15th June 2006 relying on the grounds set out in the Summons and the applicant's **Submissions dated 15th June 2016,** which he highlighted five main grounds of failure to diligently proceed with due administration of the estate to distribution among the beneficiaries despite confirmation of grant; fraudulent dealing with estate property and collusion with others to deprive the estate; failure to get in and collect estate property; failure to render accounts in accordance with the law; and general failure to comply with provisions of the law of succession relating to administration and distribution of the estates.

[9] Counsel contended that the administrators had failed to distribute the estate to the beneficiaries despite confirmation of grant on 19th May 2006, while selling some of the estate property to third parties, neglecting to recover rental income from named estate assets, failing to account for the dealings with estate property in accordance with the law. Specifically, it was pointed out that although the administrators received rental income, they had failed to account for the same. It was contended that there was no proof on the part of the respondents that properties allegedly given by the deceased to some beneficiaries were indeed so given as to exclude them from being part of the estate, and the alleged transmission of property ***L.R. Kiine/Gacharo/396*** said to belong to the deceased's father (2nd Administrator's grandfather) to the second administrator was not done in accordance with the law.

[10] The Respondents and the Interested Party filed joint written submissions dated 5th July 2016 - by Stephen Macharia Kimani Advocate for the Intersted party and M/s Madzayo Mrima & Jadi Advocates for the respondents - emphasizing four issues that the applicant could not complain of lack of account and failure to distribute the estate when she had placed cautions/caveat on the estate lands; that the applicant's claim on the Nyali House Plot LR No. 3902/MN was *res judicata* by virtue of the Judgment of the High Court in Mombasa HCCC No. 361 of 2010, which decreed the property to the Interested Party; that the applicant had not proved her case on fraudulent dealing against the respondents; and that there were no other unsuitable persons for appointment as administrators of the estate, less so the applicant who had permanent residency abroad and who would benefit from her own wrong-doing in caveating the land assets of the Estate.

[11] Counsel explained the failure to complete administration of the estate on the twin grounds of caveat by the applicant and the fateful occurrences of multiple successive deaths in the family resulting in huge expenditure in funeral costs and maintenance of the children of the estate beneficiaries as well as the ill-health of the two respondents and the advancing age of the 1st respondent. Moreover, it was specifically offered as answer to the demand for account that the income to the Estate was used by the 1st respondent widow pursuant to her legal right to a life interest under section 35 of the Law of Succession Act for which she was not liable to account under the law.

[12] Citing the high degree of proof in fraud case, it was contended that the applicant had not made out her case as to fraud with respect to the allegation that she never gave her consent to the distribution of the estate and that her signature on an agreement for that purpose had been forged.

ISSUES FOR DETERMINATION

[13] Upon hearing the evidence and submissions of the parties, the Court considers that the Summons for Revocation of Grant herein raised five broad issues as follows:

1. Whether certain named properties were part of the estate of the deceased Francis Waita Mbaki which the Administrators were liable to **get in** as free property of the Deceased in terms of section 83 (b) of the Law of Succession Act.

2. Whether the respondent Administrators had without justification failed to administer Estate as to warrant revocation of the Grant pursuant to section 76 of the Law of Succession Act.

3. Whether the respondents were liable, and had unlawfully failed, to render accounts of the administration of the Estate.

4. Whether the applicant who had placed caveats on the titles of the Estate property could be heard to complain of the failure to administer and distribute the estate properties.

5. Whether the respondents were guilty of fraudulent dealing with the estate of the Deceased to warrant revocation of the Grant.

[14] There was no premium in a determination whether the document allegedly used to support the

confirmation of grant was an affidavit or other memorandum of agreement or understanding. The significance of the document is that it purported to record an agreement reached between the beneficiaries of the estate as to the distribution of the Estate. If forgery is proved, whether the document is an affidavit or other memorandum of agreement is immaterial for the impact and consequences of the criminal act of forgery would apply equally on either.

[15] The Court does not consider the competency of the 2nd witness, alleged co-widow of George, the Deceased's late son, to inherit or to administer his estate, that being a matter for trial in the separate succession proceedings, P&A No. 72 of 2012 ***Re: Estate of George Mwakima Waita.***

DETERMINATION

Grounds for revocation of Grant

[16] Section 76 of the Law of Succession Act provides for revocation of Grant 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."*

[17] From the grounds of the application set out at the beginning of the judgment, the applicant relies on grounds (b), (c) and (d) of section 76 as follows:

> *s. 76 (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.

