REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3398 OF 2004

IN THE MATTER OF THE ESTATE OF TUBANIA KIMEMIA MUNGAI (DECEASED)

MARGARET WANJIKU KIURU …….....…….... APPLICANT

V E R S U S

HENRY KIURU TUBANIA …….....…… RESPONDENT

JUDGMENT

1. The deceased to whose estate these proceedings relate is Tubania Kimemia Mungai who died on 17th November 2003 while domiciled in Kikuyu Kenya. A grant of Letters of Administration of his estate was made to the Petitioner herein Margaret Wanjiku Kiuru, (the Administratix) on 8th September 2005. On 3rd April 2006 the Administratix filed summons for confirmation of grant. On 20th June 2006 Henry Kiuru Tubania the Objector filed an affidavit of protest thereto. Following directions of the court by Rawal J (as she then was) the Protest was disposed of by way of viva voce evidence.

2. The Protestor also raised a preliminary objection regarding which Rawal J (as she then was) directed as follows:

i) The issue raised concerns a major part of the estate and it shall not be just to distribute a small part without determining the ownership of the major part of the estate.

ii) One Administrator to file further affidavits and witness affidavits to substantiate their claim of trust. The same be filed and served within 15 days.

iii) The Respondent to file further affidavit and witness affidavits if need be, within 15 days from the date of service of the above affidavit.

iv) The issue of trust be then determined by way of cross-examination and re-examination of the dependants.

PETITIONER'S SUBMISSIONS

3. The Petitioners confined their submissions to the grounds raised in the Affidavit of Protest. They relied on the oral evidence, the filed witness documents and judicial authorities as listed below;

i) Affidavit in support of summons for confirmation of grant of probate, sworn by Margaret Wanjiku Kiuru on 28th March 2006 and annexed to the said Summons.

ii) Supplementary affidavit in support of summons for confirmation of grant, sworn by Josephine Muthoni on 12th July 2007 and filed on 16th July 2007.

iii) Affidavit in support of summons for confirmation of grant sworn by Samuel Kimani Njoroge on 21st September 2006.

iv) Further affidavit in support of summons for confirmation of grant sworn by Samuel Kimani Njoroge on 8th June 2009.

4. The Petitioner identified the issues for determination as follows:

a. Whether the Preliminary Objection stated in the Objector's submissions was tenable.

b. Whether the Administrator and Josephine Muthoni Njenga as wives of Stanley Njenga acquired beneficial interest in the 4.3 acres of land.

c. Whether the parcel of land measuring 4.3 acres was held under constructive trust by the deceased for the benefit of Stanley Njenga and his family.

d. Whether the alleged absence of a trust document (made and deposited with the Registrar of Lands) negates the presence of a constructive trust.

5. Mr. Gatitu, counsel for the Protestor asserted that the Administrator ought to have filed an application under **Order 36 Rule 1** of the **Civil Procedure Rules** for determination of whether the portion of 4.3 acres of Karai/Gikambura/273 was owned by the deceased. He contended that the orders sought do not apply in the suit herein as they relate to an application for summary judgment where a plaintiff is seeking either for a liquidated sum, or for recovery of land, rent or mesne profits in circumstances where the plaintiff is a landlord and is receiving from a tenant whose term has expired, or the term has been terminated or for breach of tenancy agreement, either by persons claiming under the tenant or against a trespasser or where the defendant has entered appearance and has not filed a defence. It was Counsel's contention that none of the above circumstances arise herein and therefore the preliminary objection ought to fail.

6. Mr. Gatitu submitted further that the preliminary objection does not arise because the questions of ownership of the 4.3 acres of the suit land by the deceased and the beneficial ownership by his son Stanley Njenga and whether the 4.3 acre portion was subject of a constructive trust, are questions of facts that are disputed. The court is required to interrogate the facts before making a determination. The objector had not in fact, raised issues of law as required of a preliminary objection and therefore the objection ought to fail. Counsel relied on the ruling of the Supreme Court in **Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others (2015) eKLR**, where the superior court upheld and restated the principles set out in the case of **Mukhisa Biscuits** on the nature of a preliminary objection.

