



REPUBLIC OF KENYA



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**In re Estate of Ezekiel Luyali Liya (Deceased) (Succession Cause
187 of 2008) [2025] KEHC 13021 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 13021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 187 OF 2008**

G MUTAI, J

MAY 28, 2025

**IN THE MATTER OF THE ESTATE OF EZEKIEL LUYALI
LIYAI(DECEASED)**

BETWEEN

**JAPHET MWANBURI LUYALI & ELIZABETH KHADIJA LUYALI (APPLYING
AS THE ADMINISTRATORS OF THE ESTATE OF JAMES MICHAEL
LUYALI) 1ST APPLICANT**

**BEATRICE LUVUNO KALINGA ALIAS BARIKA LUVUNO KALUNGA
(APPLYING ON BEHALF OF OROBA MASITSA LUYALI ALIAS SWABRINA
KALINGA (APPLYING ON BEHALF OF OROBA MASITSA LUYALI ALIAS
SWABRINA MASITSA LUYALI, A BENEFICIARY) 2ND APPLICANT**

AND

IRENE JULIET OTINGA 1ST ADMINISTRATOR

ALEX SHIVACHI LUYALI 2ND ADMINISTRATOR

RULING

1. Before this court, there are two applications dated 7th June 2023 and 4th July 2023, respectively.
2. The application dated 7th June 2023, is a summons for revocation of the grant seeking the following orders: -
 - a. Spent
 - b. That certificate of confirmation of grant issued to Irene Juliet Otinga & Alex Shivachi Luyali on 1st April 2016, be and is hereby annulled and/or revoked.



- c. The current administrators herein be restrained from intermeddling with the estate of the deceased by subdividing, transferring, selling, distributing, negotiating, leasing and/or interfering in any other way with the estate of Ezekiel Luyali Liyai (deceased);
 - d. That the court do issue orders restraining any further dealings in the estate until new administrators are appointed and a correct certificate of confirmation of grant issued;
 - e. The outgoing administrators be compelled to return/refund all the illegally acquired shares belonging to Lydia Luyali(deceased)since the time they began distributing the assets of the estate up to date;
 - f. The honourable court do issue orders that will stamp its authority in the administration of the estate henceforth; and
 - g. That costs be in the cause.
3. The application is premised on the grounds therein and the supporting affidavit of Japhet Mwamburi Luyali.
 4. Vide the said affidavit, the deponent stated that he was one of the administrators of the estate of James Michael Luyali (deceased). The deceased died intestate on 18th February 2008 and was survived by Horoba Liyai, Irene Juliet Otinga, Alex Shivachi, James Luyali, Lydia Luyali, Purity Luyali, Lewis Luyali, Godswill Luyali, and Oroba Masitsa Luyali. He further deposed that the court in its judgment of 29th January 2016, distributed the estate as follows: Horoba Liyai 9%, Irene Juliet Otinga 12%, Alex Shivachi 10%, James Luyali 10%, Lydia Luyali 9%, Purity Luyali 9%, Lewis Luyali 10%, Godswill Luyali 15%, and Oroba Masitsa Luyali 16%. However, the certificate of confirmation issued on 1st April,2016, reflects shares as follows: Irene Juliet Otinga 21%, Alex Shivachi 10%, James Michael Luyali 10%, Godswill Luyali 15%, Oroba Masitsa Luyali 16%, Purity Luyali 9%, Lewis Luyali 10%, Horoba Liyai 9%. The number of the beneficiaries also reduced from nine to eight, with the 1st administrator's shares rising to 21% by acquiring the shares of Horoba Liyai.
 5. He stated that forgery has affected the beneficiaries of the estate of Lydia Luyali, and they are undergoing extreme hardships in their upkeep and school needs.
 6. He urged the court to intervene in the matter and enforce its judgment delivered on 26th January 2016, and also to revoke the certificate of confirmation of grant issued on 1st April 2016, and issue a proper certificate.
 7. In response, the 1st respondent filed a replying affidavit sworn on 27th June 2023, wherein it was stated that they had received rental payments from Ola Energy (K) Limited five times and the same was distributed as per the certificate of confirmation of grant issued on 1st April 2016. On 1st April 2016, they received Kes.9,300,000/-, and deducted Kes.200,000/-, for Paul Wambua Valuers, and Kes.240,000/- for Fairline Valuers, leaving a balance of Kes.8,860,000/-. The balance was distributed to the beneficiaries through their advocates, according to the percentages in the certificate of confirmation of grant. On 30th August 2016, they received Kes.3,600,000/- which was similarly distributed as per the certificate of confirmation after deduction of bank charges of Kes.12,200/-. On 4th October 2017 they received Kes.7,920,000/-, which was similarly distributed after deducting Kes.4,348/- for bank charges.
 8. She stated that the shares of James Michael Luyali (Deceased) and Horoba Liyai(Deceased) were retained at the Family Bank, Jomo Kenyatta Avenue, pending the court's directions since their family members were yet to apply for letters of administration.