Existence of continuing trusts

[18] Section 41 of the Law of Succession Act provides for distribution of the Estate in case where there are continuing trusts as follows:

*"**41. Property devolving upon child to be held in trust***

*Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, **and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.**"*

[19] In addition, children of the deceased's children who die before distribution of the estate will also take their parent's share of the deceased's estate. Although the 1st respondent as grandmother of all the children of her deceased children who have died before and since the death of the deceased has taken up the maintenance of the children, the law requires the administrators as such to act as trustees for these children. Section 84 of the Act, as material, provides as follows:

*"**84. Personal representatives to act as trustees in certain cases***

***Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall,** unless other trustees have been appointed by a will for the purpose of the trust, **be the trustees thereof**:"*

[20] The administrators as **trustees** for the minor interests of whose parent predecease the deceased in terms of section 41 of the Act have a duty as such trustees to account to the beneficiaries. In addition, the administrators have a duty of account under section 83 of the Act to all beneficiaries of the estate including minor issues of the children of the Deceased who die before distribution of the estate.

Effect of section 35 of the Law of Succession Act

[21] Section 35 of the Law of Succession Act provides for the life interest of a spouse in the net intestate estate as follows:

*"**35. Where intestate has left one surviving spouse and child or children***

*(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, **the surviving spouse shall be entitled to—***

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, ***if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."***

[22] In my view, the provisions of section 35 of the Law of Succession Act are meant to provide the surviving spouse with a means of livelihood or maintenance following the death of his/her spouse. See section 37 of the Act which provides for power of sale of estate property, subject to consent of the beneficiaries and/or the Court, **"if it is necessary for his own maintenance."** It is not a means of appropriating from the estate funds or property for the ownership or disposal by the spouse. This is the reason for the Proviso that the right to the life interest is lost in case of a widow upon remarriage, when the woman secures alternative maintenance and the qualification that the right to appointment (not disposition) of property by a spouse under s. 35 (2) of the Act cannot be exercised by Will or so as to take place in the future: the deceased spouse's estate property never become the surviving spouse's free property! It is a power of appointment only, that is, a *"power vested in some person to determine the disposition of property of which that person is not the owner."* See section 3 (1) of the Act.

[23] I do not see any reason for holding as urged by Counsel for the respondents and Interested Party, that a widow, or for that purpose a spouse, who is also an administrator has no duty to account for the dealings with the estate of the deceased spouse. In the case where a widow is not the administrator, the administrators would account for monies given to her for her maintenance under her life interest provided for in section 35, to show how the estate property has been utilized. If, therefore, she is also the administrator she must account for the monies that she has utilized, whether by way of life interest dues or otherwise. In the instance when she makes an appointment, such a dealing should be accounted for so that the receiving beneficiary's share in the estate is correspondingly reduced by the value of the appointment. See section 42 (b) of the Act.

[24] Moreover, providing account does not always mean that the person accounting must surrender the funds he is to account for; it may merely be a statement of account showing how the property of the estate has been used or distributed. I do not agree that the 1st Respondent to whom the responsibility of collecting rental income of the estate was left by the failing, according to the evidence of her co-administrator (RW2) and daughter (RW3), is because of the her status as widow entitled to a life interest in the net intestate estate, not liable to render account as an **administratrix** of the estate.

Personal Representative's Duty to Account

[25] Section 83 of the Law of Succession Act on the duties of personal representatives provides as follows:

> *"**83. Duties of personal representatives***
>
> *Personal representatives shall have the following duties—*
>
> *(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;*
>
> (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
>
> *(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);*
>
> *(d) to ascertain and pay, out of the estate of the deceased, all his debts;*
>
> ***(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;***

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

[Act No. 18 of 1986, Sch.]"

[26] As a noun, the word ***"account"*** is defined in Black's Law Dictionary 8th Ed. as relevant in the following terms:

"A detailed statement of debits and credits between parties to a contract or to a fiduciary relationship."

[27] The relationship between personal representatives of a deceased and his heirs is one of a fiduciary and beneficiaries. The administrators herein are in a fiduciary relationship with the beneficiaries (including minor interests) of the deceased, a duty to account arises both in Equity and under the Law of Succession.

Breach of Duty to Account as ground for revocation of Grant

[28] As a ground for revocation of grant under section 76 (d) of the Law of Succession Act, the Court must find that the failure to account has followed due notice and be without just cause, as follows:

"76 *(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;"

[29] There has been no notice to produce accounts followed by failure without reasonable cause in this matter. Accordingly, the ground for revocation of Grant based on failure to render accounts must fail.

[30] However, the failure of this ground for revocation of grant does not excuse the administrators from rendering due accounts in accordance with section 83 of the Law of Succession Act on the justification that the 1st respondent who is in charge of collection rent is illiterate. If that were so, the administrator's

inability to perform the duty of account may be a ground for the removal and replacement of the illiterate representative with one who is capable of executing his statutory duties. In this case, however, the co-administrator 2nd respondent is a University Commerce graduate and former banker most suited for rendering full and accurate accounts.

