



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
SUCCESSION CAUSE NO. 68 OF 1986
IN THE MATTER OF THE ESTATE OF AGGREY ORIENO AMBALA (DECEASED)
JUDGEMENT

The proceedings herein have been protracted leading to the filing of numerous applications various issues, which applications have given rise to varying orders and instead of these orders assisting the beneficiaries herein resolve the issues relating to their share entitlement, have the estate distributed and wound up have lead to confusion on the way forward in bringing this long standing litigation to an end.. It is therefore necessary for this court to sift through the paper work on the record both from draft entries made by the court and the paper work filed by the respective parties in order to identify the complaints of each and every participating beneficiary or interested parties and there after draw out issues for determination, make findings on them and then make orders on the way forward in order to resolve the issue in order to wind up the estate. To this end it is necessary to set out the facts at length for ease of understanding of what has transpired in the proceedings which has led to the final orders to be made.

Highlights from the court hand drafts reveals the following entries in a summary form:-

- It appears the main file got lost and an order for reconstruction was ordered on a date torn off from the current file cover.

- On 19/5/2004 Tanui J as he then was (now rtd) made the following orders:-

- (i) Due to the urgency of the matter, administrator M. Shah do cease acting as an administrator of the said estate. That he ceases from receiving and paying money into the estate account.**
- (ii) That Opiyo Ambala and Oduor Ambala do operate the estate account with power to receive and disburse money.**
- (iii) Stood over to 16/6/2004 for inter partes hearing.**

On 3/12/2004 parties appeared before Tanui J as he then was for orders. Those recorded to have been present are Mr. Oguso for Odhiambo Ambala a beneficiary, Odeny for Gadha for Bhupen Shah the administrator, K'owade for the rest of the beneficiaries. On this date an order was made to the effect that the matter be stood over on the 27/1/2005 for mention on the issue of accounts between Shah and the estate. After the judge signed off Mr. Kowade made a representation that among the beneficiaries the distribution of the estate was to be as follows:-

On proposal given by Rajni Somaia advocate by his letter of 29/6/99 be effected and the estate be

distributed as follows:-

The estate to be distributed amongst the following:-

- (a) Otieno Ambala junior**
- (b) Oduor Ambala**
- (c) Odhiambo Ambala**
- (d) Nyerere Ambala**
- (e) Ogola Ambala -(All five sons) of the late Mrs. Perez Auma Ambala**
- (f) Auma and Chizi Ambala – daughters of Beryl and the late Otieno Ambala.**
- (g) The four children of Mrs. Nancy and the late Otieno Ambala, Akinyi, Opiyo, Apiyo and Adongo.**

Division of assets is to be as follows:-

- (i) Kisumu Shops Ambala Estate. There are a total of 10 shops of which 9 are of the same size and one shop which is double the normal size. The big shop is to be given to Auma and Chisi Ambala. The remaining shops are to be given to each beneficiary.**
- (ii) Petrol station off Kakamega road. This is to be sold to the highest bidder. The net amount to be received is to be divided equally among all the beneficiaries after all liabilities due from the estate have been paid.**
- (iii) Land in Muhoroni. This land is to be divided equally among all the beneficiaries.**
- (iv) House in Fort Jesus. This should be divided equally among Otieno, Oduor, Odhiambo , Nyerere and Ogola Ambala.**
- (v) Shares in Nararashi whole sellers this company should be sold and the proceeds to be divided equally among Otieno, Oduor, Odhiambo, Nyerere and Ogola Ambala.**
- (vi) Land in Karen: This land is to be divided equally amongst Otieno, Oduor, Odhiambo , Nyerere and Ogola Ambala.**
- (vii) Houses in Siaya: These are to be divided amongst Otieno, Oduor, Odhiambo, Nyerere and Ogola Ambala.**

The residue of the estate should be divided equally amongst the 16 beneficiaries.

That Walter Ambala and Alfred Jacob Ambala are to execute and /or sign any legal documents necessary for purposes of effecting the distribution of the estate as stated above.

All the beneficiaries herein above specified be ordered to account for all the monies they have received or may have received from the estate and that those accounts be audited by independent Auditors who will verify their correctness, which accounts are to be reconciled with the accounts to be given by Bhupen Shah who produces own accounts during his term as the administrator of the estate.

There be one escrow account to be operated by Walter Ambala and Alfred Jacob Ambala which account shall be used for collection of other rent proceeds, proceeds for sale of shares and/or any income due to the estate pending finalization on administration of the account. Liberty on any named beneficiary to apply.

Each party to bear own costs.” B.K. TANUI - JUDGE

**Signed
J.R.K. Owade**

Obura Oguso

3/12/2004

On 4/5/2006 parties appeared before Mwera J. It is indicated that those present were advocates M/S Omollo for the 2nd administrator, Walter Ambala. There is mention that there was a chamber summons dated 4/4/2006 Representation from the counsel on record then reveals that the court by Warsame J had given directions that the matter be mentioned in court to enable one Jacob Ambala (1st administrator) make an affirmation to the court in person that he does not object to Walter's withdrawal in line with the letter he had written of 10/4/2006 to that effect.

Jacob Ambala is indicated to have stated thus:-

“I do not object to Walters’ withdrawal as an administrator though the estate is large with many beneficiaries. But I will handle it alone.”

Court

By consent of Jacob Ambala first administrator that he does not object to Walter Ambala's withdrawal as an administrator leaving him Jacob as the sole administrator. Orders sought are granted.

On 2/4/2008 parties appeared before Karanja J and then recorded the following consent:-

(1) All the interested beneficiaries namely Oduor Hawi Ambala, Odhiambo Ambala, Nyerere Ambala, administrators of the estate of the late Otieno Ambala Junior, Ogola Ambala, Peris Auma Ambala and Chris Adhiambo Ambala to file a document confirming their specific portions of property in respect of the Karen property, Siaya Property, Ambala shops in Kisumu and the Muhoroni farm within twenty one (21) days from today.

(2) All beneficiaries who have had any payments made to them from the estate to account for the monies within twenty one (21) days from today.

(3) Walter Ambala and Alfred Jacob Ambala to give that account within twenty one (21) days from today.

(4) Upon presentation of their accounts the said Walter and Alfred Jacob Ambala to cease acting as administrators of the estate.

(5) Upon presentation of number one above, the Deputy Registrar to have the power to sign and or execute any documents for and on behalf of the estate.

(6) The matter be mentioned on 30th April 2008 to ascertain compliance. Costs in the cause.

On 11/9/2008, when the matter went before Mwera J, the learned judge made observations that:-

“Normally administrators cease to be such, where they have finally distributed all the estate. Here some part remains. But the order of 2/4/2008 provides that the Deputy Registrar of the court do from that date on sign all the documents.”

There is an entry made on the record on 25/11/2008 to the effect that the Registry had a consent letter dated 25/11/2008 and signed by both counsels for the parties received and filed in court on 25/11/2008 and the consent was recorded in the following terms.

By consent

1. That the Karen property being LR. NO. 1160/234 had been sub divided into LR. NO. 1160/286, LR NO. 1160/288 and LR. NO. 1160/289 totaling 15 acres.

2. That otieno Ambala Junior and Nyerere Omondi Ambala have already had benefits of their

inheritance by taking possession and selling off properties in LR. NO. 1160/286 which comprise of 5 acres being sub divisions as fore stated. This two have already benefited from the consent order made on the 3/12/2004 in the following manner:-

(a) Otieno Ambala Junior – 3 acres and (b) Nyerere Omondi Ambala – 2 acres

3. That the Karen property comprising of 15 acres was meant to be divided among (5) sons now has only 10 acres remaining which shall be divided between the remaining beneficiaries as follows:-

(a) Oduor Hawi Ambala -3 acres, (b) Odhiambo Tabu Ambala – 3 acres, (c) Nyerere Omondi Ambala – 1 acre and (d) Metric Ogola Kadhok- - 3 acres

4. That the consent order of 4/12/2004 is hereby varied to read the extend of what is stated above.

5. There be no order as to costs.

6. That upon recording this consent, then the applicant's application dated herein will be marked as settled.

There is traced on the record a ruling by Mwera J delivered on the 14/12/2009. Scheming through it reveals the following salient features:-

- The cause is contained in a bulky file with lost of proceedings. Correspondences and documents.

- The cause has been going back and forth between the Kisumu Registry and the Nairobi Registry and the same had been handled by several judges and advocates and some of the proceedings may have fallen off during its life dating from 1986.

- Be that as it many big names leave vast estates fought over by many and for long periods on various points.

- That by this time some three applications are pending on the record but before these were to be heard in whatever sequence it became necessary for the court to know the status of the estate. Has it been distributed or is it still existing.

- With that 4 sides appeared in court Mr. Otieno for Miss theuri for Marvin and Chizi (Chizzy) Ambala.

(2) Mr. Oguso for Odhiambo Ambala

(3) Mr. Mungu for Oduor Ambala and others

(4) Mr. Gichaba for Bhupen Shah an administrator said to have been discharged after distributing the estate.

- Parties were directed to submit on the state of the estate before this court in order to consider whether to hear pending proceedings or not.

- Upon perusing the submissions of M/S Theuri, Mr. Ogola and Mr. Mungu the following issues appear to stand out to be entertained by the court:-

1. Whether any party got a confirmed grant according to law to distribute the estate and if he/she distributed the estate and was thus discharged.

2. Whether all the heirs/beneficiaries consented to the scheme of distribution.

3. **Whether some people (beneficiaries) are purporting to dispose off the assets of the estate without due court authority as administrators.**
4. **Was the estate split between pre- Perez (first wife of the deceased) and post Perez acquired assets. The inventory of all the assets?**
5. **Who got what asset and are any still undistributed? The final list of distribution?.**
6. **If this court confirmed the distribution should, it review its orders to that effect or it is a matter for appeal?**
7. **The effect of all interested, consenting to Walter and Jacob Ambala to “Over see” the distribution of the estate of what legal validity was the consent?**
8. **And finally as at this stage, what does equity and justice require to be done?**
 - **In doing the best from the submissions this court is minded to rule and it rules that it will order the sequence of hearing the pending applications by viva voce evidence on the above points and any relevant ones that may crop up that way.**
 - **Parties to be at liberty to put forward points of facts and law.**

On 19/1/2011 Nambuye J became seized of the matter for the first time and requested time to study the file. On 25/3/2011 this court gave directions that it had perused the file and indicated that it is in the interests of all participating that the application for revocation dated 17/2/2009 be heard first. Parties were given liberty to file submissions on the same and exchange authorities and thereafter matter was fixed for ruling with the status quo being ordered to prevail till the delivery of the ruling and or judgment.

It is against the afore set out brief background information that one describing himself as Marvin Opiyo Ambala presented the application subject of this judgment by way of a chamber summons brought under sections 43,48,71,76 (d) (i) (ii) (iii) (e) 83 of the laws of succession Act cap 160 laws of Kenya, Rules 44,49,51 and 73 of the probate and administration rules. Seven reliefs are sought namely:-

1. **Spent**
2. **That the grant of letters of administration issued to Nancy Otieno Ambala, Joseph Odhiambo (iii) Ambala Junior and Barack Ambala on the 26th day of March 1987 be and is hereby revoked.**
3. **That the certificate of confirmation of grant issued on the 2nd day of November 1995 to Bhupen Shah, and the certificate of confirmation of grant dated 10th February 2006 be and is hereby cancelled.**
4. **That the honourable court do hereby appoint a recognized account (accountant) to undertake and audit the estate and receive all the accounts from the beneficiaries and administrators**
5. **That all the beneficiaries and of whatever nature that have handled the estate do submit accounts to the court appointed Auditor.**
6. **That the honourable court do restrain any of the beneficiaries purported administrators, their agents, servants from transferring, selling, administering, alienating any of the fixed assets of true estate especially land in Siaya, Muhoroni and Karen LR. NO. 1160/288 LR No. 1160/289 and LR. NO. 5812 Nairobi.**
7. **That costs of the application be provided for”**

The application is grounded on the grounds in the body of the application and in a summary form these are:-

- That the original administrators have been overlooked in the distribution.
- The grant of confirmation has been issued to a person only with a limited grant and 2ndly to persons who had not been properly appointed as administrators.
- That by reason of the afore said matters, there has been created a state of confusion in the administration of the estate leading to the estate being wasted.
- That the rightfully appointed administrators have not been able to file an application for confirmation and distribution of the estate.
- That there has been no move to revoke the grant of administration granted herein.
- The courts' intervention is necessary because by reason of the state of confusion prevailing, some beneficiaries are taking advantage of the confusion to waste the estate to the disadvantage of some beneficiaries as those misusing the situation are favouring members of one house only.
- Contends that the consent to confirmation was done by two advocates who were not representing all beneficiaries.
- Most beneficiaries were not aware of the alleged confirmation.
- That there is a move to distribute the estate unevenly with distribution favouring some beneficiaries over others hence the necessity for the court to intervene and ensure that justice is done to all.
- That one of the administrators Otieno Ambala Junior passed on in 2006 but this information has not found its way to court.
- Also complained that some of the beneficiaries living abroad have not been served with the proceedings.
- Lastly that the administrators have not produced any inventory or accounts of the state of the estate property.
- That the said grant has become useless and in operative hence the necessity for it to be revoked.

