In re the Estate of Ezekiel Mulanda Masai (Deceased) (Succession Cause 4 of 1992) [2025] KEHC 1591 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1591 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 4 OF 1992

JRA WANANDA, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF EZEKIEL MULANDA MASAI (DECEASED)

BETWEEN

JOHN CHESOLI WAFUKO ..... 1ST OBJECTOR

ABEDNEGO MAKLAP KAIMASACH ..... 2ND OBJECTOR

ESTHER ASIKOH HELLEN ..... 3RD OBJECTOR

JAYRUS BARASA BULUNYU ..... 4TH OBJECTOR

AND

BAINTTOS KALAWAI NAMULANDA ..... ADMINISTRATOR

RULING

1. This old matter has had a chequered history. It is a classic case of the adage, "one step forward, two steps backwards", a malaise that seems to afflict most Succession matters nowadays. Before me now, the latest in a series of Applications beginning from the year 1992, is a Summons for Revocation of a Rectified Grant.

2. The background of the matter is that the deceased, Ezekiel Mulanda Masai, died on 1/5/1991 at the age of 78 years old. On 7/01/1992, one Ambrose Nambosia Mulanda (hereinafter referred to as "Ambrose") claiming as the 1st born of the deceased, filed a Petition seeking Grant of Letters of Administration, which was then issued to him on 27/08/1992, and subsequently confirmed on 1/07/1993. I note that by the letter from the Chief relied upon at the time of filing the Petition, it was indicated that the estate property, parcel of number N/Lwandet/338 would vest into Ambrose and, once registered as owner, he would then subsequently sub-divide the same and distribute it amongst other beneficiaries.

3. By the Certificate of Confirmation issued as aforesaid, the said parcel of land known as N/Lwandet/338 measuring 26 acres, and another parcel of land described as Luhya Estate Ltd Kitale Reg. No.-07811 measuring 6 acres, were wholly vested unto Ambrose. Later, Ambrose applied for rectification of the Confirmed Grant on the ground that the said property N/Lwandet/338 has ceased to exist as it had been sub-divided into several sub-plots. The Application was allowed and a fresh Certificate of Confirmation issued on 21/05/1996.

4. However, on 29/11/2001, one Jescah Mukhwana Namulanda and one Wilson Mukiti Mulanda, describing themselves as a widow and a son of the deceased, respectively, filed a joint Application seeking revocation of the Grant on the ground that the same was obtained fraudulently. They alleged that Ambrose left out many survivors of the deceased, including the Applicants, from the list of beneficiaries and also, never notified them of the proceedings. By the Ruling delivered on 28/02/2002 by A.G.A. Etyang J, the Application was allowed and both the Grant and the Certificate of Confirmation were revoked. The Court therefore ordered that the Succession process be commenced afresh.

5. Pursuant thereto, the said Jescah Mukhwanda Namulanda filed a fresh Petition on 19/01/2005 listing 13 survivors. A fresh Grant was then issued to her jointly with one Bainitos Kalawai Namulanda, on 15/06/2016 and later confirmed on 6/05/2019. In the Certificate, the only property listed was described as Title Kwanza/Kwanza Block 3/Luhya/1 measuring 10.87 acres and which was distributed amongst 8 beneficiaries.

6. On 10/05/2023, the said Bainitos Kalawai Namulanda, returned to Court with an Application seeking rectification of the Grant by way of removal of the name of the said Jescah Mukhwanda Namulanda as a co-Administrator, whom, it was stated, had died on 23/10/2022. The Application came up before me and I allowed it on 28/07/2023. Pursuant thereto, a Rectified Grant was issued.

7. The latest Application now before this Court for determination, the subject of this Ruling, is the Summons dated 28/11/2023. The same was filed by the Applicants then acting in person, and seeks orders as follows:

    i. [.....] spent

    ii. That the Rectified Certificate of Confirmation of Grant dated 28th July, 2023 be annulled and/or revoked.

    iii. That the deceased's property be distributed afresh among all the beneficiaries including the Objectors/Applicant.

    iv. [.....] spent

    v. That the Title Deeds issued if any be cancelled and the former Title Deed to revert.

    vi. That this Honourable Court be pleased to issue an order transferring this matter to Kitale High Court for final determination.

    vii. That costs be provided for.

8. The Application is premised on the grounds stated on the face thereof, and is supported by the Affidavit sworn by 1st Applicant, John Chesoli Wafuko.