Effect of section 42 of the Law of Succession Act

[31] Section 42 of the Act provides for the taking into account during distribution of gifts made to beneficiaries by the Deceased during his life, as follows:

> *"**42. Previous benefits to be brought into account***
>
> *Where—*
>
> *(a) an intestate has, **during his lifetime** or by will, paid, **given or settled any property to or for the benefit of a child, grandchild or house**; or*
>
> *(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,*
>
> ***that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."***

[32] Accordingly, there is nothing untoward for the beneficiaries Getrude Chao and Stephen Mbaki Waita, the administrators herein, as well as other beneficiaries taking gifts given to them by the deceased during by ***inter vivos*** disposition. It would only mean that when considering the distribution of the Estate, the property that these beneficiaries have been given by the Deceased shall be taken into account in determining their respective share of the estate. Such properties, having already been disposed by the deceased do not form part of his intestate Estate for distribution among the beneficiaries but the fact of their gifting will be taken into account when fixing the given beneficiaries' share of the Estate.

Getting in of estate properties

[33] Section 94 of the Law of Succession Act makes it unlawful (apart from being a criminal offence under section 95(1) (a) of the Act) to neglect to **get in** estate property as follows:

> *"**94. Neglect or misapplication of assets by personal representatives***
>
> *When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, **be liable to make good any loss or damage so occasioned."***

[34] As regards the position regarding the properties alleged by the Applicant to have been omitted from the inventory of assets of the Deceased, evidence established specifically as follows:

> ***1. The Nyali House*** *on Plot No. 3902/I/M.N Nyali Mombasa.*
>
> This property was the subject of judgment of court of concurrent jurisdiction from which no appeal can lie to this court and there is no lawful basis for review of the decision by this Court. Indeed, the matter having been subject of subsequent appeals which were struck out, review would be unprocedural. See ***William Karani & 47 others v Wamalwa Kijana & 2 others*** **[1987] eKLR that** *"Review only lies if no appeal has been taken. If an appeal has been taken at all, that is the major process, and it must be prosecuted as far as it can go."*

2. ***Untitled properties:*** *Two Houses at Magongo Plot No.2519/VI/M.N* ***Magongo Day and Night***

***Club** and another being a rental House; Two **Houses without Land** on Plot No. 2463/VI/M.N Birikani Changamwe, allegedly one rented out as a school and the other rented out to residential tenants; and **House without Land** on Plot No. 2390/VI/M.N, rented out; Property known as **SAGANA 4A** on which stands **MAGONGO BAR;** Property known as **SAGANA 4B** allegedly operated as a Hardware store.*

There was reasonable explanation that because of lack of titles, the administrators sought to obtain titles before bringing the properties to the distribution and there was no evidence of any fraudulent intention. Indeed, the Court notes the application filed by the administrators dated 19th April 2012 to rectify the grant and bring in the omitted properties filed before the present application for revocation of grant.

3. Rental Income

*1. Rental income from plot No. 1027/VI/M **M/S Appollo Bar.***

Upon noting the Tenancy Agreement between Awadh and Said Saleh Sherman landlords of the land on which Appollo Bar stands and Stephen Mbaki Waita dated 2nd March 1995, it is clear that the property and any rental proceeds therefrom could not form part of the estate.

*2. Rental income from the property known as plot No. 3902/1/MN Nyali Mombasa, **the Nyali House**.*

The issue of rent accruing from the Nyali house was according to the evidence of Interested Party's (IP) witness part of his negotiations for the purchase from the 1st respondent, the second purchase of the property. There is no evidence that respondents failed to collect due rent thereon. Previous agreement for the Interested Party to give up tenancy within one year following his loss of the suit for recovery of the house against administrators of the estate was overtaken by subsequent negotiations for the sale of the property at Ksh.8,000,000/-, all inclusive.

***4. Utange Plot** (Registration No. not known).*

There was no evidence on such plots at all.

The position of the matter of the allegedly omitted properties is further discussed in detail below.

[35] On a balance of probabilities having already listed the properties set out below in the Petition for Grant of Letters of Administration and the administrators intention shown by their application of 19th April 2012 to bring in other assets that had been left out, I do not find that the omission to include the assets were actuated by fraudulent intention. I would accept the explanation that the properties left out were omitted on account of their status as ***'house without land'***, without registered titles for the land on which they are situate.