In addition to grounds in the body of the application there is a supporting affidavit deponed by one Marvin Opiyo Ambala a son of Nancy Ambala and the deceased subject of these proceedings. The salient features of the deponements in the supporting affidavit in a summary form are as follows:-

- The deponent/applicant is a son of the deceased subject of these proceedings with one Nancy Ambala .He is therefore a beneficiary of the estate of the deceased.
- Vide paragraph 4 that the full inventory of the assets of the deceased as at the time of his death are as set out hereunder:-

(i) Kisumu shops, (ii) Kisumu shop, (iii) Petrol station, (iv) Kisumu Municipality Block 9/4, (v) Land in Muhoroni, (vi) Fort Jesus house Mombasa, (vii) Shares in Nararasha whole sellers, (viii) Land in Karen/Nairobi LR. NO. 1160/288. LR. NO.1160/289 (LR 5312 Nairobi), (ix) Houses in Siaya and (x) Residue of the estate.

Vide paragraph 5,6,7, that they are four of them in the deponents house namely himself, Apiyo Ambala,

Adongo Ambala and Akinyi all of whom were minors as at the time the grant sought to be revoked was issued.

- That he had assumed their mother would protect their beneficial interests to the estate but she never did so.

- To his knowledge other administrators to the fathers estate have been one Joseph Odhiambo, and Barack Ambala.

- Vide paragraph 8,9,10,11,12,13,14,15,16 that from age 14 years he has had personal knowledge that the estate has not been doing well as he could not even be sustained in school by its proceeds.

- Vide paragraph 17, 18, 19 that despite the deceased father having left enough property to fend for his children, him deponent has just been struggling to fend for himself and his siblings.

- Although he knew very little about his late father because the deceased died when the deponent was very young he is sure that there is no doubt that his late father would have wished his children to share in his estate equitably.

- Vide paragraph 20, 21, 22, that certain beneficiaries have been excluded from inheriting property belonging to the deceased in Karen, Siaya, Muhoroni property and Kisumu Petrol station. Further that proceeds of sale of property's namely Kisumu shops, Kisumu Shop, petrol station, Kisumu Municipality Block 9/4, land in Muhoroni/Kisumu, Fort Jesus house in Mombasa, shares in Nararasha wholesalers, land in Karen/Nairobi LR. NO. 31160/288, LR. NO. 1160/289 (LR. NO. 5312) houses in Siaya and residue of the estate have been disposed off but the proceedings realized thereof have never reached some of the beneficiaries.

- Vide paragraph 23,24,25 and 26 that at one time him and one Oduor Ambala were mandated to operate bank accounts belonging to the estate but he was surprised to be told that there were no funds in the said accounts and upon inquiry, he was told that he had signed out all of the amount which was not true .

- He blames episodes of dishonesty and selfishness by some of those entrusted with dealings both in money and property belonging to the estate.

- Vide paragraph 27, 28 and 29 that the deponent has personal knowledge the deceased father had 100 acres of land in Karen once. He sold some leaving a portion which was partially disposed off by his mother jointly with other administrators leaving a balance of 10 acres which should be shared by all beneficiaries by being shared equally amongst the three houses of the deceased and thereafter each child to inherit from the share of his/her mothers house.

- Vide paragraph 30, 31 and 32 that it will not be proper for some of his brothers to think that some beneficiaries are more equal than others.

- Vide paragraph 33, 34, 35,36,37,38 and 39 thereof that the only grant supposed to be recognized is that one issued to his mother Nancy brother Otieno Ambala junior, Joseph Odhiambo, and Barack Ambala which has never been revoked and for this reason his step brothers Odhiambo Ambala and Oduor Ambala have no mandate to purport to have authority to sub divide and dispose off the Karen property.

- That he is of the opinion that the wife of his late half brother Otieno Ambala junior should be considered as a beneficiary as well.

- Vide paragraph 40 set out the history of the on goings in the file and for purpose of assessment these are summarized as follows:-

(i) One Harbans Rai Sai an accountant had been granted a limited grant to collect and get in

estate property for preservation was erroneously granted a full grant on the 29th of June 1989.

(ii) Upon the demise of Harbans Rai Sai in 1992, a limited grant was issued to another accountant one Bhupen Shah limited to the collecting , getting in and receiving the estate limited to preservation which grant was erroneously confirmed on the 2nd day of November 1995 but he was later removed from the administration by a court order made on the 19th day of May 2004.

(iii) That on the 3rd December 2004 one Walter Ambala and Alfred Jacob Ambala were authorized by the court to execute, sign any documents necessary for the purpose of distribution.

(iv) Thereafter the two moved the court for confirmation of the grant which was issued on 10th February 2006 and then subsequently for unknown reasons one Walter Ambala moved the court to be discharged as an administrator and an order to that effect was granted.

- That on 7th day of April 2008 the two Walter Ambala and Alfred Jacob Ambala were finally removed as administrators by the court on account of their having failed to render an account or inventory of the status of the estate.

- Vide paragraph 41,42,43,44,45,46,47,48,49,50 that according to him there is a grant in place because the grant issued to Nancy Ambala, Otieno Ambala junior, Joseph Odhiambo and Barack Odhiambo has never been revoked and so it is still valid. That Bhupen Shah could not be issued with confirmation of grant because he had no full grant as he only had a limited grant which was incapable of being confirmed.

- That by reason of the lawful administrators failing to administer the estate, the estate has gone to waste and him the deponent as a beneficiary has suffered loss and damage.

- That the deponent has put forward sufficient information to warrant him being granted the relief sought.

- That the granting of the relief is necessary to ensure a fair and equitable distribution of the residue of the estate of the deceased.

- Vide paragraph 51,52,53,54,55,56 and 57 that justification for the relief is borne out by the fact that none of the beneficiaries of the estate of the deceased gave consent to the mode of distribution before confirmation and for this reason among others, the said confirmation stands faulted and they should be discharged to pave the way for others to be issued.

There is on record a replying affidavit by one Beryl Lilian Odinga deponed on the 17th day of March 2009, comprising 51 paragraphs summarized into the following issues:-

- She had married the deceased but got divorced.

- There were two daughters between them namely Peris Auma Ambala and Chizi Ambala who were minors when the deceased died, where upon the deponent took them to Zimbabwe where she solely fended for them.

- That any request for support from the estate of the deceased was met with hostility.

- To the deponents' knowledge and as confirmed by Peris whose power of Attorney the deponent holds, they have never been consulted on any major issues concerning the estate neither have they consented to any transaction concerning the estate property.

- The said daughter never consented to any consent by Mungu advocates.

- The daughter Peris has never received her inheritance to the late fathers' estate.
- The daughter supports the application because if the estate is left in the state in which it is, the acrimony and hatreds will persist resulting in further wastage.
- Denies having instructed the firm of K'owade to enter into a consent on her behalf.
- The deponent being a legal mind depones to legal knowledge of there being requirement that consent of beneficiaries to the mode of distribution be filed alongside the application for confirmation, that there is no jurisdiction to confirm a limited grant, that the law does not discriminate any beneficiaries on account of gender.
- Contends that according to her knowledge of the deceased, there is no way children could have been discriminated upon.
- Contends that she supports the application and prays that the interests of her daughters be catered for.
- Prays to the court to intervene and ensure equal distribution of the balance of the estate of the deceased so that other beneficiaries who have not been catered for previously can receive their rightful share of the estate of the deceased.

There is also an affidavit filed by one Oduor Hawi Ambala dated on the 18th day of March 2009, and filed on the 19th day of March 2009. The following are high lights:-

- The affidavits is in response to the applicants' affidavits filed in support of the application dated 17/2/2009 on behalf of Odhiambo Ambala, Nyerere Omondi Ambala and Ogola Kadhek Ambala.
- Vide paragraph 6, 7, and 8 that the deponents late mother Peres Ambala got married to his late father at a wedding in 1958 in Nairobi under the African Christian and divorce Act cap 150 laws of Kenya. The marriage had five (5) sons of one whom is deceased and who are all presently adults.
- Vide paragraph 9,10,11,12 that the deponent has personal knowledge that he parents were a businessman and woman with the late mother being one of the first African women to run a fish and chips shop in Nairobi.
- They led a frugal life and by reason of this self denial they acquired the prime properties.
- That the property LR 532 in Karen was acquired at a price of Kshs. 126,000 and as per information to him from his late father the same was acquired in 1973 from their joint efforts (late parents).
- Vide paragraph 13,14 that upon the deponents mother passing on in June 1973, the deceased father was the sole administrator of the estate and merged all their properties together (late parents property)
- Vide paragraph 15, 16, that he has personal knowledge that the deceased father took on Beryl and had two children with her, Perez Auma and Chizi Adhiambo but the two separated in 1981 where upon Beryl went to live in Zimbabwe.
- Vide paragraph 17 that during the subsistence of the marriage with Beryl the late father cohabited with one Nancy in a way that was not legal in law and therefore there was no marriage but the union had children. Children Akinyi Ambala born in 1981, Marvin Opiyo born in 1982 and twins Apiyo Ambala and Adongo Ambala born in 1985.
- Vide paragraph 18 that the deceased father passed on, on 8th June 1985 leaving a valid will.

- Vide paragraph 19 that his late father acquired no property after the passing on of the deponents late mother.
- Vide paragraph 20 that since the late father's will did not include the children of Nancy, but since they knew that they were his late father's children him and his brothers sat down and decided to make provision for them and that is how their mother was made an administrator together with two of his elder brothers and 2 uncles.
- Vide paragraph 21,22,23,24 and 25 that since the death of his late father letters of administration were applied for and first of all issued to Nancy Ambala, Otieno Ambala, Junior, Barack Odhiambo and Joseph Odhiambo. The will was set aside but beneficiaries could not agree on the mode of distribution of the estate necessitating the Succession file to be shifted between Nairobi and Kisumu high courts Registries which situation also resulted in the change of administrators as demonstrated in paragraph 25 as:-

(i). 1986-1989 Nancy, Otieno Ambala Jnr, Barack Odhiambo Ambala and Joseph Ambala., (ii) 1989-1991 Harbans Rai Sal., (iii) 1992-2004 Bhupen Shah and (iv) 2004-2008 Walter Ambala and Jacob Ambala.

- Vide paragraph 26 that upon the beneficiaries realizing that the only persons benefiting from the estate were advocates, Nancy and his late brother went to each of the beneficiaries in Kenya with a proposal on the mode of distribution and obtained signatures on the mode of distribution and which document was readily accepted because it was fair as it had taken note of the following:-

(i) That the bulk of the property making up the estate was acquired with the joint efforts of the deponents parents.

(ii) They would follow the will subject to taking into consideration the interests of other beneficiaries.

(iii) That the property acquired by the joint efforts of the deponents late parents be shared between her sons only.-

- Vide paragraph 27 that upon reaching the agreement of the said majority of the beneficiaries agreed to be represented by the advocate of Nancy Ambala namely K'Owade advocates with one descending voice choosing to be represented by an advocate a Mr. Oguso both of whom agreed and recorded a consent in court on the distribution of the estate on 4/12/2004. Thereafter the consent was ratified in minutes taken by Perez Auma Ambala at a brothers' house on 14/12/2004 after which Nancy Ambala and Otieno Ambala moved the court to have Bhupen Shah removed as an administrator.
- Vide paragraph 31,32,33,34 in response to the applicant's deponement that Nancy was not a wife of the deceased because she came on board during the subsistence of the marriage between Beryl and the deceased and was therefore not a dependant.
- Vide paragraph 35 in response to the inventory of properties, that properties Xi Xii, xiii and xiv are the same properties.