7. It was in evidence that the deceased, during his lifetime and on or about 1958, bought one (1) acre of land in Karai, Gikambura and immediately upon its purchase moved onto the land where he resided with his three (3) wives and their children. The deceased subdivided the one acre into three portions, each to be cultivated and utilized by each of his three wives who represented his 3 houses. Soon after the deceased purchased the one acre, his son Stanley Njenga by his first wife, Hannah Wambui on or about 1958 also purchased 4.3 acres of land and started living on the said land with his first wife Josephine Muthoni and their children.

8. Stanley Njenga constructed a house on the 4.3 acre parcel of land and his wife cultivated the land. Stanley married the Administrator as his second wife on or about 1961. The 4.3 acres of land became her matrimonial home and she was shown where to cultivate. Stanley's two wives lived on and cultivated the land and before his death in 2003, Stanley subdivided the 4.3 acres of land into two equal portions to be cultivated and utilized by each of his wives equally. The three wives of the deceased did not cultivate this

particular parcel of land and were confined to the one acre that was purchased by the deceased.

9. During her examination in chief Josephine Muthoni Njenga testified that at the time of her marriage to Stanley Njenga, he, his father and his father's three wives all lived together on the one acre of land. She reiterated the testimony of the administrator that the wives of the deceased only cultivated the one acre purchased by the deceased. Further that she was present when Stanley Njenga purchased the 4.3 acres of land and he informed her of the purchase. Thereafter, that they moved and resided on the 4.3 acre parcel while the deceased continued residing on the one acre with his three wives until Stanley Njenga married his second wife, the administratix herein. The two wives continued living on and cultivating the land together for over 50 years.

10. Mrs. Khisa, counsel for the Petitioner urged the Court to find that both wives of Stanley Njenga had been in actual and physical possession and occupation of the portion measuring 4.3 acres since the parcel was purchased around 1958 and 1959. That they had resided with their children and cultivated on the said piece of land while the three wives of the deceased resided and cultivated the one acre parcel. She submitted that the Applicants acquired an indefeasible beneficial right and interest over the said portion and their acquired proprietary rights and interests in the 4.3 acre portion could not be defeated by the assertion that the entire 5.3 acres of the subject land was registered in the name of the Deceased.

11. Mrs. Khisa contended that the suit property was registered under the statutory regime of the Registered Land Act (Cap 300) laws of Kenya (now repealed) and since the suit herein was filed in November 2004, the applicable law was Cap 300 Laws of Kenya. Counsel relied on the Court of Appeal Authority of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR,** wherein the Court of Appeal upon making a finding that the appellants therein were in actual possession and occupation of the suit property, proceeded to consider whether the rights of the appellants who were in possession could be defeated by the rights of the registered proprietor.

12. The superior court in the foregoing case reiterated the provisions of Sections 28 and 30 of Cap 300 Laws of Kenya, that state at Section 30(g) that:

> ***"unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:***
>
> ***(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation…***

The superior court faulted the trial judge for failing to give due consideration to the fact that the appellants were in possession and occupation prior to issuance of the title and registration of the land in the name of the Respondent.

13. Mrs. Khisa urged the court to find that even though the consolidated

> 5.3 acres of land was registered in the name of the deceased, nevertheless the Administratix and Josephine Muthoni were in actual possession and occupation of the portion of 4.3 acres and their rights could not therefore be defeated by the registered rights of the deceased. She urged the court to consider that neither the Objector in his oral evidence nor his witness in her sworn affidavit (Mary Wambui Tubania), had denied that the family and indeed the two wives of Stanley Njenga had resided on the portion of 4.3 acres, all along.