*"**ASSETS listed in the Petition***

(a) Money held in Barclays Bank – Changamwe A/c No. 1052791

(b) Benefits being held by Insurance Company Blue Shield Insurance Co. Ltd

(c) Share Certificate in Barclays Bank and Standard Chartered Bank

(d) Land 1.7 Ha at Kwale being title No. Kwale/Kidimu 149

(e) Land 1.2 Ha at Kwale being title No. Kwale/Kidimu/162

(f) Land 4.7 Ha at Kwale being title No. Kwale/Kidimu/347

(g) Land 9.2 Ha at Kwale being title No. Kwale being title No. Kwale/Kidimu/135

(h) Land at Kirinyaga being title No. Kiine/Gacharo/396

(i) Land at Kirinyaga being title No. Kiine/Sagana/1273

(j) Land at Kirinyaga being title No. Kiine/Gaharo/1148

(k) Land at Kirinyaga being title No. Kiine/Sagana/1149

(l) Land at Kirinyaga being Title No. Mwea/Mutithi/Scheme/66

Total estimated cost value Kush. 500,000/- (Five hundred thousand.)"

Properties affected by Orders of the Court.

[36] The Nyali house property LR 3209/I/MN has been decreed by Court to the Interested Party, and it cannot be available for distribution as part of the Estate. In his Judgment dated 27th day of February, 2013, in Mombasa HCCC NO. 361 of 2010 - a suit by the Interested Party principally against the 1st Administrator as the registered proprietor of the property - Tuiyott J. decreed the Nyali house LR 3209/VI/MN to the Interested Party herein, and held as follows:

> *"35. The transfer of 28th December 2007 has its own problems. It was executed by the Vendor only. The plaintiffs claim is a suit brought upon a contract for the disposition of an interest in the suit land. One of the requirements of Section 3(3) of the Law of Contract is that the contract upon which the suit is founded must be executed by all the parties thereto. This transfer falls short of that.*
>
> *36. That said, the plaintiffs claim is sustainable only because it is expressly admitted by the Getrude. She does so in her pleadings and testimony to Court. She admits, recognizes and is desirous that the transfer to the plaintiff be effected. The court will grant this wish to her and the plaintiff.*
>
> *37. The plaintiff also sought a prayer for general damages for the delay in registration of the transfer instrument but laid no basis for me to grant these. No evidence of the loss suffered was adduced. I decline to grant any damages.*
>
> *38. Ultimately, I make the following orders-*
>
> > ***(a) I declare that the suit land [L.R No. 3209 Section 1 Main land North] has been validly sold by the first defendant to the plaintiff and that the plaintiff is entitled to specific performance of the said sale by making of an entry in the register and on the title document in the prescribed manner upon registration of the transfer instrument dated 28th December, 2007 executed in favour of the Plaintiff.***
> >
> > ***(b) The caveat lodged by the 2nd Defendant in the Register of LR No. 3209 Sec 1 MN be and is hereby removed.***
> >
> > ***(c) The 2nd Defendant shall meet costs of the plaintiff's claim and removal of the caveat.***
> >
> > ***(d) The 2nd Defendant's counter claim is hereby dismissed but with no order on costs. I bear in mind all the circumstances of this case."***

[37] Moreover, the Court cannot review or sit on appeal from the judgment of a court of equal jurisdiction (Tuiyot, J.) in HCCC No. 361 of 2010, and indeed, such appeals as were preferred by the Interested Party and the applicant herein from the said determination were struck out by the Court of Appeal, respectively on 17th November 2014 and 26th November 2014. In these circumstances, the Nyali house plot NO. 3209/I/MN is not part of the estate of the Deceased capable of distribution among the beneficiaries. Moreover, it is a maxim of law that no man can take advantage of his own wrong, see ***Broom's Legal Maxims*** 10th ed. (1939) at p. 191. In taking out the title to the property in the name of 1st Respondent so as to defeat the Interested Party's claim against the Estate, the applicant must be taken to consider the property outside the estate assets and she is estopped from turning back to claim it to be part of the estate so as to get it herself.

[38] As the Nyali house property has been judicially determined held not to be part of the estate and the rent on the Nyali house has been explained as having been considered in the agreement for the sale of the Nyali house to the Interested Party, the administrator cannot be held to have failed to get the rental asset of the estate. The issue of account for such proceeds is, of course, a different inquiry.

One property sold with consent of the beneficiaries.

[39] Kiine/Gacharo/1030 was sold to the Registered Trustees of Sisters of Mary Immaculate of Nyeri with the consent of beneficiaries. The applicant confirmed that she gave her consent to the sale both in testimony before the Court and by affidavit sworn abroad at Hamilton, Ontario Canada before a Notary Public on the 11th October 2005 in her *"capacity as a dependant confirming that I do not have any objection to sale of the said property to any willing Third Party by the Administrators of the Estate of my late father"*.