(b) Xiii, has been disposed off.

(c) The property shown as Fort Jesus does not stand for houses in Mombasa but a house at Woodley in the name of the deponents late mother and for this reason the same is not available as estate property.

(d)The deponent is a stranger to Nararasha whole salers.

(e) The titles mentioned as Karen property are sub divisions which property are measuring 32 acres as at the time of the death of his late father. Apportion of which was sold off for a song with another portion of

5 acres on which stood a mansion of 6 bed rooms was auctioned because the mother failed to service the loan despite renting it out on the pretext that she was using the proceeds to pay fees for her children.

- Vide paragraphs 39,40,41,42,43,44,45 and 46 concedes that beneficiaries have suffered as a result of the affairs complained of, that some of the persons mentioned as administrators moved out of administration on their own volition.

- Vide paragraph 47 disputes allegations of the applicant because he has benefits of the shop allocated to him and had also received Kshs. 800,000.00 as his share of proceeds from the sell of the petrol station.

- Vide paragraph 49, 50, 51 and 52 the deponent maintains that all the properties were acquired during the lives of late parents. Asserts applicants' mother stayed with the father only 4 years during which time no property was acquired, concedes existence of wrangles in the family but says that these were caused by the applicants' mother and lastly that the estate accounts were Audited in 2004 by Samvir Kassim Lakha.

- Vide paragraph 53 on the status of the property forming the estate the deponent high lights the following:-

(a)Kisumu shops that the entire property is intact and infact the applicant owns one of the shops from which he collects rent.

(b)Kisumu shop is nonexistent.

(c)Kisumu Block 9/4 is the title on which stood the petrol station which was sold and the applicant received Kshs. 800,000 as his share.

(d)Land in Muhoroni is intact and the same is in the process of being subdivided and the applicant is one of the beneficiaries.

(e)Denies knowledge of the Nararasha whole salers property.

(f) The land in Karen has been sub divided and given to the respective beneficiaries according to the consent of December 3rd 2004.

- The houses in Siaya was part of the consent in December 3rd, 2004.

- Vide paragraph 55 maintains that the estate account was run properly.

- Vide paragraphs 56,57,58 and 59 that the deponent is a stranger to the existence of any love and affection between applicant and the deponents immediate brothers, denies wrangling within the family since the consent order in 2004, concedes there was a purported sell of some property in Karen but this is now a police case and the applicants mother has recorded a statement to that effect, dispute the issue of application of Luo customary law to the late fathers' estate as the father has never been polygamous as he had one wife at a time.

- Vide paragraph 60,61,62,63,64,65,66,67 and 68 that the father left a will, some of the complaints laid were overtaken by the consent of 3rd December 2004, that the application is meant to defeat the criminal prosecution with regard to the various properties, that the applicant has partially benefited from the estate and that his late brothers wife has no claim to the balance of the estate because he had sold off part of the various properties and upon his demise the wife chose to migrate to England (Britain).

- Vide paragraph 69,70,71,72,73,74,75,76,77 that the deponent stands by the content of the court record, that some of the beneficiaries have sold legitimate shares to 3rd parties and that it is in the interests

of justice that the property subject of this estate be inherited as per the content of the will and as settled by the consent herein and the applicant should not be allowed to complain belatedly more so when he has failed to disclose that he has also benefited from the consent of 2004.

Apiyo Ambala also deponed a replying affidavit deponed on the 19th day of March 2009. Scheming through it reveals the following:-

- To her, since the beneficiaries paternity is not in question it is fair to evenly and fairly distribute the deceased's' estate.
- Although she was of age of majority her consent was not sought when the consent of 3/12/2004 was entered into.
- She has information from her mother who says she only gave instructions to remove Bhupen Shah as an administrator but not to consent to any mode of distribution.
- Confirms that she has knowledge that their mother has been making efforts to educate them without support of proceeds from the estate.
- If any consent was given by their mother to the mode of distribution consented to, then it does not bind the deponent.
- There should be no reliance on the alleged will as it ceased to have any relevance long time ago.
- Vide paragraph 42 that she confirms having received 800,000.00 as proceeds of sale of the petrol station.
- She has never renounced her inheritance rights and she has knowledge that her mother also has not renounced her inheritance rights.

There is traced on the record a further affidavit by the applicant deponed on the 3rd day of August 2009, and filed on the 17th day of September 2009. Scheming through it reveals the following high lights:-

- Vide paragraph 1,2,3,4,5,6,7,8 and 9 made correction to his earlier deponements with regard to age, residence and who has been supporting his siblings and that he has authority from two sisters to depone on their behalf.
- Vide paragraph 10,11,12,13,14,15,16,17,18,19,20,21,22,23,24 and 25 that all he has all along been interested in is to restore harmony within the family by demanding fair and equitable distribution of the estate of the deceased and confirms lack of consent of 3/12/2004.
- Vide paragraph 26,27,28,29,30,31,32,33,34,35,36,37,38,39, that he reiterates the content of the replying affidavits of his sister that it is their mother who has been struggling to educate them.
- Vide paragraphs 40,41,42,43,44,45,46 and 47 that he reiterates that all beneficiaries should consent to the mode of distribution.
- That in addition to what had been deponed earlier other property belonging to the estate of the deceased are:-

(i) LR. NO. Siaya/Karapul Ramba/385,388., (ii) Kisumu Muhoroni/664, (iii) Plot No. 965 and 1115 Muhoroni scheme., (iv) Shares at East African Breweries., (v) K.C.B. Siaya Branch., (vi) Loan over matrimonial home Gem., and (vii) Karen LR. NO. 1160/287.

- That any sale of property by beneficiaries before distribution is null and void.

Parties filed written submissions. Those of Oduor Ambala , Nyerere Omondi Ambala and Ogola Ambala are dated on the 24th day of February 2011 and filed the same date. Scheming through them reveals a reiteration of the content of their deponements on the record and in summary form the following have been stressed:-

- It is their contention that the deceased who died on the 8th day of June 1985 had successive wives and was never polygamous with the first one having been married in 1958 in which marriage they had five sons between them namely Otieno Ambala junior, now deceased, Oduor HAWI Ambala , Odhiambo Ambala and Nyerere Omondi Ambala and Ogola Kodhek Ambala. The second Beryl was married in 1974 in a civil marriage. This union had two daughters Presz Auma and Chizi Ambala. The union ended in divorce in 1981. The 3rd one Nancy was a cohabitee but they had four children between them namely Akinyi Ambala, Twins Apiyo and Adongo Ambala and Martin (Marvin) Opiyo Ambala. The history of the administration of the estate is as stated in their deponement namely that:-

From 1986-89 the administrators were Nancy Ambala, Otieno Ambala, junior, Barack Odhiambo Ambala and Joseph Ambala who were removed in 1989. Upon their removal came one Harban Rai Sai Raisal who passed on ushering in Bhupen Shah who administered the estate from 1992 to 2004 when he was removed by the consent order of 3/12/2004. The last are Walter Ambala and Jacob Ambala. It is belated for the applicant to contend that Bhupen Shah was never issued with a full grant. Confirms the existence of a written will of the deceased but despite its revelation and existence parties opted to proceed with the proceedings as intestate. Maintains the late Perez Ambala made immense contribution to the acquisition of the estate of late Aggrey Ambala, a fact acknowledged by the will of the deceased. That from the content of the title deeds of properties forming the estate of the late Aggrey Ambala, these go to demonstrate that the deceased never acquired any properties after the death of his first wife Perez.

On distribution of the estate, they reiterate their deponements in the replying affidavit that advocate Rajni Somaia made proposals which were reduced into minutes signed by all beneficiaries inclusive of the applicant and it is that consensus which found its way into the consent order of 3rd December 2004, a position confirmed by correspondences exchanged between Hawi Ambala and other beneficiaries exhibited by them. The distribution took the form of selling of the petrol station and parties being given their shares and also by being given specific shares of properties. That shops were distributed and there has been no assertion that each beneficiary is not reaping proceeds from their allocated shops.

With regard to the administration of the estate by Bhupen Shah, Allegations that he was granted a limited grant which could not lead to confirmation does not hold as no complaint was raised by any of the beneficiaries when he was granted a confirmation. All beneficiaries dealt with him as such and had benefits flowing from the said administrator to them. That Walter and Jacob also had a confirmed grant which was used to distribute the estate of the deceased. The court is invited to believe the assertion of the deponements of Oduor Hawi Ambala that all beneficiaries were informed of the on goings in the estate evidenced by the presence of the beneficiaries signatures and thumb prints on the various documents exhibited by Oduor which the beneficiaries have not explained their presence. Contends that beneficiaries have all taken that which was given to them and have just turned around and changed their minds when the Respondents and his siblings moved to take their entitlement of the Karen property. Contends that by reason of what has been stated above, the court is invited to hold that the application has been brought in bad faith. The court is invited to disallow the denial of Nancy Ambala that she gave no instruction to M/S K'Owade to sign consent on her behalf as the denial has been disproved by the presence of her hand written instructions and deponements to that effect. The applicant has also benefited from the said consent as he participated in activities undertaken as a result of the said consent namely such as being a signatory to the estate account. Also confirms that all those who have deponed replying affidavits in support of the application have also benefited and participated in activities arising from the said consent. Contends that the voiceless in the house of Chizi and Nancy were represented by Chizi and Nancy and their deponements are deponed in bad faith. By reason of the a fore set out assertions , the court has been invited to make findings on the pending application as follows:-

(i) That the estate has been distributed fully and none exists and assent to the transfers were signed by the Deputy Registrar following orders issued by Karanja J and for this reason this court is being

asked to sit on an appellate capacity over orders issued by a court of co-ordinate jurisdiction.

(ii) That parties are estopped from going back on the distribution proposal by Rajin Somaia which was in line with the will of the deceased. They took what they had been given and cannot go back to that. This is evidenced by the fact that the challenge has come five years after the consent.

(iii) That if there are any property which were left out then the applicant is at liberty to take out a grant of representation to administer the same.

(iv) No sound ground has been advanced to warrant the court being invited to exercise its discretion in favour of the applicants. More so when the parties have benefited from the said consent.

(v) That the will of the deceased is a reflection of the deceaseds' wishes with regard to the distribution of his estate and that the same should be respected.

(vi) The court is invited to take note of the fact that the caveator is the genesis of the current application following the loss of a civil case in Milimani Commercial court Nairobi and will be a beneficiary should the applicant succeed. This will be a benefit from a sale of the estate property by persons who were not administrators at the time.

(vii) That by reason of what has been stated above; the court should hold that there is no merit in the application and that the same should be dismissed with costs to them.

Submissions by the counsel for the applicant on the application are dated 1st of April 2011 and in a summary form these reiterate the content of the deponements filed by applicant and those supporting the application and then the following has been stressed.

The court is invited to be guided by responses to ten questions, the court put to parties with regard to the parties to appraise the court on the on goings in the file which are dated 24th February 2011 and filed the same date. The following are high lights of the same.

(i) Confirms that most or all beneficiaries benefited from the sale of the petrol station and the distribution of the shops.

(ii) Chizi and Ambala were for unexplained reasons given one shop to share while the rest got a shop each. (There is mention that it was a double shop- 2 in one)

(iii) Despite the Respondent referring to Nancy Ambala as a concubine the court to note that the law says otherwise and the court is invited to be guided by the provisions of section 40 of the law of succession Act and then find that the position in law is that whether or not a marriage was contracted between Nancy Ambala and the deceased is irrelevant. What is relevant is that the said Nancy is a wife for purposes of the succession Act. Likewise one Beryl Odinga as an ex-wife should also be considered for purposes of inheritance.

(iv) For purposes of the succession Act, the deceased had three households because he married more than once.

(v) That the consent on distribution stands faulted as one beneficiary from the first house objected to it in writing but which objection was ignored by the law.

(vi) Concedes that the three households know each other save that the senior house thinks that it is superior to the other two households.

(vii) With regard to grants, the court is invited to note that the first grant was never revoked, the second one lapsed by the death of the administrator, whereas the 3rd one which was also confirmed was not

revoked but that notwithstanding some beneficiaries were given authority to administer the estate and were also issued with a grant of confirmation. By reason of the afore said, they content the only grant validly issued was that one which had been issued to Nancy Ambala, Otieno Ambala , Junior, Barrack Ambala ad Joseph Odhiambo.