14. The Administratix testified that on or about 1958 or 1959, the one acre that was purchased by the deceased together with the 4.3 acres that was purchased by Stanley Njenga were jointly registered in the name of the deceased. This was because by the Government policy/ demarcation rules that existed at the time, the government had declared that any land measuring one acre and below would be compulsorily acquired to provide for social amenities in the area, such as schools, markets or roads. In order to save the one acre parcel from being compulsorily acquired therefore, Stanley Njenga decided that it would be

prudent to combine his 4.3 acre with his father's one (1) acre to make 5. 3 acres, to ensure the government did not acquire the land.

15. The 5.3 acre parcel was therefore registered as Karai/Gikambura/273 in the sole name of the deceased and not joint names of the deceased and Stanley, in spite of the fact that it was Stanley who purchased the portion of 4.3 acres. Stanley was said to have agreed to this arrangement out of respect for his father as the head of the home and the great love they shared between them.

16. Josephine Muthoni reiterated the above averments of the Administratix in her testimony. She asserted that the registration of the land in the sole name of the deceased did not mean that the 4.3 acres belonged to the deceased. She pointed out that the occupation and cultivation of the two portions of land remained as had been divided at the time of the purchase with the two wives of Stanley Njenga continuing to cultivate the 4.3 acres to the exclusion of the rest of the family.

17. The evidence of the wives of Stanley Njenga was corroborated by two affidavits sworn by Samuel Kimani Njoroge (deceased) on the 21st of September 2006 and 8th June 2009 respectively. In the first affidavit, the deponent averred that during the period from 1958 to 1987, he was the Assistant Chief of Karai Location and the Secretary of the Land Consolidation Committee.

18. Samuel Kimani Njoroge averred that Stanley Njenga (son to the late Tubania Kimemia Mungai) at one time informed the Land Consolidation Committee of his intention to consolidate his parcel of land with that of his father. This was done and it was registered as Karai/Gikambura/273. He explained the reasons why Stanley wanted to have the two parcels of land consolidated and that even after the two parcels were consolidated in 1958, Stanley Njenga continued to occupy his portion and further subdivided his portion equally between his two wives.

19. Mrs. Khisa submitted that from the evidence adduced, it was clear that the deceased held the 4.3 acres of land in trust for his son Stanley Njenga and his family. She contended that the Objector could not explain why his father before his death, allocated a larger portion of land to Stanley and not to him and his mother. Counsel urged the court to find that there was a constructive trust in respect of 4.3 acres of land for the benefit of Stanley Njenga and his family and divide the said 4.3 acres between the two houses of Stanley Njenga equally. The one acre to be shared between the three houses of Tubania Njenga.

20. The objector pointed to the absence of a trust document made and deposited with the Registrar of lands negating the presence of a constructive trust. Mrs. Khisa dismissed this argument for reasons that during cross examination the Objector admitted that he was not old enough to know how his father (the deceased) purchased or acquired the suit property; he could not have been allocated the land by the deceased because he was too young to till the land and that; the suit land was governed by the provisions of **Cap 300.**

Counsel contended that the absence of a trust document did not mean that there was no constructive trust and it did not affect the enforceability of a constructive trust, or defeat the proprietary interest and rights of Stanley Njenga.

OBJECTOR/PROTESTOR'S SUBMISSIONS

21. The preliminary objection by the Protestor was based on **Rule 41(3)** of the **Law of Succession Act Cap 165 Laws of Kenya** and **Order 37 Rule 1** of the **Civil Procedure Rules 2010** which provides inter alia that;

Rule 41(3)

> ***"where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside***

the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, Rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant."

Order 37 Rule 1 of the **Civil Procedure Rules, 2010** provides;

"1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons specified, and the circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions…"

The Objector submitted that the Civil Procedure Rules were amended and **Order XXXVI Rule 1** was now **Order 37 Rule 1** which provided in similar fashion, the process to deal with an issue arising in administration of an estate.

22. Mr. Gatitu, submitted for the protester that a substantive claim of trust could not be raised in an application for confirmation of grant and distribution of the estate. That it was impossible to defend a substantive claim raised in distribution of an estate as the same had clear provisions on how it was to be determined.