[40] The sale was validly concluded in terms of section 37 of the Law of Succession Act, which provides as follows:

> *"**37. Powers of spouse during life interest***
>
> *A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, **with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:***
>
> ***Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.***

[Act No. 8 of 1976, s. 9.]"

However, the administrators are under a duty to account for the use of the proceeds of the sale.

[41] Accordingly, this property Kiine/Gacharo/1030 is not part of the distributable estate of the Deceased.

Proof of fraud

[42] Fraud requires a higher degree of cogency of evidence on the balance of probability test to prove. I agree with the following passage from the decision of Kneller J. (as he then was) in ***Mutsonga v. Nyati*** (1984) KLR 425, 439:

> *"The next issue is whether or not the defendant had the parcel registered in his name fraudulently? **Charges of fraud should not be lightly made or considered.** Mason v Clarke [1955] AC 778, 794: Bradford Building Society v Borders, [1941] 2 All ER 205. **They must be strictly proved and although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required.** Ratilal Gordon bhai Pate v Lalji Makanji, [1957] EA 314 (CA-T). **In fact a high degree of probability is required.** Hornal v*

Neuberger Products Limited, [1957] QB 247, 258. ***<u>It is very much a question for the trial judge to answer.</u>*** *Gross v Lewis Hilman, [1970] Ch 445 (CA). See generally Clerk & Lindsell on Torts, 15th ed, [1982] pages 853, para 17-20.* ***<u>Whether there is an evidence to support an allegation of fraud is a question of fact.</u>*** *Ludgater v Love (188), 44 LT 694 (CA). Halsbury's Laws of England, Vol 26 Third Ed, [1959] page 845, para 1572."*

[43] Similarly in ***Koinange & 13 Ors. v. Koinange*** (1986) KLR 23, 42-44, Amin, J. relied on the principle of standard of proof higher than a balance of probabilities for proof of fraud, although he thought it a question of law-

*"**In my view it is a question of law for this court to determine on the basis of facts before it as to whether the defendant did act fraudulently** or that although the distribution which took place was highly objectionable, prejudicial and unfair to the plaintiff, it lacked the element of fraud on the part of the defendant. ….*

*In arriving at my decision in this respect in have relied upon the principle enunciated in **Ratilal Patel v Lalji Makanji** [1957] EAR 314-317:*

"There is one observation which we must make – burden of proof required – <u>allegations of fraud must be strictly proved, although that standard of proof may not be heavy as to require proof beyond reasonable doubt. Something more than a balance of probabilities is required."</u>

[44] As Lord Nicholls explained in the House of Lords decision in ***H (Minors), Re (1996) A.C 563*** while considering the standard of proof in fraud cases***:***

<u>"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.</u> *When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case,* ***<u>that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. …. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighting the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established."</u>***

[emphasis added]

[45] The respondents explained that the affidavit on distribution of the Estate was signed on behalf of the Applicant by Grace who the applicant had appointed to represent her in the succession matters while away abroad. There was no evidence that in seeking the confirmation of grant as proposed in the application dated and in dealing with the properties of the Estate and those that the deceased herein had *inter vivos* gifted various beneficiaries, the administrators sought to achieve a fraudulent distribution of the Estate. As Amin, J. held in the ***Koinange***, supra, in the said case -

"*although the distribution which took place was highly objectionable, prejudicial and unfair to the plaintiff, it lacked the element of fraud on the part of the defendant.*"

In this case, it was not demonstrated that the distribution of the Estate was skewed to favour the administrators or any beneficiary of the Estate.

[46] Similarly, the omission to include certain unregistered properties in the application for confirmation

was not proved to have done with fraudulent intention. There was a reasonable explanation by the 2nd Respondent that the administrators had waited for the registration of titles to the said properties before including them in the estate for distribution. It was not shown that the administrators had omitted to list the said unregistered properties with the intention of keeping them for themselves or appropriating to themselves or to any beneficiary, without due distribution, the proceeds therefrom.

[47] Moreover, the law of succession anticipates such situation when it provides for applications for **rectification** of Grant under section 74 of the Law of Succession Act as well as provision of **variation** of Grant (see sections 92 and 93 of the Act indicating that variation does not affect receipt of monies by duly appointed administrators or the transfer of property by them). Through rectification and variation, properties inadvertently omitted or those discovered by the administrators after grant may be included and distributed among the beneficiaries.