(viii) The source of disharmony is the belief of the first house that what their father owned emanated from their late mother and the only way this can be resolved is by making an order that the estate of the deceased be distributed equally amongst all the beneficiaries.

(ix) It is suggested that the matter be reopened and the beneficiaries be heard a fresh on the mode of distribution.

Turning to the submissions of 14/4/2011 in addition to stressing what has been stated above, the following have been reiterated:-

(i) The limited grant which had been issued to Bhupen Shah was illegally confirmed as it was incapable of being confirmed.

(ii) The grant to Walter and Jacob Ambala was irregularly issued without them making an application for issuance of a grant. This being the case, the certificate of grant issued herein in their favour was irregular and of no consequence and anything done under the authority of the said paper was nothing but a nullity and it should be set aside.

(iii) That in the absence of consent of the beneficiaries to the issuance of the grant distribution and confirmation, the transactions complained of stand faulted.

This court has given due consideration to both rival pleadings and submissions and in its opinion the following are own framed questions for determination in the disposal of this matter:-

- 1. What are this courts general observations with regard to the proceedings this far?**
- 2. Are there any legal issues arising from the afore said general observations made above?. If so, what is this courts response to those legal issues?**
- 3. What relief is the applicant seeking from the seat of justice?**
- 4. What strong points have been advanced by either side for and against the relief sought?**
- 5. What ingredients is the applicant required to establish before one can earn such a relied?**
- 6. Has the applicant brought himself within the ambit of the said ingredients or have the applicants' assertions been ousted by the Respondents responses to them?**
- 7. What final orders is this court going to make in the final disposal of this matter?**

In response to own framed question 1, major high lights of the general observations have already been set out in the bulky background information but for purposes of reasoning and assessment of facts, these are summarized as hereunder:-

(i) The deceased herein died on the 8th June of 1985.

(ii) It has been gathered from the record that he has had three wives one after another. Gleaning through the paper work on the record reveals that as per the content of the paper work annexed in a bundle as annexure "OHA" to the supplementary affidavit of Oduor Hawi Ambala, they show that she died on the 3rd day of June 1973. The paper work relating to this is in respect of HCCC P&A 13 of 1974 in which the deceased subject of these proceedings had petitioned for the grant of representation to the

said estate of Perez in his capacity as her widower. The dependants of the estate besides the applicant were given as:-

(1) Otieno Aggrey Ambala age 13 years., (2) Oduor Safari Ambala age 9 years,

(3) Odhiambo Tabu Ambala age 8 years, (4) Omondi Nyerere age 7 years and (5) Ogola Kodhek Ambala age 4 years.

It is noted that the said grant was issued to the deceased subject of these proceedings under the hand of the late Chanan Singh on the 11th day of February 1974. The list or the inventory forming the property forming that estate and the confirmed grant have not also been exhibited. Form P & A 2 used to list the beneficiaries list, does not indicate the asset devolved. The net worth of the estate is stated to be to the estimate tune of Kshs. 94,915/-. There is also an affidavit of means deponed and filed by the deceased subject of these proceedings. Vide paragraph 2 thereof it is deponed:-

“Paragraph 2. That I was proprietor in common with the deceased of LR. 209/374/3 Hurling harm lane, Arguing Kodhek Road Nairobi. There is no other property mentioned.”

The second wife is stated to have been one Beryl Lilian Odinga Ambala who was married under a civil marriage. There are two undisputed issues between them namely Peres Auma and Chizzi Ambala. This marriage ended up in divorce. There is an affidavit in the bundle of documents exhibited by Oduor Ambala to his further affidavit deponed by Beryl Lilian Odinga on a date not indicated and the commissioning stamp is not also indicated but it bears a signature. Vide paragraph 3 thereof, it is deponed that the deceased had taken her in as one of his dependants and he was maintaining her as such up to the time of the deceased's death. This assertion is negated by clauses 20 of the purported will of the deceased executed in 1979, whereby the deceased complained of Beryl having subjected him to mental torture and suffering and gave her only 20/- out of the net estate in order to hold the assertions should have been backed up by documentary proof that such support went across the boarder to her since she was in Zimbabwe. There is a current affidavit deponed by the same Beryl on the 17th day of March 2009, and filed on the 18th day of March 2009.

Vide paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49,50 and 51 the thread running through the same is one of championing the rights of her daughters on a plea that they should receive equal share from the deceaseds' estate. There is no mention that she was being maintained by the deceased prior to his death or that she is also a contender as a beneficiary. There is also no mention that any property was settled upon her by the deceased upon divorce.

There is evidence of the said Beryl having had knowledge of the consent of 3rd December 2004 vide which the estate was distributed. There is no deponement in that affidavit that she took offence with the content of the said consent order and that she took steps to reverse the situation in order also to have her interests catered for despite there being liberty to apply to whomever found it fit to apply. There is no message in the said deponements that there is now a desire to have her included as a dependant of the deceased.

(5) There is the case of Nancy Ambala who has four undisputed children with the deceased namely Marvin Ambala- son, Akinyi Ambala – daughter , Adongo Ambala – daughter, Apiyo Ambala- daughter. Nancy has been described as a third wife by the applicant and his counsel both of whom assert that this is the correct description. To them this is fortified by the fact that Nancy was indicated as one of the administrators issued with the grant under the hand of Joseph Butler Sloss as he then was on the 26th day of August 1986, jointly with one Otieno Ambala Junior, Barrack Willson Odhiambo Ambala, and Joseph Odhiambo. It is evidently clear that Nancy was left out of the distribution list vide the consent of 3/12/2004. There has been no mention that she moved the court soon thereafter to challenge her being excluded as a beneficiary. This court has not traced any deponement from her in support of the application subject of this judgment seeking to assert her rights of inheritance. The assertion of her right

of inheritance has come from the applicant a son and Apiyo a daughter and submissions of counsel.

(6) There is no dispute on the identities of the children of the deceased both from the depositions on both sides as well as the submissions. These are listed as:- House of **Perez Alice Auma Ambala.**

(a) Aggrey Otieno Ambala Junior son (deceased), (b) Oduor Ambala – son Respondent., (c) Odhiambo Ambala – son, (d) Metrick Ambala – son and (e) Nyerere Ambala – son.

HOUSE OF BERYL LILIAN ODINGA

(a) Perez Auma Ambala – daughter and (b) Chizzi Ambala – daughter

HOUSE OF NANCY AMBALA

(a) Marvin Ambala – son, (b) Akinyi Ambala- daughter, (c) Adongo Ambala – daughter (d) Apiyo – Ambala - daughter

(7) With regard to property forming the distributable property of the estate it is observed that the initial inventory presented to court when the application for grant was made is not available for the courts' perusal because the file was allegedly reconstructed. Neither side has given that list. There is however the details of the property forming the consent of 3/12/2004. With the exception of the property on which the petrol station stood and the Karen property, details by way of registration of the rest were not given.

The applicant followed the same sequence in paragraph 4 of his supporting affidavit and only annexed title relating to the Karen property as annexure MVA2. Oduor Hawi Ambala in his replying affidavit followed the same sequence in his paragraph 53. No title documents were annexed by the said Oduor. The applicant put in a further affidavit deposed on the 3rd day of August 2009 and filed on the 17th day of September 2009. He has given in paragraph 44 enumeration of the said properties by title description though title documents have not been exhibited as an accompaniment.

(i) LR NO. Siaya/Karapul Ramba 385 and 388., (ii) Kisumu Muhoroni/664, (iii) Plot No. 165 and 1115 Muhoroni scheme., (iv) Shares at East African Breweries., (v) KCB branch Siaya., (vi) Loan over Matrimonial home.

(vii) Karen LR. NO. 1166/287, LR. NO. 1160/288, LR NO. 1160/289.

(I.R. No. 5312)

Assistance can also be sourced from the purported will.

(a) Vide clause 6 there is mention of twelve (12) flats contained in West view apartment flat on plot No. 374/3 Nairobi.

(b) Vide clause 8 thereof, there are 10 Ambala Estate houses in Siaya on plot NO. 385 and 388 Siaya.

(c) Vide clause 9 thereof LR. NO. 1160/234 Karen.

(d) Vide clause 10 thereof PLOT NUMBER 1/336 Turbo road Nairobi.

(e) Vide clause 11 plot number 1148/532 Obote road Kisumu.

(f) Vide clause 12 investment interest in Timbwalo Saw mills Limited.

(g) Vide clause 13 interests in Nararashi wholesalers.

(h) Vide clause 14 forty thousand (40,000) shares in Ambode Tanning company limited.

(i) Vide clause 16 shares in Kenya Breweries limited, National Industrial Credit East Africa, Bamburi Portland cement company, Homa lime company limited.

(j) Vide clause 17 house number F1 Kibera house.

(k) Vide clause 18 plot number 7 Siaya.

It is noted that when Oduor Ambala filed a further replying affidavit on 14/2/2011 he did not controvert the enumeration of the said properties by applicant in paragraph 44 of the applicants further affidavit as property forming the distributable estate of the deceased. The said Oduor was also silent about the details of the properties forming the properties in the purported will.

(8) With regard to distribution. It is observed that all the deponements filed in respect to the application under review have tended to show that this is anchored on the consent order of 3/12/2004 as well as the resultant confirmation based on the said consent. The applicant has gone a head to annex what appears to be a statement of account to his further affidavit.

With the exception of the sharing of the proceeds from the sell of the petrol station on LR. Kisumu Municipality Block 9/4 now registered as Kisumu Municipality Block 9/446 and the sharing of the shops, there is mention of information with regard to other properties. Page 4 on the reverse, there is information that as at the time of the deceased's death, the deceased left the following properties:-

1. 30 acres in Karen, 2. Shares with companies, 3. House in Kisumu, 4. 10 shops in Kisumu Block No. 944/b, 5. Petrol station in Kisumu Block 944/a, 6. Land in Muhoroni, (7)Houses in Siaya, (8) 2 Hardware shops, (9) One chips shop in Kisumu and (10)Tannary Machines

At page 5, on the Karen land, there is observation that **5 acres had been sold off by the first administrators of the estate who were Otieno Ambala, Nancy Ambala, Barack Ambala and Joseph Odhiambo. 5 acres plot with house (plot LR. NO. 1160/290 was auctioned for 2 million shillings to recover a debt of about 1.2. Million shillings. 6 acres had allegedly sold by the late Otieno Ambala as follows:- 1 acre he sold was to clear outstanding land rates. 3 acres he sold off was for his own personal gain. 1 acre he sold was on behalf of Nyerere Ambala. Another 1 acre he sold off was for his own personal gain but full payment wasn't made. A balance of Kshs. 800,000.00 which was to complete the payment has been deposited in a Nairobi court pending a court case filed by Oduor Ambala against the buyer. 5 acres plot LR. NO. 1160/287 had been sold off to a Mr. Nyamato and full payment for the land was yet to be made. 9 acres plot No. 1160/288 and LR. NO. 1160/289 was then currently being illegally sub divided and in the process of being illegally sold by some of the beneficiaries without the knowledge or the consent of the administrators.**

(b)On shares with companies , it was noted that Homalime, Bamburi and East African breweries shares had not been properly accounted for whereas Nararashi shares had been sold off by some of the beneficiaries and the proceeds divided amongst Oduor Ambala, Odhiambo Ambala, Nyerere Ambala and Ogola Ambala. Oduor has not disputed this content. It is therefore not proper for him to depone that he is a stranger to Nararashi shares. A house in Kisumu is alleged to have been sold by one Somaia advocate and the proceeds realized thereof were shared amongst the late O.A Ambala , Odhiambo Ambala, Nyerere Ambala and Ogola Ambala. It is noted that each beneficiary had been allocated a shop each except Nancy Ambala. That a petrol station in Kisumu Municipality Block/ 944 had been sold for 21 million and some beneficiaries got more shares than others with Nancy Ambala not getting any proceeds from the sale. As for assets still in possession of the estate these were indicated to be land in Muhoroni and land in Siaya. Whereas assets indicated not to be in the possession of the estate were indicated to be 2 hardware shops , one in Kisumu and the other in Yala and equipment , one chips shop in Kisumu and Tannery machines .