9. Further on 24th October 2019, they received Kes.8,712,000/- which was distributed to the beneficiaries after deducting Kes.100,000/- for Paul Wambua Valuer and Kes.340,000/- for processing lease. The shares for Lewis Luyali, James Michael Luyali, Purity Luyali, and Oroba Masitsa were deposited in the Bank of Africa Nyali Branch, awaiting the determination of the court. After the court ruling on 5th May 2020, the share of the said beneficiaries was distributed minus bank charges.
10. On 19th October 2021, they received a sum of Kes.4,791,600/-, which was distributed after deduction of Kes.100,000/- for transactions that were ongoing. The 9% held at the Family Bank account for Horoba Liyai, at 9%, was distributed to the beneficiaries according to their percentage of shares following a court order that released them.
11. She stated that the estate owes her Kes.50,600/- deducted from her share, and that the administrators have been using their monies to follow up on the estate, including transport to government offices in Mombasa and Nairobi, especially during the lease negotiations and the sale transaction involving Oil Libya Company Limited and Barnsbury Limited, respectively.
12. The 2nd respondent filed a replying affidavit sworn on 31st August 2023. He stated that the application does not meet the legal requirements for revocation or annulment of the grant. He averred that the applicants are strangers to the estate of the deceased herein as Japhet Mwamburi and Elizabeth Khadija are grandchildren of the deceased by dint of being the children of James Michael Luyali, while Beatrice Luvuno Kalinga is not a beneficiary, and the child she was representing attained the age of majority on 8th April 2016, thus she has been receiving the proceeds irregularly.
13. On the issue of the certificate of confirmation of grant issued on 1st April 2016, she deposed that the same was a result of a consent by all the beneficiaries and that the 1st applicant's father James Michael Luyali (Deceased) and the 2nd applicant were part of the discussions and cannot turn around and pretend they were not aware and take this court in circles. He contended that there is no evidence of forgery of a court document, more so, the certificate of confirmation of grant.
14. Further, they had distributed the properties available for distribution despite challenges, using their own money, most of the time, without being compensated. He deposed that the applicants were hellbent to wage war against the administrators, despite the fact that this matter went all the way to the Court of Appeal and back.
15. The 2nd respondent filed a further affidavit sworn on 28th February, 2024. He stated that they expended Kes.11,127,560/- towards the removal of the petrol station dealer Times Touch Enterprises Limited and the trespassers who had taken over the premises, Plot No. 7665 Section I/MN. The amount was advanced to them by the purchaser Barnsbury Investment Limited through their advocates, Muthee Soni & Company Advocates. The same was deducted from the 90% balance of the purchase price and therefore the amount forwarded to Munyithya, Mutugi, Umara & Muzna Company Advocates as the balance was Kes.114,872,440/-. He stated that the administrators have filed ELC Case No. 126 of 2022; Irene Juliet Otinga & Alex Shivachi Luyali (for Estate of Ezekiel Luyali Liyai) v Ola Energy (K) Limited and Timestouch Enterprises Limited for recovery of the amounts expended.
16. The second application dated 4th July 2023 seeks the following orders:-
 - a. Spent;
 - b. Spent;
 - c. This honourable court be pleased to summon the 1st administrator /respondent (Irene Juliet Otinga) and the 2nd administrator /respondent (Alex Shivachi Luyali) to both appear



personally in physical court and show cause why they should not be punished for contempt of court orders;