[48] Indeed, one such application by Summons for Rectification of Grant dated 19th April 2012 had been filed on 2nd May 2013 by Counsel for the administrators M/S Wangechi Munene & Co. Advocates, in this Succession Cause before the applicant's Summons for Revocation of Grant dated 15th day of July, 2013, and sought orders ***"That the certificate of confirmation of grant issued to Getrude Chao Waita and Stephen Mbaki Waita in this matter on 24/5/2006 to be rectified in terms of paragraphs 5 of the supporting affidavit herein"*** on the principal grounds that since the confirmation of grant *"and before the estate has been distributed some beneficiaries under the grant have since passed away [and] there are some deceased properties also which were not included in the grant hence the need to amend the same."*

[49] The said application for rectification sought to bring in and distribute deceased properties identified in paragraph 5 of the supporting affidavit of STEPHEN MBAKI WAITA of 19th April, 2012 as follows:

> *5. That there were also properties of the deceased which were left out and would propose they be shared out as follows:-*
>
> *(a) Land Parcel No. Kiine/Gacharo/395 – to be succeeded by Getrude Chao Waita.*
>
> *(b) Building on plot No. 2519R/VI/MN known as Magongo day and Night Club Magongo Guest house to be succeeded by Lucy Msigo Waita and Stephen Mbaki Waita jointly.*
>
> *(c) Building on Plot No. 2393VI/MN hosting Bahati Bar Restaurant and corner garage near*
>
> - *Changamwe Roundabout to be shared as follows;*
> - *Bahati Bar and Restaurant – Lucy Msigo Waita*
> - *Corner Garage near Changamwe roundabout – ½ share Lucy Msigo Waita Mbaki and Stephen Mbaki Waita.*
> - *Corner Garage near Changamwe round about – ½ share Salim Abdalla.*
>
> *(d) Plot No. 12 Kiangwachi – Getrude Chao Waita and Mary Waruguru Waita"*

Alleged agreement for the distribution of the Estate

[50] A fact is not proved when it is neither proved nor disproved. See section 3(4) of the Evidence Act. The applicant alleged fraud in the deposition by the administrators in support of the application for confirmation of grant that the beneficiaries had agreed to the distribution of assets set out in an Affidavit purportedly sworn by the beneficiaries including the applicant. The applicant alleged that she was out of the country in the year 2006 and could not have signed the distribution agreement. The Respondents contended that the distribution agreement was signed for the applicant by her sister Grace whom she had, with the knowledge of the other beneficiaries, appointed to represent her in the succession matters while she was away abroad.

[51] The allegation of fraud requires a high standard of proof and as pointed out by the Counsel for the Interested Party, the applicant did not provide proof that she did not sign the distribution affidavit or that she had not given instructions to her sister Grace to sign for her. On the other hand, the Respondents did not show any valid appointment for the sister Grace to represent the applicant in the distribution agreement, although in their such response, the respondents impliedly admit that the applicant was not in the country and she did not sign he said affidavit herself.

[52] Accordingly, I find the fraudulent dealing in the distribution agreement alleged by the applicant whose has the legal burden of proof under section 107 and 108 of the Evidence Act, not proved. The applicant's ground for revocation of grant based on fraud against the administrators based on non-inclusion of certain estate properties must for the reasons given above also fail.

Want of persons to be appointed administrators

[53] The applicant prayed for an order for the appointment of the Public Trustee to administer the estate, upon revocation of the Grant issued jointly to her mother and her brother. I consider that not only for the reason of the health and age of the 1st respondent widow of the deceased given by Counsel for the respondents and the Interested party, there should be added another person for purposes of administration and final distribution of the Estate. The 2nd Respondent's health which he said had resulted in delayed reaction time also calls for supplementary support by new administrators.

[54] The applicant as a permanent resident abroad in Canada and who it was conceded does not come to Kenya over long periods is not suitable for appointment as a co-administrator. The only other child of the deceased Lucy Msigo Waita testified in support of the respondents case and the two other adults at the level of child of the deceased, that is to say Edith and Agnes whom the latter without agreement of the respondents testified were co-wives of George, the late son of the deceased because of the known position on the matter not suitable to bring an independent consideration to the matter. Indeed, the present administrators already have proceedings for the revocation of the grant made to the latter in the ***Estate of Gorge Mukima Waita P&A No. 72 of 2012***, and there may be an obvious conflict of interest.

[55] The Court will, therefore, direct that two (2) of the adult children of the deceased children of the deceased subject of these proceedings be appointed and added in the Grant of Letters of Administration as co-administrators. The reason for the appointment of the full permitted number of administrators to take into account the large size of the beneficiaries and the continuing trusts arising in the Estate following the many deaths with issues of the children of the deceased. This way the Court will give effect to the levels of preference on appointment of administrators under section 66 of the Law of Succession rather than giving the administration of the estate to the Public Trustee, which though independent may not administer the estate with the passion necessary to realize the best benefit for the beneficiaries.