9. In the Affidavit, the 1st Applicant deponed that on various dates between 2005 to 2010, the Applicants purchased land forming part of the parcel known as Kwanza/Kwanza Block 3 Luyha/1 (hereinafter

referred to as "the property") and have resided thereon to date, and that they purchased their respective portions from the following members of the family of the deceased as vendors, in the following manner:

Purchaser	Vendor	Date of Purchase	Acreage purchased
1st Applicant	Ambrose Namulunda & John Simiyu Kutukhulu	10/05/2005	2 acres
1st Applicant	Ambrose Namulunda & John Simiyu Kutukhulu	29/10/2010	1 acre
2nd Applicant	Jescah Mukhwana Namulanda	18/03/2010	4 acres
2nd Applicant	Ezekiel Mulanda Masai	1/04/2010	1 acre
3rd Applicant	Bainitos Kalawai Namulanda	28/11/2008	1 acre
3rd Applicant	Bainitos Kalawai Namulanda	20/08/2009	½ acre
4th Applicant	Wilson Mukiti Mulanda	10/10/2006	1.6 acres

10. I however note that, in respect to the Agreement dated 1/04/2010 above, relating to the 2nd Applicant, although the 1st Applicant alleges that the same was entered into with the deceased, Ezekiel Mulanda Masai, a look at the Agreement shows that this allegation is wholly misleading since the vendor named therein is, in fact, one Mourice Simiyu Bulunya, and not the deceased, as alleged. In any case, the Agreement having been entered into in the year 2010, how can it even be possible that the deceased, who died much earlier in the year 1991, could have entered into it in the year 2010, 19 years after his death? I hope this was an innocent oversight by the drafter of the Affidavit and not a deliberate attempt to knowingly mislead the Court.

11. Be that as it may, the 1st Applicant deponed further that the Applicants paid their respective purchase prices in full and were given vacant possession and use of the same, and reside thereon to date, but that however, they were not listed as purchasers or beneficiaries at the time of filing of these Succession proceedings or during the confirmation of the Grant. He deponed further that one Jane Anyona Mukavana who is listed as a beneficiary in the Rectified Certificate dated 28/07/2023 does not own any share in the estate but was instead given the 1st Applicant's share as evidenced by the exhibited copy of a letter from the Chief.

12. According to the 1st Applicant therefore, there was material concealment from the Court and the Grant was issued, confirmed and rectified fraudulently since it was not revealed to the Court that that the Applicants were excluded from the proceedings. He urged that the Applicants only came to learn of these proceedings in November 2023 when a Surveyor visited the site to commence the process of sub-

division. He then urged the Court to transfer this matter to the Kitale High Court since all beneficiaries and the Applicants reside within that jurisdiction, where the property is also situated.

13. I may comment that by the Notice of Appointment filed on 5/03/2024, the firm of Messrs Seneti & Co. Advocates came n record for the Applicants.

Administrator's Replying Affidavit

14. The Application is opposed vide the Replying Affidavit sworn by the Administrator and filed through his newly appointed Advocates, Messrs Teti & Co. In the Affidavit, he deponed that the Application is incompetent as a look at the exhibited Sale Agreements reveals that none of the Applicants purchased any portion of the property directly from the deceased, Ezekiel Mulanda Masai, and that for this reason, the Applicants are neither creditors nor beneficiaries nor dependents of the deceased.

15. He deponed further that the Application offends the provisions of Section 66 of the *Law of Succession Act* since the Applicants, as purchasers, are not persons entitled to a grant of Letters of Administration and cannot therefore apply for revocation of the Grant as they are neither beneficiaries nor dependents of the deceased. According to him, the Applicants' recourse lies in suing whoever sold to them the portions of the property or the administrators of their estates in the event that they are dead.

16. In the end, he deponed that as a result of the Applicants' illegal acts, it has become impossible to survey and/or sub-divide the property for the purposes of implementing the Certificate of Confirmation of the Grant issued herein.

Hearing of the Application

17. The Application was canvassed by way of written Submissions. The Applicants' Submissions bears the Court stamp of 9/10/2024 but the same does not appear to have been filed in the Judiciary Court Tracking System (CTS) portal as required under current procedure. On his part, the Administrator had filed his Submissions much earlier on 31/05/2024.