- d. This honourable court be pleased to commit to the 1st administrator /respondent (Irene Juliet Otinga) and the 2nd administrator /respondent (Alex Shivachi Luyali) to civil jail for six (6) months, or for such other period as the court may deem fit, and the officer commanding Nyali Police Station and Sub-County Police Commander, Kisauni to enforce the court's orders;
 - e. The honourable court be pleased to order the respondents /administrators to pay up all illegally deducted amounts from the shares of the applicants herein from April 2016, when the estate realized its first proceeds up to April 2023 (the most recent payment), on admission, there being no opposing statement of accounts as had been ordered by the court;
 - f. The respondents /administrators be condemned to bear costs of this suit;
 - g. This honourable court be pleased to make any other or further order as the justice of the case may demand.
17. The application is premised on the grounds stated therein and the supporting affidavit of the 1st applicant. He stated that he is the son of James Michael Luyali, a beneficiary of the estate of the deceased herein. He deposed that the administrators have not taken any step to comply with the court orders of 27th March 2023, which were unambiguous. The administrators continue to mismanage the estate and are determined to frustrate them. The respondents have been deducting their shares maliciously without any justification. He urged the court to grant the orders sought.
 18. The 2nd respondent filed a replying affidavit sworn on 18th July 2023. He stated that the application does not meet the threshold for contempt as the order of 27th March 2023, was issued in the absence of their advocates due to a technical internet connection. On 3rd July 2023, they filed a comprehensive tabulation of the accounts of the estate and how they have been distributed, stating that the accounts are accurate accounts of the estate and no funds were deducted illegally.
 19. He stated that there was no breach of the court orders as alleged. That they have been selling one of the main assets of the estate, Plot No. LR MN/1/7665 and the exercise is complete, and distribution is done.
 20. The applications were canvassed by way of written submissions.
 21. The applicants, through their advocates Khaminwa & Khaminwa Advocates, filed written submissions dated 5th December 2024, in respect of the two applications. Counsel submitted on the following issues: whether the respondents are in contempt of the court's orders and liable for punishment; Whether the judgment of the court can be re-written by parties; whether there are sufficient grounds to revoke the grant herein; whether the administrators are liable to refund the deductions complained of by the applicants; and, which party will bear the costs.
 22. On the first issue, counsel submitted that the respondents have not complied with the orders of this honourable court of 27th March 2023 and therefore are in contempt of court orders, hence liable for punishment of contempt.
 23. On the 2nd issue counsel submitted that once a court renders judgment it becomes functus officio and cannot interfere with the judgment unless moved by parties for its review with the other option being an appeal by the aggrieved party.
 24. On the third issue counsel relied on Section 76 of the *Law of Succession Act* and submitted that there are two grounds to warrant revocation of the grant in this case namely; the instant grant is a total forgery,



not emanating from the orders of this honourable court; the administrators have failed to produce to the court, within the time prescribed, the inventory and account of administration as is required by the orders of court of 27th March 2023. It was urged that the respondents have rewritten the judgment of the court and removed one of the beneficiaries. Counsel urged the court to revoke the grant herein as it was illegally procured.