23. Counsel contended that it was an abuse of the court process for the Petitioner to file the petition for distribution of the deceased's estate and then raise a claim for trust at the distribution stage. That the Petitioners had all along in the Petition stated that the property belonged to the deceased and it was unacceptable to claim at the distribution stage that 4/5 of the estate in fact, belonged to them and not the deceased by raising claims against the deceased's estate that had no basis, hoping to mislead the court. Counsel relied on the authority of **Arthur Wamiti Njoroge -v- The Disciplinary Tribunal & another (2017) eKLR,** where the court restated that litigation was not a game of chess where players outsmart themselves by dexterity of purpose and traps.

24. The Objectors' contention was that the occupation that the Applicants wanted to base a claim of trust on, was dishonest as they had possession of the land because their husband was allowed by the father on humanitarian grounds and according to custom to build in the home. He pointed out that the houses of the Petitioners and Protestors were all built at the same location and the husband of the Petitioners and the deceased were buried at the same place, a clear indication that the deceased and the husband of the Petitioners did not own distinct portions of the land. He submitted that beneficiaries of an estate could not raise claims based on possession of the estate and that it was evident that their possession was related to their relationship with the deceased.

25. He observed that the Applicants had gone back to the provisions of distribution of an estate under **Section 40** of the law of succession act and admitted that they had omitted two daughters of the first house. They now want the court to distribute the estate to beneficiaries that were not included in their petition and who had not indicated their desire to share in the estate. This he asserted, was adequate ground for the court to revoke the grant issued to the petitioners and re-issue it to more trustworthy persons like the Protestor.

26. Mr. Gatitu stated that after the Petitioners realized that their claim for trust was not viable, they were now seeking to get more land from the estate through including beneficiaries whom they had not acknowledged. He contended that an equal distribution of the estate to the three houses was the only fair distribution considering the facts, customs and the long usage of most of the land by the Petitioners.

ANALYSIS AND DETERMINATION

27. I have considered the respective parties' pleadings and their affidavits. I have also given due regard to their respective counsel's submissions.

28. Above are the facts that this court was confronted with and which this court has to interrogate and decide whether a case has been made for nullification or revocation of the grant of letters of administration made to the respondent herein and/or whether the summons for confirmation of grant made on 8th September 2005 by the Petitioner herein should be confirmed.

29. The three key questions raised by this dispute are:

a) Whether the deceased Tubania Kimemia held the subject property registered in his name in trust for his son Stanley Njenga (deceased) and whether a constructive trust was created.

b) Whether the Petitioner Margaret Wanjiku Kiuru was in breach of any statutory procedure by raising a claim within a Petition for confirmation of grant and distribution of the estate of the deceased.

c) What orders ought to be made in respect of the protest.

30. Turning to the substance of the protest itself, I think it is important to state at the outset that the present matter relates to the administration of the estate of Tubania Kimemia, and not his son the late Stanley Njenga.

31. Mr. Gatitu for the Protestor made a preliminary objection with respect to the Petitioner's summons for confirmation of grant of letters of administration on the basis that; the Petitioners ought to have applied under **Order 36 Rule 1** of the **Civil Procedure Rules 2010,** for the determination of their issues concerning the subject land and not in the petition for distribution of the deceased estate and whether land parcel No. Karai/Gikambura/273 was registered in the name of the deceased as the absolute proprietor as was evidenced by the copy of the green card from the land registry in trust for his son Stanley Njenga.

32. Mrs. Khisa for the Petitioner submitted that there was a constructive trust that was created by the deceased for the benefit of his son Stanley Njenga who predeceased him when they both agreed that the entire 5.3 acres of Karai/Gikambura would be registered in the sole name of the deceased, but 4.3 acres of the land was for the benefit of his son and his family. The 1st wife of Stanley Njenga reiterated this position in her testimony stating that she was present at the time her husband purchased the 4.3 acres of land and he informed her of the purchase.