Applicants' Submissions

18. Counsel for the Applicants reiterated the history and facts already set out in their Supporting Affidavit which I will not therefore repeat. He then submitted that as a result of the purchase of the respective portions of the property, there existed a nexus between the Applicants and the deceased, and that there are valid Agreements of Sale. He urged that the bone of contention herein is whether there was intermeddling with the estate of the deceased contrary to the provisions of Section 45 of the *Law of Succession Act*. He then submitted that the Administrator has misguided the Court into believing that these proceedings were filed in 2016 yet the true position is that the same was first instituted, and Grant issued, in the year 1992. He urged that by reason thereof, the 1st Applicant purchased his portion from the deceased when he was still alive.

19. Regarding the rest of the Applicants, he submitted that they entered into Agreements with the beneficiaries of the deceased when the Succession Cause had already been commenced and a Grant issued. Regarding the prayer for Revocation of the Grant, he submitted that the Applicants rely on Section 76(a) of the *Law of Succession Act*, as they were not involved or listed as beneficiaries in the proceedings yet they have been residing on the property from the year 2005, and have invested heavily thereon.

Petitioner's Submissions

20. On his part, Counsel for the Administrator reiterated that looking at the Agreements for Sale exhibited, it is clear that none of the Applicants purchased any portion of the property from the deceased, Ezekiel Mulanda Masai, considering that he died on 1/05/1991 and the Applicants purchased their portions from the year 2005, 15 years later. He then submitted that the Application is incompetent since the Applicants were not parties to this case yet they never filed entries of appearance as required under Rule 60 of the Probate and Administration Rules, thus rendering the Application fatally defective.

21. He submitted further that the Application offends the provisions of Section 29, 45 and 66 of the *Law of Succession Act* and also Rule 7(7) of the Probate and Administration Rules. He urged that Section 29 defines who "dependents" are and the purchasers are not, that Section 66 does not include "purchasers" as being among the persons to be given preference to administer the estate of a deceased person, and that to the extent that the Applicants never purchased their portions from the deceased, they are not "creditors" to the estate.

22. According to him, what the Applicants have done is "intermeddling" in the estate which is contrary to the provisions of Section 45 of the *Law of Succession Act*, and are, as a result, illegal acts. He cited the case of Ireri Nyaga v Karani Ngari & Another, Embu HC Succ. No. 68 of 2007 [2010] eKLR, the case of In re Estate of William Akeya Sambo (Deceased) [2019] eKLR, the case of In re Estate of Philip Mokaya Gesanda (Deceased) [2018] eKLR, the case of Muriuki Hassan v Rose Kanyua & 4 Others, MRU HC Succ. Cause No. 62 of 2012 [2014] eKLR and lastly, the case of In re Estate of Andrea Ooko Tianga (deceased) [2019] eKLR. According to him, the Applicants lack the locus standi to institute the instant Application, and that their recourse lies in suing the people who sold to them the land, or the Administrator of their estates, if the sellers are dead.

Determination

23. The broad issue that arises for determination in this matter is "whether the Applicants have demonstrated sufficient material to justify revocation of the Rectified Certificate of Confirmation of Grant issued herein."

24. In respect to revocation of Grants, Section 76 of the *Law of Succession Act* provides as follows:

> "Revocation or annulment of grant
>
> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—
>
> (a) that the proceedings to obtain the grant were defective in substance;
>
> (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
>
> (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

25. Section 76 was expounded upon by W. Musyoka J. in the case of Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR in which he aptly explained it as follows:

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."

26. It is also settled that the grounds set out in Section 76 above need to be proved with sufficient evidence as the mandate to revoke a Grant is a discretionary power that must be exercised judiciously and only on sound grounds, not whimsically or capriciously.

15. Regarding the fate of the property of a deceased person, Section 79 of the *Law of Succession Act* provides that the same shall vest in his/her personal representative. It states as follows:

> " The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."

16. Section 82 then lists the powers of such personal representatives but also provides a limitation on, inter alia, sale of immovable assets. It provides as follows:

> " Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
>
> (a) .....;
>
> (b) .....
>
> Provided that—
>
> (i) .....
>
> (ii) no immovable property shall be sold before confirmation of the grant (emphasis own);
>
> ....."

27. In light of the above clear provisions of the law, I find this to be an easy case to determine.

28. In this case, it is not in dispute that the property in contention herein, namely, Kwanza/Kwanza Block 3 Luhya/1, is still in the name of the deceased, Ezekiel Mulanda Masai, and has never been transmitted to any other person, not even the beneficiaries. It is also not in dispute that none of the Agreements for Sale exhibited by the Applicants demonstrates that any of them purchased his/her alleged portions of the property directly from the deceased, Ezekiel Mulanda Masai.