25. On the fourth issue, counsel relied on Sections 83 and 84 of the [Law of Succession Act](#) and submitted that it was upon the respondents to hold the shares of Lydia Luyali on trust for her children, who were still minors at the time she passed on.
26. On the fifth issue, counsel submitted that costs follow the event and urged the court to award the applicants costs.
27. The 1st respondent, on the other hand, through her advocates Munyithya, Mutugi, Umara & Muzna Co. Advocates, filed written submissions dated 20th January 2025. Counsel submitted that the two applications herein are unmerited and should be dismissed.
28. On the first application, counsel relied on section 76 of the [Law of Succession Act](#) and submitted that the administrators have been diligent in their work and have involved the beneficiaries at every stage of the process. It was submitted that the distribution of the estate in respect of the free assets had progressed well despite the various challenges posed by either squatters/or the dealer who was running the petrol station under OLA Energy(K) Limited's franchise.
29. On prayer 3 and 4, counsel submitted that the administrators were appointed by the court upon full hearing and delivery of a well-considered judgment and are also beneficiaries of the estate in their individual capacities. Further, they are performing their duties under Sections 82 and 83 of the [Law of Succession Act](#). It was urged that no ground had been proved to warrant the revocation/annulment of the grant.
30. On prayer 5 of the application, counsel submitted that the change in the distribution percentage was effected through an agreement signed by all the parties, which was a compromise to withdraw the notice of appeal. That the shares added to Irene did not emanate from the shares of Lydia Luyali at all, and that no evidence to prove the said allegation had been provided. Lydia, being one of the beneficiaries, died before the distribution of the estate, and therefore her share reverted back to the estate for distribution to the surviving beneficiaries. The 1st applicant is not a child of Lydia.
31. On prayer, 6 counsel submitted that the administrators are operating under difficult circumstances and have done what is humanly possible to distribute the estate.
32. On the 2nd application, counsel submitted that the court had an open session with all the parties on 30th January 2024 from 11 am to 3.30 pm and therefore the applications by the applicants are out of ulterior motive and urged the court to dismiss the applications.
33. On prayer 4, of the application counsel submitted that the administrators have not disobeyed any court orders. It was submitted that when the court ordered that an audit be conducted, both parties were asked to nominate their preferred auditors for the court to select one. The applicant suggested an unknown name, while the administrators proposed Ambale Ogot Auditors, who insisted on a deposit before commencing the work. None of the parties ever suggested how to raise the deposit, and therefore, no auditor had been appointed. The parties have held several meetings, but no consensus has been reached, and therefore, the administrators cannot be said to be in contempt of court orders. The court was urged to dismiss the prayers herein.



34. On prayer 5, counsel submitted that the administrators' affidavits dated 31st March 2023 and 18th July 2023 explain how the amounts paid were distributed. The 1st applicant's father, James Michael Luyali (Deceased), was represented by the firm of Kadima & Company Advocates, and their share was received by the said firm; therefore, he should seek an explanation from the said firm. Same situation applied to the 2nd applicant whose share was received by her advocates Madzayo Mrima & Jadi Advocates.
35. Counsel submitted that the amount of Kes . 11,000,000/- was utilized with the full knowledge of all parties, and that it was necessary to have the dealer and trespassers removed.
36. On prayer 6, counsel relied on Section 86 of the *Law of Succession Act* and submitted that all the debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy, and therefore, the administrators cannot be saddled with costs of proceedings, and urged the court to dismiss the same.
37. In conclusion, counsel urged the court to direct the administrators to follow up on the remaining assets in conjunction with the applicant, as earlier ordered.
38. When the matter came up for highlighting, Mr Yose, counsel for the applicants, reiterated the applicants' position and submitted that Lydia died on 4th August 2014, before judgment was written, and therefore she couldn't have participated in the alleged negotiations. There was no proof that there was anyone to take care of her estate. He urged that the certificate of confirmation is a forgery and does not reflect the findings of the court.
39. Mr. Mutugi, counsel for the 1st respondent, reiterated the respondent's position and submitted that the applicants have not met the legal test applicable to applications under Section 76 of the Law of Succession. He submitted that the administrators have done an exemplary job in distribution; however, they had not concluded the administration due to cases in court. He further submitted that the alleged children are strangers to the estate, as the consent of 30th March 2016, was signed by all beneficiaries, including James Michael Luyali.
40. In a rejoinder, Mr Yose submitted that Lydia's beneficiaries were seeking her share of the estate. The said beneficiaries did not participate in the negotiations, and the judgment of the court cannot be rewritten/changed by consent.
41. Section 76 of the *Law of Succession Act* states as follows:-
- “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.”