33. It was the Protestor's submission on the other hand that a claim for trust had to be proved by evidence and the Petitioner/Applicant did not provide any evidence to that effect. Further that there was neither instrument of the trust produced in court, nor witnesses to testify to the alleged agreement to hold 4.3 acres of the subject land in trust, nor evidence of the financial ability of the Applicant's husband to purchase the land as was alleged.

34. The requirements for a constructive trust to arise are explained in detail in **Halsbury's Laws of England, 4th Edition, Volume 48** at paragraph 690 that I quote as there under:

"A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where:

(1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property."

35. The reading above means that parties to an agreement must both have common intention evidenced by an express common agreement, or inference from the conduct of the parties that is to say, consideration must be shown. It is therefore the case that a constructive trust can arise from the conduct of parties, and the court may infer a common intention thereon that the property was to be shared beneficially.

36. The Petitioner avers that her late husband Stanley Njenga purchased 4.3 acres of land and immediately after purchase started living with his first wife Josephine Muthoni and their children thereon after constructing a house. Josephine reiterated the Petitioner's submission by testifying that her late husband informed her of the purchase of the 4.3 acre parcel. However, the Petitioner has not all through the case, supported this contention by adducing evidence as to how the land was purchased and from whom it was purchased. Neither has she brought any documentation to the court to prove that the subject land was purchased by her late husband. No sale agreement, receipts or any direct contribution towards the purchase of the 4.3 acre parcel have been adduced by the Petitioner/Applicant to justify her contention that Stanley Njenga owned 4.3 acres out of the 5.3 acres registered in the name of the deceased.

37. The Petitioner also did not demonstrate to the court that her husband was financially capable to purchase the 4.3 acre parcel in 1958 as was contended by the Objector but merely stated that her late husband owned businesses without any proof or documentation. It is noteworthy that the Petitioner did not call any witnesses from the family, or the clan that may have been present, to testify to the existence of the agreement to consolidate the suit property and in this regard any indirect involvement in the alleged agreement to hold the land in trust only amounts to hearsay. The Petitioners did not provide any proof of the existence of the alleged land policy that led to the consolidation of the two parcels of land for fear that land measuring less than 3 acres in that location, would be compulsorily acquired as posited by the Petitioner.

38. Lastly, the Petitioner/Applicant submitted that together with her co-wife they had lived on and cultivated the 4.3 acre parcel for over fifty (50) years and before their husband's death, he subdivided the land into two equal portions for both their benefit. It was her contention that the three wives of Tubania Kimemia only cultivated the one acre piece of land that their husband purchased. On the other hand, the Objector submitted that the houses of the Petitioners and the Protestors were all built at the same location and that the husband of the Petitioners and the deceased were buried at the same place, a clear indication that the deceased and the husband of the Petitioner did not own distinct portions of the land as had been stated by the Petitioner.

39. It is noteworthy that the Petitioner/Applicant also failed to demonstrate to the Court that they (both her family and that of her co-wife) were in actual possession of the said 4.3 acres of land and that they utilized and cultivated the said parcel to the exclusion of the rest of the family. In the premises, I find that the Petitioner's claim of an implied constructive trust created over the 4.3 acre parcel of land is unmerited. For reasons stated above, I find that no overriding interest over the subject property was created as set out in Section 30 (g) of the repealed Registered Land Act Cap 300 as was submitted by counsel for the Petitioner/Applicant.

40. It cannot be stated with any degree of certainty from the above that there was a common intention by Stanley Njenga and his father Tubania Kimemia to create a trust in which both of them had a beneficial interest. I say so because both Stanley and his father Tubania would have easily been registered as co-proprietors if they owned the land jointly, even if an instrument to declare the trust was not made and deposited with the Registrar.

41. It is therefore the finding of this court that the deceased Tubania Kimemia was not a constructive trustee to this extent, and did not hold the suit property in trust for his son Stanley Njenga.

42. On the second issue for determination, it was the Objector/Protestor's contention that the Petitioner/Applicant ought to have applied under **Order 37 Rule (1)** of the **Civil Procedure Rules 2010** for the determination of the question of trust with regards to the subject parcel of land and not have it sought in the hearing for the distribution of the deceased's estate. Further that from the provisions of **Rule 41(3)** of the **Law of Succession Act**, any questions such as trust ought to be determined in an application under Order 37 of the Civil Procedure Rules.