(9) It is on record that the land which was allegedly sold by the first administrators is the one which has brought on board the caveator namely, Farooq ASIF BUTT who has litigated in Nairobi Milimani HCCC Number 350 of 2008 between **FAROOQ ASIF BUTT AND WALTER AMBALA, JACOB AMBALA**

SED AS PERSONAL REPRESENTATIONS OF THE ESTATE, OTIENO AMBALA JUNIOR AND ODUOR HAWI AMBALA, ODHIAMBO TAABU AMBALA AND NYERERE MONDI

AMBALA. It is observed that request for protective orders by the caveator was refused. One Oduor Ambala in his replying affidavit deponed to the effect that it is the interest of the caveator which has sparked off the filing of the belated application for revocation of grant and the resultant confirmation. Circumstances under which the caveator came to be linked to these proceedings have been set out in his affidavit deponed on the 26th day of July 2010, and filed on 3rd August 2010. A summary of which is that he purchased 1 acre of land from the late Otieno Ambala Junior, a matter already mentioned in the report annexed to the applicants further affidavit.

(11) Turning to the issue of letters of administration, it is observed that indeed several of them have been issued. The first one appears to be the one which had been issued to one Nancy Ambala, Otieno Ambala Junior, Joseph Odhiambo and Barack Wilson Odhiambo Ambala on the 26th day of August 1986. It is undisputed that this grant was never confirmed. It has been contended by the applicant that it has never been revoked, a fact not disputed by any of the contending parties. It is only counsel for Oduor who says the first administrators were removed paving the way for the appointment of Harbans Rai Sai, but there is no mention of the method used to remove them i.e. application for cancellation. In the absence of a deponement to that effect and documentary proof submissions from counsel are a statement from the bar which cannot be used to controvert the deponement by applicant that the grant is still intact.

There is another grant issued to Harbans Rai Sai on the 26th day of June 1989. The circumstance under which this grant was granted in the wake of the presence of the grant to Nancy and her co administrators has not been borne out by the record as the application vide which it was applied for has not been traced on the record. This gives the impression of there having existed two grants granted to two different people over the same subject matter meant to be operational at the same time. This court has been informed that this administrator passed on and the grant issued to him was never confirmed and is alleged to have lapsed. There is no provision in the L.S.A. or probate and administration rules under which a grant lapses by reason of death of an administrator. The correct position that this court has judicial notice of is that it remains dormant till re activated by rectification by appointment of another administrator through an application for rectification under the relevant rules.

There is another grant issued to one Bhupen Shah on the 20th day of January 1992. It is however clearly indicated that this is a limited grant ad colligenda bona. The purpose of the said grant by operation of law is already stated in the content of the same grant signified by the following words:- **“Which by law devolves to and vests in his personal representative but limited to the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation ...”**

The extracted order also annexed reveals that the said grant was issued on the basis of an application whose copy has not been traced on the record. It is the content of the affidavit in support which could have shed light on the reasons as to why this limited grant had been applied for. The temporality of this grant notwithstanding the same was confirmed on the 2nd day of November 1995. The properties indicated are NRB LR NO. 1160/286 and 287, Kisumu Municipality Block no. 9/4. The beneficiaries are not indicated.

There is no application for issuance of a grant to Walter Ambala and Alfred Jacob Ambala traced on the record. Neither side has deponed and argued that any such application was ever made. What this court has been informed about is that the mandate given to the named two by the consent order of 3/12/2004 was limited to the two being mandated to **“operate the estate account with power to receive and disburse money.** Those orders arose from an application dated 21st day of April 2004. But a perusal of the confirmed grant in their favour reveals that it reads that the grant which had been issued to one Walter Ambala and Alfred Jacob Ambala on the 3rd day of December 2004 was ordered confirmed on the 10th day of February 2006. The confirmation was along the terms of the consent of 3/12/2004. The application for confirmation which gave rise to the said orders has not been annexed by either side to their deponements.

(12)The issue of lack of consensus amongst the beneficiaries on the distribution has also featured in the argument. The arguments of the applicant being that no consent of the beneficiaries was obtained before distribution and confirmation as it is required by law on the one hand and on the other hand that majority of the disadvantaged beneficiaries were minors. The response of Oduor Ambala is that, that is not true because one Nancy Ambala who was acting for her children consented and was aware of all the transactions pertaining to the estate affairs on the one hand. On the other hand he has annexed correspondences from the alleged disadvantaged beneficiaries to his further affidavit evidencing their knowledge of the proceedings and that they gave positive go ahead in those correspondence.

Turning to own framed question number 2 on the issue of whether there are any legal issues raised, the courts' response is that several of these have been raised and the court will proceed to answer them:-

(a) There is a legal issue arising from the argument advanced by Oduor Ambala in his replying affidavit and submissions of his counsel that most of the properties forming the estate of the deceased were acquired during the subsistence of the marriage of his late mother Perez Alice Auma Ambala and the deceased subject of these proceedings, and that no properties were acquired by the deceased father after the death of their late mother and for this reason there should be no complaint that the bulk of the estate property appears to have gone to the sons of the first house by the content of the consent order. As observed elsewhere, in this judgment the documentation exhibited by Oduor demonstrates that the deceased father acknowledged only one joint property that is the Hurling Harm property and for this reason the proper inference to be drawn from the afore assessed paper work is that the named and the only itemized property was the only one whose half share contribution devolved from the estate of Perez Alice Auma to the benefit of the deceased subject of these proceedings.

“Clause 3. This court is alive to the existence of clause 3 of the purported Will. It read: **“I give recognition to love, respect, devotion, and understanding and help my late wife Perez Alice Auma Ambala gave me in all I did in the form of business undertaking. For this case and devotion I give all my estate to her children but specifically and precisely I mean the following property.....”**”

This courts' construction of this clause is that what was being lauded by the deceased was moral support of a loving and caring wife. There is no mention of immense financial support for joint acquisition of the properties that were to be bequeathed. However this court notes that having been a wife for long it cannot be ruled out that indeed her contribution in kind and support as acknowledged by the deceased had an impact on property acquisition. This acknowledgement cannot however operate to defeat the overriding principle that when it comes to estate matters what is of importance is what the deceased could freely give out during his life time. It is only that which the deceased could not freely give out to these other children which can be withheld, though the court can have a discretion to make reflection of an element of compensation to the senior cause for their mothers contribution.

It also has to be borne in mind the fact that the law of succession applicable then was the Indian succession Act. Act X1865. Section 27 thereof reads:-

“Where the intestate has left a widow if he has also left any lineal descendants one third of his property shall belong to his widow and the remaining two thirds shall go to his lineal descendants according to the rules contained herein. Section 30: Where the intestate has left surviving him a child or children but no more remote lineal descendants through a deceased child, the property shall belong to his surviving child if there be only one or shall be equally divided among all his surviving children”

When applied to the Respondents arguments herein, it is clear that in order for that argument to hold, it has to be demonstrated that besides the house mentioned, the other properties belonging to the estate of Perez Auma exceeded the one third 1/3 that the law of succession then permitted the deceased to get out of his late wife's estate.

(b)The second issue raised and which follows up from the first issue is the issue of what should form the

distributable estate of the deceased. This is answered by the definitions of “**estate**” and “**free property**” and meaning of “**intestacy**” in section 2 and 34 of the law of succession ct cap 160 laws of Kenya, and these state:-“**Estate**” means the free property of a deceased person. “**Free property**” in relation to a deceased person means the property of which that person was legally competent freely to dispose during his life time and in respect of which his interest has not been terminated by his death”

Intestacy has been defined in section 34 as:- “**A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of not taking effect**”

When applied to the arguments of the respondent with regard to property allegedly forming the estate of late Perez, the objection can only hold if demonstrated by documentary proof that they belonged to the late Perez and deceased had not inherited them. Secondly, objection was raised at the earliest opportunity that the said properties should form part of the Free property of the deceased herein. No such demonstration was made hence all the affected property herein form the free property of the deceased and as such they are proper candidates for distribution.

(c)There is the issue of the will. Purportedly left by the deceased but there is agreement that succession proceedings are intestate. That notwithstanding Oduor Ambala has argued that the consent order of 3/12/2004 was in line with the said will and it should not be upset. This court has traced a copy in the bundle of the documents forming the bundle annexed to the replying affidavit. It is noted that the same was made in the year 1979. A reading through it reveals that in deed most of the properties were purportedly willed to the five sons of the first house. The content of this purported Will appears to have found its way into the content of the consent order of 3rd December 2004 by comparison of the contents of both documents and then subsequently forming the basis of the confirmation of 10/2/2006. The explanation given by Oduor was that they wanted to accommodate the other children of the deceased who had been left out. By choosing to proceed under intestacy and then import into the intestacy proceedings the content of the purported Will and enforce the same, it has ended up defeating the good will and gesture intended by the first house if indeed there was such good will and gesture. The correct path to have been taken by the parties and their counsels as well as the court should have been for them to make an election as to whether to follow testate or intestate proceedings. Once the intestacy path was chosen then all those affected should have been subjected to intestacy rules because the L.S.A. makes no provision for mixed grill where by the two procedures can bed fellow and co exist in any one single proceeding.

(d)There is a legal issue touching on the position of the legal status of the entitlement of the surviving wives namely Beryl who had been legally divorced and Nancy whose marriage does not appear to have been formalized but has children whose paternity is not in question. The stand of the applicant and his counsel is that these should be considered as beneficiaries under the section 3(5) of the law of succession Act provision. It reads:-

“Section 3(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is where her husband had contracted a previous or subsequent monogamous marriage to another woman never the less a wife for the purpose of this Act and in particular section 29 and 40 thereof and her children are accordingly children within the meaning of this Act” Section 29 of the Act defines who a dependant for purpose of the Act is. It reads:-“**Section 29 for purpose of this part dependant means :- “The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.....”**”

Section 40 on the other hand reads:-

“Section 40(1) where an intestate has married more than once under any system of law permitting polygamy; his personal and household effects and the residue of the net intestate estate shall in the first instance be divided amongst the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.

2. The distribution of the personal and household effects and the residue of net intestate estate

within each house shall then be in accordance with the rules set out in section 35 to 38”

These provisions have been construed and applied to the rival arguments herein on this issue and the court makes a finding that indeed it has been rightly argued that the deceased was not a polygamist in that, he did not live with all of the three women in his life at the same time. They came on board one after another with the exception of the allegation that Nancy came on board during the subsistence of the deceased’s marriage with Beryl.. It is therefore clear that the deceased had and did leave behind 3 household units signified by the presence of children from each wife and or women he had lived with and these each form a distinct unit.

With regard to inheritance rights of Beryl and Nancy, as observed earlier on, Beryl had asserted those rights in her uncommisioned affidavit. But has not asserted the same in the current replying affidavit in which it has already been observed that she appeared to champion the inheritance rights of her daughters only . As for Nancy, it is evident that there is no deponement from her. It has not been stated that she is incapacitated in any way. This means that although both Nancy and Beryl qualify as beneficiaries in terms of the provisions of section 3(5) and 29 of the law of succession Act , they don’t appear to have shown any interest in pursuing their rights. This is confirmed by the fact that despite them being aware of the consent order of 3/12/2004, which excluded them from the inheritance no move was made by either to complain. This court has judicial notice of the fact that indeed inheritance is a right which right can be renounced either voluntarily or by conduct. The right of the two ladies appear to have been renounced by conduct.

(e)Issues also arose about the scope of a limited grant. section 54 of the Act reads:-

“ Section 54: A court may according to the circumstances of each case limit a grant of representation which it has jurisdiction to make in any of the forms described in the fourth schedule. Section 67 (1) No grant of representation other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant inviting objections thereto to be made known to the court within the specified period of not less than thirty days from the date of publication and the period so specified has expired.....”

There is also Rule 36 of the probate and administration rules. It reads in part: **“Rule 36 (1) where owing to special circumstances the urgency of the matter is so great that it would not be possible, for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessity of the case, any person may apply to the court for making of a grant of administration Ad colligenda bona defunct of the estate of the deceased.....”**

This court has no doubt that the grant issued to Bhupen Shah falls under this category considering the fact that the content itself indicated that it was limited to receiving and preserving of the estate and it means that anything else done outside that mandate, was outside the scope of that grant.