29. Further, while the deceased died in the year 1991, the Agreements show that they were all entered into between the years 2005-2010, long after the deceased had died. The Applicants will therefore fail unless they can successfully demonstrate that the "vendors" who sold to them the portions, if any, were authorized by Court sanction, in terms of a lawful Certificate of Confirmation of a Grant of Letters of Administration, as legal representatives of the estate of the deceased, to enter into such sale transactions.

30. The question that therefore arises is whether the "vendors" from whom the Applicants allegedly purchased portions of the property were possessed of such legal capacity to sell the same. In other words, were the sales, if at all, lawful under the provisions of the *Law of Succession Act*?

31. In answering the above question, I reiterate that the initial Certificate of Confirmation of Grant was issued on 27/08/1992 to Ambrose Nambosia Namulanda, but which was revoked about 10 years later on 28/02/2002. A fresh Certificate of Confirmation was only eventually issued, jointly, to Jescah Mukhwana Namulanda and Bainitos Kalawai Namulanda on 6/05/2019. It is therefore evident that there was no Certificate of Confirmation of Grant in existence between 28/02/2002 when the initial Grant was revoked, and 6/05/2019 when the fresh Grant was eventually issued. By this reason alone, all the Agreement for Sale exhibited by the Applicants are rendered null and void as they were all clearly entered into during that intervening period (28/02/2002 - 6/05/2019) when there was no Certificate of Confirmation of Grant in existence. In the absence of a Certificate of Confirmation of Grant issued by the Court, no one had any power to purport to sell any of the estate property during that period.

32. Further, noting that there is no evidence that the property has to date been transferred from the name of the deceased into the name of any other person, not even the beneficiaries, and no sub-division has also taken place, it is evident that even assuming that there was any valid Certificate of Confirmation of Grant upon which the portions of land could have been sold to the Applicants, only the Administrators appointed by the Court would have had the legal capacity to enter into any sale transactions. I however note that some of the "vendors" included people who were never

Administrators at any time, whether during the existence of the initial Certificate of Confirmation of Grant, or even in the fresh one issued subsequently. I have noted for instance, John Simiyu Kutukhulu, Mourice Simiyu Bulunya and Wilison Mukiti Mulanda, who have never at any point in time been appointed Administrators of the estate yet are cited as some of the "vendors".

33. It is strange that some of the Agreements indicate that they were even drawn by an Advocate's law firm. Such Advocates must surely have known that that the purported "vendors" had no legal capacity to "sell" any part of the estate of the deceased and that any such purported was null and void. This makes me wonder whether the Lawyers deliberately misled the purchasers?

34. What the Applicants and the purported vendors committed, by their said acts of purporting to transact on property owned by the deceased, clearly amounts to the offence "intermeddling" with the estate of a deceased person, which is prohibited under Section 45 of the *Law of Succession Act*. In respect thereto, Gikonyo J in the case of Re Estate of M'Ngarithi M'Miriti [2017] eKLR, described "intermeddling" in the following terms:

> " Whereas there is no specific definition provided by the Act for the term "intermeddling", it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."

35. In view of the foregoing, one fact that I find curious is that the Administrator, Bainitos Kalawai Namulanda, despite there being the Agreements dated 18/03/2010, 28/11/2008, 20/08/2009 exhibited by the Applicants indicating that indeed he entered into the Agreements purporting to sell portions of the property to some of the Applicants, and even received purchase price payments from them, by his Replying Affidavit filed herein, and without even denying the allegations made, simply argues, correctly though, that the Agreements were unlawful.

36. If the allegation of his receiving funds as purported purchase price is true, does he therefore mean that he is ready and willing to refund the Applicants the purchase price, and possibly also consequential losses caused to them? Is he saying that he innocently sold the portions ignorantly believing that he had the capacity to so sell? I hope he has been well advised, otherwise, short of labelling him a "fraud" for obtaining money by false pretences, he is most probably staring at heavy litigation, probably both civil and criminal, towards himself.

37. Regarding transactions concerning the property of a deceased person entered into before the Grant of Letters of Administration has been confirmed, the estate distributed and properties transmitted to

the beneficiaries, I cite the decision of F. Gikonyo J, in the case of In re Estate of M'Ajogi M'Ikiugu (Deceased) [2017] eKLR, in which he stated the following:

> "(4) Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the *Law of Succession Act*. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.