43. The Petitioner in response submitted that none of the circumstances in Order 37 of the Civil Procedure Act 2010 arose in the suit herein and that the preliminary objection ought to fail because the questions of ownership of the 4.3 acre portion of land and the said land being subject of a constructive trust were both questions of facts. She contended that the language in **Rule 41(3)** of the **Law of Succession Act** and **Order 36 Rule 1** of the **Civil Procedure Rules** was only permissive or directive but was not mandatory.

44. It was her submission that the rule did not necessarily contemplate a situation where the Petitioner should have first filed an originating summons under **Order 37 Rule 1** for determination of her share and that of her co-wife and thereafter file a petition for letters of administration and subsequently confirmation of grant. She submitted that in view of the above, no prejudice was caused to the Protestor and that the court ought to exercise its wider powers as conferred to it by **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** and find that the Petitioner did not breach Rule 41(3) of the Law of Succession Act by not filing an Originating summons for determination of her share of the estate of the deceased.

45. The court in succession matters under **Section 47** of the **Law of Succession Act** has jurisdiction to entertain any dispute under the Law of Succession Act without due regard to technicalities. In determining this question B. G. Kariuki J, (as he then was), stated in **HCSC 2226 of 2008** ***Lucy Wanjiru Kibaba & Another vs Lucy Wanjiru Muchene(2013*****) eKLR** that technicalities of procedure in succession matters are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance, with a view to do justice to the parties. **Section 73** of the **Probate and Administration Rules** fortifies this position thus:-

> ***"Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

46. It follows that failure to follow a format does not necessarily stop the court from dealing with any issue that is clear regarding the estate of a deceased. It is therefore the considered opinion of this court that whereas it is not encouraged, the failure of the Petitioner/Applicant herein to follow the right form and/or procedure and defend her substantive claim to the subject land, cannot be a basis to deny her a hearing and determination of her application on merits. I take refuge in **Article 159(2) (d)** of the

Constitution 2010 where the court is enjoined to administer justice without undue regard to technicalities.

47. It is noteworthy to the Court that the Petitioner herein filed the petition for grant of representation after the surviving wife of the deceased Mary Wambui declined and/or neglected to file for such Petition. The surviving widow and surviving children of the deceased were cited in Citation dated 3rd November 2004 and filed on 9th November 2004. The grant of representation issued did not also include all the beneficiaries to the estate of the deceased. The Protestor urged the court to revoke the grant issued to the Petitioner and issue it to him. He contended that an equal distribution of the estate to the three houses of the deceased was the only fair distribution.

48. It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. The purpose of the rules of pleadings is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

49. The grounds upon which a grant may be revoked or annulled therefore are statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of the grounds set out in Section 76 of the Law of Succession Act. The protestor's application did not, on the face thereof, specify which of the grounds stated in section 76 was applicable to his application.

50. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. This position was expressed in ***Galaxy Paints Co Ltd v Falcon Guards Ltd [2000] 2 EA 385***, where the Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

51. Having found that there was no evidence or proof that a constructive trust was created in favour of the Petitioner and her co-wife (with regard to the subject land), the inevitable conclusion is that the Petitioner's claim cannot be sustained and is not merited. It is accordingly dismissed. Consequently, I order as follows:-

i) That the Grant of Letters of Administration remains in the name of the Petitioner in Succession Cause No. 3398 of 2004.

ii) All beneficiaries in the estate of Tubania Kimemia Mungai to be included in the list of beneficiaries.

iii) The estate of the Deceased be distributed according to Section 40 of the Law of Succession Act.

iv) The Grant of Letters of Administration is hereby confirmed in the foregoing terms.

Each party will bear their own costs.

DATED, SEALED and **DELIVERED** at **NAIROBI** this **22nd day of September, 2017.**

L. A. ACHODE

JUDGE