(f)Issues arose about the right of the first grant holder namely Nancy Ambala , Otieno Ambala junior, Barack Wilson Ambala and Joseph Odhiambo using the said temporary grant to dispose off property belonging to the estate. Section 55 of the Act provides an Answer to this. it reads:-

“ Section 55 (1) No grant of representation whether or not limited in its terms shall confer power to distribute any capital assets constituting a net estate or to make any division of property unless and until the grant has been confirmed as provided by section 71.

(2) The restriction on distribution under sub section 1 does not apply to the distribution or application before the grant of representation is confined of any income arising from the estate and received after the date of the death whether the income arises in respect of a period wholly or partly before or after the date of death”

This courts construction of this provision is that it is clear that there is no mandate to a temporary grant holder to dispose off capital assets before confirmation of the said grant what is mandated to be disposed

off is the income generated from the estate property. It follows that all that was disposed off by the first grant holders as capital assets is null and void.

(g)The legality of the confirmed grant confirmed in favour of Walter Ambala and Alfred Jacob Ambala also arose because as argued by the applicant there was no application for a grant which was presented by the two Walter and Jacob. There is also no grant of representation issued to them which has been exhibited on the record. It is also undisputed that the mandate given to them by the consent order of 3/12/2004 was to receive and disburse money from the estate account. There was no mandate to administer the estate. The aforementioned condition notwithstanding the two applied and were issued with a grant of confirmation. The court has been informed that by reason of issuance with that confirmed grant the two went ahead to distribute the estate although neither of them filed an inventory of the status of the estate in accordance with the orders which had been issued by Karanja J.

Section 45 (1) of the law of succession Act reads:- “ **Section 45 (1) Except so far as expressly authorized by this Act or by any other written law, or by a grant of representation under this Act, no person shall for any purpose take possession or dispose or otherwise intermeddle with any free property of a deceased person....**” . Section 71 (1) of the same Act on the other hand reads:- “**Section 71 (1) After the expiration of a period of six months or such shorter period as the court may direct under sub section (3) from the date of any grant of representation the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.**

Subject to sub section 2A the court to which application is made or to which any dispute in respect thereof is referred, may :-

(a)If it is satisfied that the grant was rightly made to the applicant and that he is administering and will administer the estate according to law confirm the grant or

(b)If it is not so satisfied issue to some other person or persons in accordance with the provisions of section 56 to 66 inclusive , a confirmed grant of letters of administration in respect of the estate or so much thereof as may be administered or order the applicant to deliver or transfers to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control or

(c)Postpone confirmation of the grant for such period or periods pending issue of further citation or otherwise as may seem necessary in all the circumstances of the case provided that in cases of intestacy the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all person beneficiary entitled and when confirmed the grant shall specify all such person and their respective shares.

Section 72. No grant of representation shall be confirmed until the court:-

Is satisfied that no application under part 111 is pending, and has received a certificate from the estate duty commissioner that he is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid or that no estate duty is payable in respect thereof or is itself satisfied that no estate duty is payable in respect of the estate concerned.

Section 79. The Executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant and subject to any limitation imposed by the grant all the property of the deceased shall vest in him as a personal representative”

This court has construed the afore said provisions make a finding that in order for the confirmed grant issued to Walter and Jacob to hold, the following should have been demonstrated to have existed as at the time the same was confirmed:-

I. That the two had in fact applied for and had been issued with a grant of representation.

- II. That six months had lapsed from the date of the granting of the grant of representation.
- III. The court had in fact discharged its obligation to inquire and satisfy itself that indeed the grant sought to be confirmed had been rightly issued.
- IV. The court ought to have satisfied itself that the applicants not only administering but were willing also to administer the estate according to law.
- V. That the beneficiaries entitled to beneficially benefit from the distribution had been identified.
- VI. That it had to satisfied itself that the shares of the beneficiaries had been identified.
- VII. That a certificate from the commissioner of estate duty that the duty had either been paid or the same was not payable had been obtained.

When these ingredients are applied to the rival arguments on this issue, it is clear that neither party has deponed and or submitted that these procedural steps were undertaken before the grant was confirmed in favour of Walter and Jacob. Had the court confirming the grant exercised caution on this, the court would have discovered that applicants Walter and Jacob Ambala were not holders of any grant of representation and as such they were not proper persons to be issued with the confirmed grant. It would also have discovered that from the history of the file and as per the courts mandate of 3/12/2004, the two had not administered the estate well as they had not even filed a statement of accounts on the operations of the estate account as mandated. Neither did they give an undertaking that they were hence forth going to administer the Estate according to law court would also have discovered that there was no jurisdiction to confirm a grant which was non-existent as the applicants had not been mandated as administrators but as persons with access to the estate accounts. The court would also have discovered that the consent to confirmation of all the participating beneficiaries had not been filed either individually or collectively. For these reasons the said confirmation to Walter and Jacob stands faulted.

(h) Issue arose about the courts move to discharge one Walter Ambala from the administration of the estate on 4/5/2006 before the winding up of the estate. Section 82 of the act donates powers of personal representatives and in a summary form, **“they have power to enforce suits whose cause of action survive the death of the deceased, to sell and turn to account all or part of the assets vested in them, ensure that any immovable property can only be sold after confirmation, to assent to vesting orders after confirmation, to appropriate after confirmation any assets vested in them”**.

Vide section 83 thereof, the personal representatives have the following duties in a summary form to provide and pay out of the estate assets funeral expenses, to get in all the free property of the estate of the deceased, to pay out of the estate of the deceased all expenses in relation to the grant and debts owed by the estate. Vide section 83(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 accounts of all dealings. There upto the date of the account, subject to section 55 to distribute or to retain on trust the estate. Vide section 83 (g) Within six months from the date of confirmation of the grant or such longer period as the court may deem 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”. 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 upto 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”

This court has construed these two provisions and applied them to the rival arguments herein on this issue, and in its opinion, the court when discharging the said Walter from the purported administration of

the estate, should have asked him to render an account of his transactions with the estate. Failure to so ignore leads to a finding that the said discharge of the purported administrator of the estate has irregular.

(I) Issue was also raised about lack of confirmation. It has been established by this courts assessment of section 71 of the L.S.A. above that consent of the beneficiary to the mode of distribution subject of confirmation is essential before the confirmation order issued.

There is now a wealth of case law principles on what amounts to and what does not amount to a valid consent capable of being protected by law. There is the case of **ISMAIL SUNDERJI HIRANI VERSUS NOOR ALI ESMAIL KASSAM (1952) EACA 131** in which the court of appeal for Eastern Africa held inter alia that:- “ **The compromise of a disputed claim made bonafide is a god consideration and the court can only interfere with it in circumstances which would afford good ground for varying or rescinding a contract between parties**”.

The case of **BROOKE BOND LIEBIG (T) LIMITED VERSUS MALYA (1975) EA 266** where the same court of appeal held inter alia that “ **A consent judgment may only be set aside for fraud , collusion or for any reason which would enable the court set aside an agreement**” and lastly, the case of **FLORA N. WASIKE VERSUS DESTIMO WAMBOKO (1982-1988) KAR 625** where the court of appeal held inter alia that:-

(i) It is settled that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.

(3) An advocate would have ostensible authority to compromise a suit or consent to judgment so far as the opponent is concerned.

(4) The court would not readily assume that a judgment recorded by a judge being by consent was not so unless it was demonstrably shown otherwise.

These principles have been applied to the rival argument herein, on the issue of consent to confirmation and the court finds that there is an element of fraud as there appears to have been an apparent deliberate move to rely on the content of the consent of 3rd December 2004 in support of the confirmation and thereby solidify the enforcement of the purported Will irregularly imported into the intestate proceeds.

(ii) Collusion exists because this was a calculated move to vest mandate on non grant holders and use them as a vehicle to confirm the grant hopefully without the truth being discovered.

(iii) Mistake is also proved to exist by reason of the purported administrators thinking that they could import the consent of 3rd December 2004 into the confirmation process and use it as a back up consent. The proper procedure should have been to obtain afresh consent from each beneficiary for this is what the law requires. The documentation Oduor has exhibited does not help as these were not filed in court as supportive document for confirmation.

(j) Issue was also raised about this court having a mandate to sit on appeal over orders made by coordinate judges meaning that this court has no jurisdiction to entertain the application in the first instance, and then proceed on to make a pronouncement on the application in the second instance. Judge Mwera in his observations of 14th December 2009 also paused the question of whether the court will have jurisdiction to revisit the issue of confirmation of the grant or this is a matter for an appeal. This court is aware that its jurisdiction has been sought under the section 76 L.S.A procedures. It reads in part:-

“Section 76. 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-

(g) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed 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 particulars; or

(e) That the grant has become useless and inoperative through subsequent circumstances

There is also Rule 73 of the probate and administration rules which enshrines the inherent power of the court. It reads:-

“Nothing in this rule 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 court”.

There are also the prescriptions in section 1A and 1B of the CPA Cap 21 Laws of Kenya these read:-

“Section 1A (i) which introduces the principle of the overriding of the objective in civil litigation. Section 1B of the same Act on the other hand stipulates the aims of the overriding objective principle being the just determination of the proceedings, the efficient disposal of the business of the court, the efficient utilization of the available judicial and administrative resources, the timely disposal of proceedings in all other proceedings in the court at a cost affordable by the respective parties and the use of technology.”

This court's construction of the principle in Section 76 L. S. A, Rule 73 of the Probate and Administration Rules and the overriding objective principles in Sections 1A, 1B Civil Procedure Act is that:-

(i) Issues of revocation can be interrogated at any stage of the proceedings even after confirmation

(ii) It has its inherent power donated by Rule 73 of the Probate and Administration Rules to do justice to both parties herein.

(iii) It has power donated by Section 1A, 1B of Cap 21 Civil Procedure Act to interfere because a party has complained of suffering injustice on account of illegalities irregularities and nullities and case law construing these provisions amounting from the Court of Appeal demonstrate that this principle applies to all forms of judicial litigation.

(iv) Further on this, this court has judicial notice of the fact that revocation is not only available to litigants desiring to fault grants issued by the lower courts but even those issued by the high court itself, either by the same judge or another judge, in which the procedural and regularity in issuing that grant even upto confirmation level has come into question. When that arises, the court seized of the matter has jurisdiction and or mandate to revisit the whole record to interrogate the procedural and regularity of the procedure leading to issuance of the grant issued. This court is therefore satisfied that it is procedurally and properly seized of the matter not in an appellate capacity but in its original jurisdiction

capacity.

(K) Issues also arose about rules of distribution which should have been applied and should apply. The argument of the applicant is that the deceased had three wives and as such Luo customary law should apply so that the property is shared amongst three houses represented by each wife. Whereas the Respondent argued that the deceased was never polygamous for the reasons given. But he children with each woman separately and in law, each set forms a unit. This is why counsel for the applicant asked the court to apply the principle in section 40(1) of the L.S.A. already set out herein. This provision was construed by the court of appeal in the case of **RONO VERSUS RONO AND ANOTHER (2008) 1KLR (G&F) 803** In the summary of facts at page 803 paragraph 31-35 it is observed that **“the Respondent sons wanted the bigger portion of the property to go to the first house and specifically to the male children because the land was bought and improvements made on it before the existence of the second house which had only daughters”**. The court held inter alia that:-

- 1. The application of customary law was expressly excluded unless the law of succession Act itself made provision for it. This was done in section 32 and 33 in respect of agricultural land and crops growing, thereon or livestock where the custom of the deceased’s community was applicable.**
- 2. The custom of the deceaseds’ community was limited to the areas specified by the minister in the gazette notice and the deceaseds’ estate did not fall into that category.**
- 3. The fact that the girls would one day get married was not a determining factor when it came to the distribution of the net estate of the deceased. The court had a duty to exercise its discretion judiciously when it came to distributing the estate.**
- 4. The deceased treated all his children equally and therefore the court should have done the same. There was no indication that the daughters’ were going to get married as they were at an advanced age. There was therefore no justification for the court reducing their shares, the distribution should have been done according to the number of children in each house”**

Section 40 procedures invites the court to apply the distribution rules in section 35 -38.

