

- (b) Margaret Wangila - 102 acres.
- (c) Maurice Masinde Wabuge - 144 acres.
- (d) Peter Mwombe Wabuge - 144 acres.
- (e) Antony Kilwake Wabuge - 144 acres.
- (f) Roselyn Naliaka Mwangi - 5 acres.

5. In further arguments to support the above grounds, the applicant's counsel **Mr. Barongo** who teamed up with **Mr. Mr. Tororey** submitted that the applicant did not sign the agreed mode of distribution and was not given a chance to object since it was filed on 16th December, 2010 and confirmed on the same day. Moreover, the proposed mode of distribution discriminates against the applicant. It was admitted that although there were correspondence between counsel for the petitioners and the applicant. The agreed mode of distribution was merely copied to the advocates therefore there were no genuine efforts to obtain the consent of the applicant. Counsel referred to the provisions of Section 47 which gives this court jurisdiction to determine any matter regarding an estate of the deceased.

6. According to counsel, the applicant has been discriminated against by other beneficiaries who are his brothers and they have been given 140 acres each and no plausible reasons have been given for this differential treatment which is against the provisions of Article 27 (2) of the Constitution of Kenya. Regarding the competency of the application, counsel urged the court to find that the main prayer is for revocation, and to ignore the technicalities that do not affect the substance of the matter.

7. This application was opposed by both **Mr. Kiarie** and **Mrs. Arunga** for the petitioners and other beneficiaries. Several objections were raised regarding the competency of this summons for revocation which sought for both revocation and annulment without specifying. Mr. Kiarie cited several decisions by the High Court where similar applications were struck out for failure to specify whether the order sought was revocation or annulment. It was submitted that the application did not comply with the provisions of rule 44 of the P & A Rules which clearly provide that an interested party can apply for the grant to be revoked or annulled. Under the rules an applicant should indicate whether they are seeking a revocation or annulment of a grant.

8. There are consequences arising from a revocation and annulment of a grant and that is why the applicant should also have indicated the extent to which the estate of the deceased had been administered. The application was also faulted for failure to comply with the laid down procedure especially the affidavit in support of the summons did not comply with the format provided for under form 14 of the P&A Rules. The affidavit is supposed to be titled "affidavit in support of the summons for the revocation or annulment of a grant". The affidavit is supposed to state the grounds as provided for under section 76 of the Law of Succession Act. According to **Mr. Kiarie**, the defects in this application are too many. They go into the root of the matter because the applicant is objecting to item No. 1 and 5, thus he should have applied for review instead of upsetting the whole distribution especially on other items that have been agreed upon after several meetings of the family.

9. Furthermore since the grant was applied for in 1997, a lot has happened with the estate of the deceased over the years, a lot of compromises were done to prevent the estate from wasting. Upsetting the entire grant will not be in the interest of justice and especially the house of the 1st petitioner which is not affected by the items no 1 and 5. The applicant has also failed to disclose that he was present in court on 16th December, 2010 but refused to indicate his objection. The proposed mode of distribution was passed onto his advocate who failed to file an affidavit of protest.

10. The distribution caters for both families and item No. 1 & 5 relate to the family of the 2nd respondent. The families agreed on the proposal before it was brought to court. This application is therefore an afterthought. The applicant is a child born out of wedlock. It is the 1st widow who took him in her house, brought him up and educated him and the family of the 1st widow agreed how to share items No 1 and 5 among themselves.

11. I agree with counsel for the petitioners that this application is slovenly drawn. It has not been brought within the provisions of section 76 of the Law of Succession Act, and also the P&A Rules. The applicant is objecting to the items No.s 1 and 5 of the agreed mode of distribution therefore he should have applied for a review of the order as the provisions of order 44 of the Civil Procedure rules appertaining to review are applicable under the P & A rules instead of seeking to upset the entire mode of distribution. Going by the proceedings in this matter, I find that a lot of things have happened to the deceased's estate over the last 15 years when this matter has remained undetermined. Thus revoking the grant will not be in the interest of justice.

12. On the merit of this application, the applicant claims that he was discriminated against and given only 30 acres when his other brothers were given 140 acres. This differential treatment according to the applicant offends the provisions of Article 27 of the Constitution of Kenya. On the part of the petitioners, they contend that the applicant was a child born out of wedlock and it was the 1st wife who brought him in her family. Moreover the summons for confirmation where the 1st widow had proposed to distribute to the applicant 226 acres was opposed and was the subject of the protests to the confirmation. That issue was resolved by the entire family agreeing on the mode of distribution.

13. Besides the fact that the family agreed, the record of this case shows that the applicant was always represented in court by an advocate. On 28th October, 2010, **Mr. Barongo** indicated to court that his client would be objecting to the proposed mode of distribution. It was on that day that the court directed that the applicant should file an affidavit of protest for hearing on 16th

December, 2010. However, on 16th December, 2010, the applicant did not file an affidavit of protest, he was present in court and he did not indicate his objection. The court confirmed the grant because there was no protest, was the applicant all along waiting to scuttle the efforts of everybody and render the entire proceedings a nullity when he was given an opportunity to present his protest or address the court but he failed to do so.

14. At a glance, this application renders itself for dismissal firstly for its slovenes and for lack of good faith on the part of the applicant. However considering this is a P&A court, and under the Act, I am given discretion to ensure ends of justice. In this regard I have considered that this is an old matter that has been in court for 15 years, it is in the interest of justice that this matter should be determined one way or the other and brought to an end so that the beneficiaries of the deceased estate can continue with their lives. Also this old file should not continue to gather moulds in the shelves of the court registry, it should be determined so that the parties can move on. For this reason I have invoked my inherent powers under the provisions of rule 73 of the P & A rules to ensure ends of justice.

15. In this regard I am looking at the interest of justice regarding the distribution of the deceased estate. Looking at the age of matter, no doubt the preferred mode of distribution was arrived at after many considerations, one of which I presume was the fact that the applicant was a child born out of wedlock and brought up by 1st widow who is now deceased, that explains why he is put together with the children of the 1st widow. The applicant objects to item No. 1 and 5 which only affect the house of the 1st widow and does not affect the house of the 1st petitioner.

16. As regards the only item covered under item No. 5, this is a shop at Lwandeti which the applicant wants to own alone. According to the proposed mode of distribution, it is supposed to benefit the applicant and 9 others. Giving it to the applicant alone will upset the other beneficiaries for no valid reason. To bring an equilibrium in the house of the 1st widow where the applicant was brought up, I will interfere with item 5 (i) and grant the applicant a further 40 acres which was supposed to be held by the 2nd respondent in trust of all the beneficiaries for communal purposes. That in my humble view will increase the applicant's acreage to 70 acres from the original 30 acres and it will not substantially affect the other beneficiaries save that they will now have only ten (10) acres for communal purposes.

17. Accordingly, the agreed mode of distribution is ordered to be amended by amending item 1 (f) and granting the applicant a total of seventy (70) acres from L.R. No. 6417, and item L, the 2nd respondent to hold ten (10) acres in trust of the beneficiaries B – J.

Since these proceedings were necessitated by the applicant who squandered the opportunity given to him to file a protest, I order that he should pay the costs of the respondents for this application.

Ruling read and signed on 15th day of July, 2011.

**MARTHA KOOME.
JUDGE.**