Conclusion

[56] Although, the respondent administrators cannot be faulted for failure to get in the assets of the estate which the deceased had during his life distributed to various beneficiaries, and to administer and distribute the estate of the deceased to the beneficiaries while cautions/caveats placed by the applicant subsisted on the titles to the estate property, and whereas failure to render account only crystallizes as a reason for revocation of grant when failure is subsequent a valid notice given for that purpose in terms of section 76 of the Law of Succession Act, the Confirmation of Grant on 19th May, 2006 was shown to have been based on false material particulars that all the beneficiaries has consented to the proposed distribution. The applicant has not proved fraud to the required standard of proof.

[57] However, the respondents' defence that the applicant had given her consent to the distribution through her late sister was not proved by any valid power of attorney authorizing the said late sister to give consent on behalf of the applicant. It would to be a case covered by ground for revocation of grant under section 76 (c) of the Act "***(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***".

[58] The untrue allegation of fact essential in point law is that all the beneficiaries had consented to the distribution set out in the Schedule to the application for confirmation of grant as follows:

"SCHEDULE OF ASSETS AND DISTRIBUTION

(a) GETRUDE CHAO WAITA

i. Money held in Barclays Bank at Changamwe Mombasa in Account No. 1052791.

ii. Benefits held by Blue Shield Insurance Company Limited.

iii. Shares in Barclays Bank and Standard Chartered Bank

iv. Kwale/Kidimu/149

v. Kwale/Kidimu/347

vi. Kwale/Kidimu/135

vii. Mwea/Mutiithi/Scheme/66

(b) LUCY MSIGO WAITA

(i) Kiine/Sagana/1273

(c) JANE WANDIA WAITA

(i) Kiine/Sagana/1273

(d) GRACE NJERI WAITA

(i) Kiine/Gachari/1148

(e) STEPHEN MBAKI WAITA

(i) Plot No. 3A Sagana Town together with the building thereat.

(f) GEORGE MWAKIMA WAITA

(i) Plot No. 4A Sagana Town together with the building thereat.

(g) GETRUDE CHAO WAITA AND MARY WARUNGURU WAITA

(i) Kiine/Gacharo/736

(h) STEPHEN MBAKI WAITA

(i) Kiine/Gacharo/736

(i) SISTER OF MARY IMMACULATE OF NJERI REGISTERED TRUSTEES

(i) Kiine/Gacharo/1030 and the beneficiaries thereof to STEPHEN MBAKI WAITA.

(j) ADAM LAWRENCE WAITA and GETRUDE WAITA

To share with GETRUDE CHAO WAITA on plot No. Kiine/Gecharo/396."

[59] Moreover, there was no indication at all that the distribution proposed by the Confirmed Grant ever took into account in accordance with section 42 of the Law of Succession Act of gifts of property made by the Deceased to come of his beneficiaries including the two administrators. From the evidence it appeared that the distribution, making no mention of the gifted properties proceeded on the basis of the Estate net of these *inter vivo* gifts.

[60] There are obvious errors in the Confirmed Grant as the distribution list of 4th May, 2006 purported to distribute to the applicant and the 1st respondent property *Kiine/Gacharo/396* which was registered in the 2nd Respondent in 1981 long before the death of the Deceased and only included in the Petition in error according to the 2nd Respondent, and *Mwea/Mutiithi/Scheme/66* to the 1st respondent when the deceased had already gifted these to his sisters according to RW1, RW2 and RW3.

[61] In addition, the distribution under the Confirmed Grant did not take into account unregistered properties, which the respondents said were left out because they had no titles. While the omission of he said assets is no proof of fraud as the administrators may properly seek rectification of grant, such distribution would unfairly favour those who ended up with the unregistered and undisclosed properties and disfavor those who got their share of the estate based on the smaller disclosed estate. As the existence of these untitled properties was known to the administrators, they should properly have been taken into account during distribution with due qualification and recognition being given to their unregistered status. It was not true as suggested by the application for confirmation of Grant that the assets of the estate have been ascertained, which is expressly required by section 71 (2) Proviso of the Law of Succession Act before confirmation of grant in determining the respective shares of the beneficiaries, as follows:

> *"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."*

The respective shares of the beneficiaries cannot be ascertained if the known estate assets are not included.

[62] The Court is, accordingly, entitled to revoke the Confirmed Grant pursuant to section 76 (c) of the Law of Succession Act on the ground-

> "***(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***".

[63] Further, the need to comply with the law in taking into account of gifts by the deceased ***inter vivos*** and to correct the distribution of property not belonging to the estate, such as Kiine/ Gacharo/396 amount to defects in substance contemplated under section 76 (a) of the Law of Succession Act, which must provide sufficient reason for the revocation of Confirmed Grant.