Section 35 applies where the intestate has left a spouse and children. This court has observed and ruled earlier on Beryl as a former wife and Nancy, though not a legal wife but one who has children with the deceased whose paternity is not in question qualify as wives for purposes of section 3(5) of the same Act L.S.A. However their conduct of showing lack of interest in pursuing their inheritance rights herein makes them to be deemed to have renounced their inheritance rights by conduct for the reasons given. The exclusion of them as wives in contest ushers in the operation of the provisions in section 38 of the same Act. It reads:-

“Where an intestate is left a surviving child or children but no spouse, the net intestate shall subject to the provisions of section 41 and 42 devolve upon the surviving child if there be one or be equally divided among the surviving children”

Section 41 deals with provisions of a trust I respect of property devolving to a child. Whereas section 42 enjoins the court to take into consideration any advancement of gift inter vivos to any of the contending beneficiaries, whether there are any claims advanced under section 26 by dependants and also the provisions of section 35 on how a spouse should deal with the devolved property before final distribution to the children in her house hold unit.

This court has construed the afore said provisions Sections 40 (1), 42, 43 and 35 – 38 of the L. S. A. and applied them to the issue of distribution and it proceeds to make the following findings on the same:-

- (i) The overriding guiding principle on the application of Section 40 (1) is the establishment that the property is the free property of the deceased once established it matters not that the property was acquired and improved before the second unit came on board.

- (ii) Element of equality of treatment with regard to share entitlement of children irrespective of their gender is of primary consideration.
- (iii) The way the deceased treated his children when alive is also of primary consideration. Herein with the exception of the content of the purported Will in which the children of the first house were given preferential treatment to a daughter of Beryl, there is nothing else to show that the deceased did not treat his children equally or that he did not wish them to be treated equally after his death. Once the purported Will is discarded there is nothing to shield the preferential treatment evident herein.
- (iv) Also that depending on the circumstances of each case, the court has a discretion to act within the Rules but ensure fairness and justice in its distribution of the estate to the beneficiaries.
- (v) It is noted that distribution herein is intestate as the will alleged to have been made by the deceased was incapable of taking effect and so its ideals should not have been imported into these proceedings whole sale but with little variation as a camouflage via the consent Order of 3rd December 2004.
- (vi) There are no minors involved and so issues of trust does not arise.
- (vii) Since the court has discounted the inheritance of the two ladies Beryl and Nancy on account of their in deference conduct in not pursuing their rights, the only contenders for purposes of inheritance are the children of the deceased.
- (viii) The mode of distribution is that pertaining in section 38 of the L.S.A. but, tempered with the courts unfettered discretion to do justice and ensure fairness in the distribution of the estate with an element reflecting contribution by late Perez towards acquisition of the property.

With regard to own framed questions 3, 4 and 5, the relief being sought by the applicant is revocation which is the central core of this judgment. It is clear that the application is laid under section 76 of the L.S.A. which has already been set out herein. The points for and against are already set out on the record. The ingredients required to be established before the relief is earned are inbuilt in the same section 76 L.S.A. and these form the grounds in the body of the application. This court has judicial notice of the fact that this provision has been construed by the court of appeal.

In the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (2005) IKLR 455** where it was held inter alia that:-

- 1. A grant may be revoked either by the application of an interested party or on the courts own motion.**
- 2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making of false statement or by concealment of something material to the case or that the grant was obtained by means of an untrue allegation of facts essential in points of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.**
- 3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.**
- 4. When a deceased has died intestate the court shall save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made but shall without prejudice to that discretion accept as a general guide the following order of preference:-**

(a)Surviving spouse or spouses, with or without association of other beneficiaries.

(b)Other beneficiaries entitled in intestacy with priority according to their respective beneficiaries interests as provided by part (v) of the law of succession Act

(c)Public trustee, and

(d)Creditors.

This court has construed the provisions of Section 76 L. S. A and the principle of case law cited above. When applied to the rival arguments herein an revocation the court proceeds to make the following findings on the same:-

1. That the principles on revocation under Section 76 L. S. A. have now been crystallized by the above case law.
 2. That there is no requirement that all ingredients be established before one can earn the relief. It is sufficient to establish are ingredient signed by the use of the ward “or” after the setting out of each ingredient
 3. When disposing of an application for revocation the court has jurisdiction either to wind up the proceedings by appointing non administrators and then proceed as to distribute the estate and confirm the grant issued on revocation simultaneously or alternatively revoke the grant, appoint administrators and then direct parties to start afresh the process of distribution and confirmation
 4. The applicant has locus standi to bring the application for revocation as an interested party because he has a legitimate interest in the estate subject of these proceedings as a beneficiary.
 5. Indeed five years have passed since the consent order of 3rd December 2004 and three years since the confirmation order complained of were made, But that notwithstanding, he is within the provisions of Section 76 LSA which mandates him to complain about the procedurally and the regularity of the issuance of the grant at any stage of the proceedings.
 6. It is appreciated as observed by Mwera J in his ruling on the survey of the status of the estate that the file has been going back and forth between Nairobi and Kisumu high court registries and some valuable paper work may have been lost. It is also evident that the file has been reconstructed but nonetheless as present lyre constructed, it contains sufficient material on the basis of which a sound pronouncement on the merits of the matter can be made. As at now it is clear that indeed the initial grant was issued to Nancy Ambala, Otieno Ambala Junior, Barack Wilson Ambala and Joseph Odhiambo. A copy has been exhibited and referred to and acknowledged by both sides. It is not clear as to what the court did to this grant before issuing a grant to Harbans Rai. In the absence of evidence that the said grant was cancelled and a fresh one issued to Harbans Rai the same still stands to date and circumstances relating to its present effectiveness for purposes of administration of the estate herein can be inquired into. Assertions through submission by the respondents counsel that this grant was cancelled holds no water as these are representations from the bar. These do not oust depositions on record that the grant is still alive.
- (ii)The original administrators were mandated by provisions of section 71 to have moved to have the grant confirmed within 6 months.They failed to do so. No explanation has been given as to why they did not apply for confirmation. They were also expected under Section 82 and 83 LSA to furnish accounts the court which issued the grant as well as inventory of the status of the estate. None has ever been filed by then.
- (iii)Another grant was issued to Harbans Rai Sai during its subsistence. No move was made by the said administrators to complain.It has not been used since 1989. It is a proper candidate for being deemed as having become useless and inoperative.

(4) With regard to the grant issued to Bhupen Shah, it is clear that the same was issued as a limited grant and in terms of the provisions of section 54,67 and rule 36 of the probate and administration rules, this grant was limited to the purpose specified therein namely to receive , collect and preserve the estate. By virtue of the provision of section 71 of the L.S.A a limited grant is not a proper candidate for confirmation as the only proper candidate for confirmation is a full grant. It therefore follows that the purported confirmation of the limited grant in favour of Bhupen Shah is a nullity. This court is alive to the fact that it has been argued by the Respondents counsel that parties never complained about the said grant to Bhupen Shah and have no right to complain about its regularity because they have benefited from it. Indeed this appears to be the correct position, but it has to be borne in mind that the correct position in law that this court has judicial notice of is that parties have no mandate to confer jurisdiction, Or regularity to a process. It is the law which confers jurisdiction and procedurally, and where it says plainly that a limited grant cannot be confirmed that is what it means and a court of law has no other business but to uphold that position in the first instance and then go ahead to enforce it in the second instance.

(ii) Further since Bhupen Shah came on board after the alleged demise of Harbans Rai Sai, the issuance of this grant a fresh to Bhupen Shah was irregular. What should have been done should have been an application to rectify the grant issued to Harbans Singh Rai Sai under section 74 of the L.S.A which provides that **“errors in names descriptions or in setting out the time and place of deceaseds’ death or the purpose limited in the grant may be rectified by the court and the grant of representation whether before or after confirmation may be altered or amended accordingly”**. The procedures on rectification is donated by Rule 43 of the Probate and Administration Rules.

(5) The confirmed grant in favour of Walter Ambala and Alfred Jacob Ambala made on 10th February 2006 is also a nullity because of the following reasons:-

(i) As assessed, the provisions of sections 71 L.S.A stipulates that confirmation can only issue to a holder of a full grant of representation. The recipients of the confirmed grant of 10th February 2006 were never holders of a full grant of representation in pursuance of Orders of 3/12/2004 as their mandate donated by the said consent was for operating the estate account in terms of receiving and disbursing finds. They were never vested with the vesture of administrators.

(ii) As assessed herein it is agreed from both sides that the live never at any one time apply for a grant of representation.

(iii) As assessed herein, the court did not satisfy itself with regard to the prerequisites required to be established in section 71 before issuing confirmation order among others that those seeking confirmation are holders grant, that they are administered the estate well and are willing on going to continue administering the estate according to law and that they are furnished the court with accounts and full inventory of the estate report.

(iv) Even if it had been found to have been regularly issued, the same would have been a proper candidate for revocation because the administrators namely Walter and Jacob failed to provide a proper inventory and account of the true status of the estate 6 months after confirmation and they have not done so up to the present day.

(v) The purported administrators also failed to give a true account of the administration of the estate even after being called upon by the orders of Karanja J to do so as found herein.

(v) As at the time of the disposal of this judgment, the said purported administrators have not demonstrated to the satisfaction of the court that the estate had been distributed and wound up. Alternatively that they are now willing to administer the said estate in accordance with the law.

(9) There is evidence of concealment of material facts in that although on the face of the record of the proceedings herein, the proceedings are intestate nonetheless, a reading of the content of the confirmed exhibited to the replying affidavit of Oduor which purported Will went to inform the content of the

consent order of 3rd December 2004 with the exception of little variation on the issue of the sharing of the shops and proceeds of sell of the petrol station, and which content of 3rd December 2004 went to inform the content of the confirmation. This amounts to an enforcement of the content of the purported will allegedly abandoned but then introduced through the said content of 3rd December 2004. This no doubt accounts for the advantaged groups reluctance to furnish the court with an inventory on distribution because it will plainly show that the content of the purported Will has been followed and enforced unprocedurally.

(10) There is a clear demonstration of existence of an un true allegation of fact in that the impression created by the move to confirm the grant on 10th February 2006 in favour of Walter and Jacob was that these two had been vested with the vesture of administrators by the orders of 3rd December 2004 and that the said vesture was ripe for confirmation a matter which was not true because all that the said order of 3rd December 2004 did to the two was to vest them with the power to operate the estate account.

(ii) There is further concealment thereof if the fact that the said applicants for the confirmation of the grant confirmed on 10th February 2006 concealed the fact that in fact the two had never applied for and had never been issued with a grant of representation in their capacity as administrator to the said estate.

(11) Ingredient 3 has also been established because no full accounts and inventory has ever been furnished to court by all the purported administrators. They are termed purported by this court by reason of the fact in the wake of the applicant presence of the original grant, the subsequent successive issuance of grants was irregular.

(12) Ingredient 4 is also established in that both the original grant issued to Nancy and her co-administrators as well as the purported lapsed grant to Harbans Rai Sai, the irregularly issued and confirmed grant to Bhupen Shah as well as the purported grant confirmed in favour of Walter and Jacob have become in operative and useless because

I. They have failed to satisfy the inheritance of the beneficiaries.

II. They have failed to vest properties in favour of the beneficiaries.

III. They have failed to render a true account and inventory to the court and in essence they have trampled on the law and abused the due process of the court.

On the basis of the assessment done, herein this court makes a finding that on the basis of the facts and exhibits exhibited by both sides, there has been demonstration of existence of illegalities and irregularities in the conduct of proceedings herein culminating in the filing of the application for revocation. As observed by Mwera J, in his lordship's ruling assessed herein, the said irregularities and illegalities have been contributed to by all those on board including the court. The court therefore pauses the same question as his lordship did, whether there is jurisdiction on the part of this court to revisit those irregularities and nullities on the one hand and on the other hand whether in doing so the court will be exercising its jurisdiction in an original capacity or in capacity appellate.

As ruled earlier on, on the jurisdiction over belated application for revocation, the court is satisfied that its jurisdiction will be original and not appellate because when investigating issues on revocation the court has jurisdiction to revisit the entire record to assess all the on goings on the file and investigate their proceduralty and regularity leading to issuance of the grant sought to be revoked. This court's direction on the way forward in this matter is as follows:-

(a) To determine whether the illegalities and irregularities noted in the assessment which have persisted throughout the entire proceedings and which have been participated in by all on board and which have accounted for the difficulty the court has found itself in falling to progress the estate to its finalization and winding up are minor and whether these can be ignored or these go to the root of the entire proceedings and operate to affect the proceedings considering that the proceedings as at now have

reached a dead end and if allowed to stand the estate which left man embarrassed position as it will be incapable of enforcement and final winding up meaning that no, effective remedy will be forth coming.