38. Further, in the case of In re Estate of the Late Chemase Ego (Deceased) (Succession Cause 116 of 2000) [2025] KEHC 527 (KLR) (27 January 2025) (Ruling), R. Nyakundi J, also correctly found as follows:

> "34. Having weighed all the factors in this matter, I find that the application for revocation falls short of establishing the threshold required under Section 76 of the *Law of Succession Act*. Several considerations inform this determination. First, the alleged non-disclosure of purported land sales cannot constitute material concealment as these transactions, having occurred before confirmation of the grant, were void ab initio by operation of Section 82(b) (ii) of the Act. Second, the claims against the estate do not qualify as liabilities requiring disclosure since they did not arise from transactions with the deceased during his lifetime. Third, while the current occupation of land parcel Irong/Iten/165 presents complex issues requiring resolution, these matters are properly within the jurisdiction of the Environment and Land Court rather than forming grounds for revocation of the grant."

39. I also cite the decision of W. Musyoka J, in the case of In re Estate Jamin Inyanda Kadambi (deceased) (2021) eklr in which he held as follows:

> "21. The administrators have made a lot hay out of the alleged sale of the estate property to the 1st administrator to facilitate burial of the 2 sons of the deceased. The administrators appear to be blind to the fact that the alleged sale happened before the grant was obtained, and, therefore, the estate had not been vested in any one, by virtue of section 79 of the *Law of Succession Act*, who would have been in a position to exercise the powers of an administrator set out in section 82 of the *Law of Succession Act*, which include the power to sell estate assets. It is critical to note that sale of or handling of or dealing with

estate property without a grant of representation is outlawed by section 45 of the *Law of Succession Act*, and violation of that provision attracts criminal sanctions. Only the holder of a grant, whether letters of administration or probate, can legitimately handle the property of a dead person, any other person doing so would violate the law, in what is known as intermeddling. The fact that one is child of a dead person does not give them any rights to handle the dead parent's proper unless they have legal authorization, which comes with a grant of representation. The sale alleged in this case happened before a grant had been made, and, therefore, those involved in the process were intermeddling with the estate of the deceased.

40. It cannot therefore be an issue of any debate that the purported acquisition, by the Applicants, of portions of the property known as Kwanza/Kwanza Block 3 Luhya/1 owned by the deceased, more than 15 years after he had died, was unlawful, null and void and above all, an illegality.

41. I may conclude by adding that the Applicants' claim herein seem to be of the nature that should perhaps be placed before the Environment and Land Court for determination. This is in accordance with separation of jurisdiction between respective Courts. On this issue, I cite the decision of, again, W. Musyoka J in the case of In the matter of the Estate of Stone Kakhuli Muinde (Deceased) [2016] eKLR where he stated as follows:

> "24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.
>
> 25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.
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> 26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.
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> 27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.

29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place."

42. I fully associate myself with the above views advanced by Musyoka J. Indeed, Article 162(b) of *the Constitution* of Kenya 2010 gives to the Environment and Land Court (ELC) the sole mandate and jurisdiction to determine issues of ownership, use and occupation of land. I am therefore satisfied that the claims made in the instant Application are matters that are squarely within the province of the Environment & Land Court (ELC) and not this High Court sitting as a Probate Court.

43. For the various reasons cited above, it is clear that the Application herein cannot succeed. I am alive to the Applicants' allegations that they have been in occupation of, and have been residing, on the property for a long time and have heavily invested thereon, including possibly building their homes thereon. It is unfortunate that the effect of my findings herein is that, if the allegations are true, then the Applicants are staring at incurring heavy losses, including probably eviction from their homes. However, this, being a Court of law, and not a Court of sympathy, it is guided by Constitutional and statutory provisions.

44. The Applicants were the authors of their own misfortune, but even so, if well advised, they will realize that they can still pursue and obtain redress before a different forum.

Final orders

45. In the end, I find the Applicants' Summons for Revocation of Grant, dated November 28, 2023 lacking in merit. The same is accordingly dismissed but each party shall bear his/her own costs thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

No Appearance by Advocates for the parties

Present: 3 Objectors: John Chesoli Wafuko, Abednego Maklap Kaimasach and Esther Asikoh Hellen

Court Assistant: Brian Kimathi