[64] Needless to say, in making the untrue allegation which has not been shown to be wilful or reckless, the administrators have, however, not committed an offence under section 52 of the Law of Succession Act, providing as follows:

> "***52. Wilful and reckless statements in application for grant***
>
> *Any person who, in an application for representation, wilfully or recklessly makes a statement which is false in any material particular shall 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."*

Nor an offence under section 95 of the Act.

ORDERS

[65] For the reasons set out above, the Confirmed grant of Letters of Administration made on 19th May, 2006 is revoked.

[66] A fresh Grant of Letters of Administration intestate shall issue to the present administrators in this Petition, namely Gertrude Chao Waita and Stephen Mbaki Waita, **together** with two (2) other co-administrators to be appointed from among the ***adult*** children of the ***deceased*** children of the Deceased herein, Francis Waita Mbaki, to be agreed between the beneficiaries through their Counsel on record, and failing agreement within fourteen (14) days, in view of the need for continued administration of the estate, to be appointed by Court from

such ***adult*** children of the deceased children of the Deceased.

[67] For avoidance of doubt, the Court finds that the following properties are not part of the distributable estate of the Deceased, although they shall be taken into account as having been gifts ***inter vivos***, gifted by the deceased to the respective heirs during his life for purposes of distribution of the estate, in terms of section 42 of the Law of Succession Act:

1. The Nyali property, LR. No. 3209/I/MN gifted to the 1st Respondent, and in accordance with the Judgment of the Court in HCCC NO. 361 of 2010, with a subsequent appeal therefrom by the applicant herein, Court of Appeal at Mombasa Civil Appeal No. 33 of 2014 ***Mary Waruguru Waita v. Rosky Traders Company Limited, Gertrude Chao Waita and Registrar of Titles, Mombasa,*** being struck out by the Court of Appeal on 26th November, 2014. The Nyali property, LR. No. 3209/I/MN, having decreed to the Interested Party by a court of competent jurisdiction and appeal therefrom struck out cannot be taken to be part of the Estate of the Deceased available for distribution among his heirs;

2. Apollo Bar building purchased for and in the name of the 2nd Respondent.

[68] The property at Mskiti Noor house LR 627/VI/MN registered in the name of George Mukima Waita is actively the subject of separate judicial proceedings before another court for revocation of grant made in the ***Estate of George Francis Waita***, P&A 76 of 2012, by Summons for Revocation of Grant dated 20th September, 2014 on the principal ground that *"the property in question was registered in the name of the deceased son George Francis Waita when he was only 13 years old to hold in trust for the rest of the family, his mother and siblings included."* For good order, the Court does not pronounce on it as being part of the Estate of the Deceased, or otherwise. With respect, however, the Court does not see why the principle of advancement under section 42 of the Law of Succession Act should differently apply to the said property. The distribution of the Estate with respect to the said property shall abide the determination of the said revocation proceedings.

[69] Property No. Kiine/Gacharo/396 which was registered in the name of the Deceased's father and later transferred into the names of the 2nd respondent never belonged to the Deceased. While the property may have been purchased by the Deceased and registered in the name of his father Mbaki Waita or his son Mbaki Waita, who subsequently got it registered in his full names Stephen Mbaki Waita or it may have belonged to the 2nd Respondent's grandfather, only to be irregularly inherited by the grandson, at any rate according to the evidence of the respondents. While the process of transfer by letter and affidavit explaining that the registered proprietor Mbaki Waita was the same person known as *Stephen Mbaki Waita* is illegal and unlawful if it was, as testified, aimed at effecting the inheritance of the property from the grandfather to the 2nd respondent without taking out succession proceedings, it does not affect the present succession proceedings as the property was not shown ever to have belonged to the Deceased. However, the distribution of this property under the agreement of 4th May, 2006 to the Applicant and the 1st Respondent must call for a revocation of distribution effected under the confirmed grant since the property is not part of the distributable estate of the deceased.

[70] Property known as Kiine/Gacharo/1030 was sold by the administrators with the consent of the beneficiaries, including the applicant, and nothing turns on it.

[71] The respondents herein, as the outgoing administrators to be replaced by the new administrators to be appointed as above, shall within three months (90) days furnish to the parties and to Court a full and accurate account of their dealings with the estate property from the date of appointment to the date of account.

[72] The newly appointed administrators shall within six months, or such other period, under section 73 of the Law of Succession Act, as the Court may grant, file an application for confirmation of Grant and distribution of the Estate.

[73] Liberty to apply.

[74] There shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF FEBRUARY, 2018

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JUDGE

APPEARANCES:

M/S Khatib & Co. Advocates for the Applicant.

M/S Madzayo Mrima & Jadi Advocates for Respondents.

Mr. Stephen Kimani Macharia, Advocate for the Interested Party.