(b) If the courts stand is that the irregularities and illegalities noted go to the root of the entire proceedings decide on what orders are to be made herein in the best interest of the estate.

(c) In deciding on what orders are to be made in the best interest of the estate the court has to weigh the impact its decision of either (a) or

(b) above is going to have on the entire proceedings, and the parties position, when ruling as to whether to unwind the proceedings or leave the status quo prevailing here to persist and then give reasons either way.

For the afore said reason, this court is inclined to take the position it took on illegalities in its own decision delivered on 24th September 2010 in the case of **Karagita Self Help Group =vs= Thika River Estate Nairobi HCCC No. 2561 of 1994**. At page 14 this court quoted with approval the case of **Republic =vs= The Business Premises Rent Tribunal Respondent Lenco Investments Limited Interested party and Samina Investments Limited exparte Applicant Nairobi Misc Application Number 562 of 2007** decided by Nyamu J as he then was now JA , in which the learned Judge encountered nullities and illegalities. At page 39 line 8 from the top in the said own ruling the learned Judge is said to have made the following observations and or gave the following guideline on how to deal with nullities and irregularities when encountered in the judicial process.

- 1. A nullity is a nullity and always remains a nullity.**
- 2. If nullities are condoned by the courts of law, they are capable of clogging the justice system, erode its effectiveness and respect of the rule of law.**
- 3. Failing to act in the circumstance would be a serious abdication of the seat of justice.**
- 4. The principle to be observed is the principle that no litigant should be allowed to benefit from irregularities or nullities since these would be against the policy of law.**
- 5. Nullities are defects and cobwebs in our legal system which if allowed to remain would discredit and litter, derail the administration of justice in accordance with the law.**
- 6. It would be unjust for the court not to intervene in the face of a nullity where the tribunal and the lower court had no jurisdiction from the word go.**
- 7. Where preservation of the status quo is a threat to the rule of law, the conscience of this court, the spirit and its sense of justice cannot allow the preservation of the status quo.**
- 8. It cannot be good law to allow a party benefit from a blatant violation of the law**

Though the decision by Nyamu J as he then was is a decision by a court of concurrent jurisdiction, this court agreed with the said observation of the learned judge because it stated the correct position in law. In following suit in the said quoted own decision, this court refused to allow illegalities and irregularities to hold and reviewed and set aside a judgment delivered 7-8 years ago because in failing to do so would have amounted to condoning illegalities and irregularities and also would have amount to allowing litigants benefit from a blatant flouting of the law.

Applying that stand to the proceedings herein, it is clear that there has been a clear presence and evidence of a blatant flouting and trampling of the law exploitation of situations for personal gain and in the process leaving proceedings in an embarrassing position. Failure to act firmly against those illegalities and irregularities will amount to a serious abdication of the seat of justice. Secondly leaving the matter as it is will open a can of worms or a Pandora's box and will continue the status quo of stalemate presenter

prevailing.

In the premises this court proceeds to make the following orders in the disposal of the applicant's application dated 17th day of February 2009 and filed on the 19th February 2009.

- (1) The grant issued herein to Nancy Ambala, Otieno Ambala Junior, Barack Wilson Ambala and Joseph Odhiambo on 26th August 1986 be and is hereby revoked for the reasons given.
- (2) The grant which had been issued to Harbans Rai Sai in the of the existence of the original grant which had not been cancelled is declared to have been an irregularity and therefore a nullity.
- (3) The certificate of confirmation given to Bhupen Shah on the 2nd day of November 1995 is declared a nullity and annulled because having been issued as a limited grant it was incapable of being confirmed by operation of law. It mattered not that those on board raised no objection and benefited from its operation because jurisdiction is donated by law and it is never contend by parties.
- (4) The mandate given to Opiyo Ambala and Oduor Ambala on 19th May 2004 to operate the estate account is declared as nullity by reason of the two not having been holders of a grant of representation to the estate of the deceased herein Section 45 and 71 mandates only holders of letter of Administration to have power to deal with a deceased person property
- (5) The mandate given to Walter Ambala and Alfred Jacob Ambala vide the order of 3rd December 2004 to sign and execute legal documents necessary for purposes of effecting the distribution of the estate is declared a nullity because the two had no letters of Administration to Act as such.
- (6) The purported confirmed grant confirmed in favour of Walter Ambala and Alfred Ambala purportedly confirmed on 10th February 2006 be and is hereby declared a nullity and the same is annulled because the applicants had never applied for and granted letters of administration which could be confirmed. The properties required to be established before issuance were not adduced.
- (7) The order of 4th May 2006 purported to have granted one Walter Ambala to withdraw from being a purported administrators is declared irregular in that the said Walter had never been vested with the vesture of an administrators on the one hand and on the other hand the same was done in disregard of the requirements of Section 82 and 83 of the same Act in that no demand was made to Walter to furnish statement of accounts and full inventory of property.
- (8) The order made on 2nd April 2008 mandating the Deputy Registrar of this Court to execute documents on behalf of the estate is declared irregular in so far as it went to leave the administration of the estate in a vacuum. The Deputy Registrar should have been mandated to work along side the administrators if there were any on board.
- (9) The consent of 25th November 2008 filed as between counsels acting for a section of the parties is declared irregular and a nullity in so far as it purported to vary a purported confirmation of grant purportedly confirmed on 10th February 2006 as no application had been made to rectify the confirmed grant in order to introduce the content of the said grant consent as a variation of the earlier order on the purported confirmation.
- (10) By reason of what has been stated above all transactions relating to the capital Estate property forming the free property of this Estate be and are hereby declared nullity and of no consequences.
- (11) By reason of what has been stated in number 9 above all the capital estate property is ordered to revert back to the Estate in its original form as at the time the deceased subject of these proceedings passed on.

(12) All disbursement of income to the beneficiaries by persons not validly appointed as administrators are declared a nullity and the said proceeds disbursed becomes accountable to the Estate by both the disbursers and the recipients.

(13) The orders made in number 9, 10 and 11 above notwithstanding, there is room where genuine disbursement of income which has been acknowledged as received by the recipients and found to be forming whole or part of the rightful share of the recipient to have these confirmed subsequently by the new incoming administrators coming on board.

(14) Considering the general overview of the entire proceeding this court in the exercise of its inherent power under Rule 73 of the Probate and administration rules and acting on its own motion subject to their acceptance and for purposes of providing new direction herein does appoint the following as administrators

(a) Marvin Opiyo, (b) Chizzi Ambala and (c) Nyerere Ambala

(15) A grant of representation does issue as soon as acceptance notes are filed in court and not later than fifty (50) days from the reading of the Ruling.

(16) To avoid a stalemate in the administration of the estate. These will now be court supervised administrators in accordance with Rule 10 of the 5th schedule which provides:- Rule 10 pending any suit touching on the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrators of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate and the administrators shall be subject to the immediate control of the court and shall act under its direction”.

(17) In the invocation of its inherent power under Rule 73 of the Probate and administration rules mandates the new grant holders to act under the direction of the court but with the right to distribute the estate under the supervision of the court.

(18) The properties forming the estate of the deceased are those sourced from paragraph 44 of the applicants further affidavit and the content of the purported Will as there has been no objection from either side that this is not the correct position, these are:-

(1) LR NO. SIAYA /KASIPUL RAMBA 385, 388 – comprising 10 houses.

(ii) Kisumu Muhoroni 664.

(iii) Plot number 965 and 1115 Muhoroni Scheme

(iv) Karen LR Number 1160/287, 1160/288, 1160/289

(v) Shares in Kenya Breweries, National Credit East Africa, Bamburi Port land Cement Company, Homalime Company Limited, Navarashi Wholeslers, 40,000 shares in Ambode Tanning Company, Timbwlo Saw Mills Limited.

(vi) 12 flats contained in West View apartment flat on plot number 374 /3 Nairobi.

(vii) Plot number 1/336 Turbo Road Nairobi

(viii) Plot number 1148/532 Obote road Kisumu

(ix) House F1 Kibera house

(x) Plot number 7 Siaya

(xi) Kisumu shops

19. **Beneficiaries** – These will come from three units:-

A. HOUSE OF LATE PEREZ:-

- (a) Aggrey Otieno Ambala Juniors- deceased for the benefit of his estate.
- (b) Oduor Ambala
- (c) Odhiambo Ambala
- (d) Nyerere Ambala

B. HOUSE OF BERYL LILIAN ODINGA:-

- (1) Perez Auma Ambala
- (2) Chizzi Ambala

C. HOUSE OF NANCY AMBALA:-

- (1) Marvin Ambala – son
- (2) Akinyi Ambala – daughter
- (3) Adongo Ambala – daughter
- (4) Apiyo Ambala – daughter

20. Beryl Lilian Odinga and Nancy Ambala have been excluded from the mode of distribution for reasons given in the assessment that by reason of their indifferent conduct in failing to pursue their claim, they have become disentitled as beneficiaries by conduct.

21. Mode of distribution. This will follow the rules in section 35 – 38 of the L.S.A but for purposes of harmony within the family and for sake of reflecting and acknowledging the contribution made by late Perez to the acquisition of the said properties, the court in the exercise of its discretion tempers with the said rules and directs that one half of the properties will go to the members of family unit of late Perez Auma to be shared equally amongst them. Whereas the other half will be shared equally amongst the units of Beryl and Nancy but with variations as the court deems fit with regard to individual properties as justice demands as shown here under:-

I. All shares in Kenya Breweries, National Credit East Africa, Bamburi Portland Cement (Ltd) Homalime, Navarashi wholesalers, Timbwalo Sawmills Limited and two hardware shops one in Kisumu and another Yala are to be disposed off. Half the proceeds will go to the members of the unit of Perez in equal shares. The other half will be shared by the units of Beryl and Nancy in equal shares.

II. The sharing of shops will not be disturbed as parties seem to be in agreement over this.

III. Sharing of the proceeds of sale of the petrol station will not be disturbed as parties seem to be in agreement though not done on equal basis. The court has been informed that these were disposed off.

IV. 12 flats in Nairobi on West View apartment on plot number 374/3, 6 will go to the house of late Perez and the balance of 6 to be shared equally between the units of Beryl and Nancy.

V. Hurlingham or Kibera house No F1 will go to the house of late Perez.

VI. 10 houses in Ambala estate in Siaya will be shared as follows:- Five will go to the house of late Perez in equal shares while the other five will be shared equally between the units of Beryl and Nancy.

- VII. The plot on Turbo road in Nairobi will go to the house of late PEREZ in equal shares.
- (ix) The house on Obote road in Kisumu to go to the units of Beryl and Nancy in equal shares
- (x) Karen property LR No. 1160/287, 1160/288 and LR 1160/289- after all the illegal transactions are faulted and the property ordered to revert back to the estate, half of the acreage will go to the units of late PEREZ in equal shares and half to be shared equally amongst the units of Beryl and Nancy.
- (xi) The Muhoroni and Siaya lands or shambas to be shared equally amongst all the beneficiaries on board as there appears to be a consensus on this.
- (xii) Any other residue of the estate to be shared equally amongst all the beneficiaries on board.
- (22) The confirmation of grant will issue simultaneously with issuance of the grant of representation.
- (23) The newly appointed administrators herein are vested with the powers, duties and obligations specified by law in Section 79, 82 and 83 of the L.S.A with liberty to validate illegal sales to 3rd parties where these fall into the share entitlement of the particular beneficiary who have acknowledged the same in writing and such acknowledgment filed in court during the periodical reporting to court.
- (24) The newly appointed administrators being court appointed and supervised will be required to be filing reports quarterly until the estate is wound up with the first one required to be filed within the next sixty (60) days upon their being issued with a grant .
- (25) The newly appointed administrators have authority to conduct searches on the position of all capital assets of the estate and file findings in court.
- (26) The said new appointed administrators have power to take and recover the capital assets illegally disposed off to 3rd parties through civil litigation.
- (27) The said newly appointed administrators also have power to receive complaints from 3rd parties arising from illegal sales.
- (28) There will be general liberty to apply
- (29) Each party will bear own costs

Dated, signed and delivered at Kisumu this 2nd day of August 2011.

**R. N. NAMBUYE
JUDGE**

RNN/aao