42. The court’s power to revoke a grant was discussed in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] KEHC 1528 (KLR). The Court stated that:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account the interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

43. The court in its judgement of 22nd January 2016, by Lady Justice Maureen Odero, listed the following as the beneficiaries of the estate of the deceased herein and their shares: Horoba Liyai 9%, Irene Juliet Otinga 12%, Alex Shivachi 10%, James Luyali 10%, Lydia Luyali 9%, Purity Luyali 9%, Lewis Luyali 10%, Godswill Luyali 15%, and Oroba Masitsa Luyali 16%.

44. My understanding of the applicant’s case is that they are aggrieved by the failure to include Lydia Luyali (deceased) in the certificate of confirmation of grant. I am not convinced based on the available evidence that the applicants are the children of Lydia Luyali.

45. That being the case, it is my view that the applicants have not laid the basis for the revocation of the grant and therefore the application must fail.

46. On the second application for punishment of the respondents on the account of the alleged contempt of court, the court in the case of *Sheila Cassatt Issenberg & Watoto World Centre v Antony Machatha Kinyanjui* [2021] KEHC 5692 (KLR) stated that:-

“The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him... Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order... The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and wilful disobedience unless the contemnor had knowledge of the existence of that order. And because contempt is



of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second, that he deliberately and wilfully disobeyed it... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly.”

47. Further, the court in *Samuel M. N. Mweru & Others v National Land Commission, Nairobi City Water and Sewerage Company Limited & Nairobi City Water County* [2020] KEHC 9233 (KLR) stated that:-

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*, who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases, which is higher than civil cases) that:-

- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant's conduct was deliberate.

... Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.

The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an ‘accused person.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of



contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established.

And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one':-

“The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far reaching.

There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.’

Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.”

48. The court in its ruling of 27th March 2023 issued the following orders; the administrators, Irene Juliet Otinga and Alex Shivachi Luyali, shall within 60 days render true and just account on the status of the distribution of the estate of the deceased herein; the administrators, Irene Juliet Otinga and Alex Shivachi Luyali, shall complete the administration of the estate in respect of all matters set out in the certificate of confirmation of grant dated 1st April 2016 within 6 months; the administrators, Irene Juliet Otinga and Alex Shivachi Luyali, shall produce in court within 60 days a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate audited account of all dealings therewith up to the date of the account; and there shall be no order as to costs.
49. After discussing with the parties and their counsel, the court directed the parties to agree on a joint auditor. When the matter came up on 6th March 2024, the parties had not yet agreed on an auditor. The court then directed parties to nominate one auditor each within one week so that the court may decide as to which auditor shall make a forensic audit, and that the estate shall bear the cost of the audit. The court also directed parties to provide the beneficiaries with a statement of accounts of the deceased's bank accounts and searches of all his properties within 14 days.
50. From my understanding of what is ongoing in this matter, it is my view that the respondents have attempted to comply with the orders of the court and that they have experienced challenges. It cannot be said, therefore, that there has been wilful and deliberate disobedience. In my view, the application has been done hastily in a context that would require introspection and circumspection.



51. The upshot of the foregoing is that it is my finding that the two applications lack merit. The same are hereby dismissed with no orders as to costs.

52. Orders accordingly.

DATED AND SIGNED AT MOMBASA, THIS 28TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Yose, for the Applicants;

Mrs Umara, holding brief for Mr Mutugi, for the 1st Administrator/Respondent;

No appearance for the 2nd Administrator/Respondent; and

Arthur - Court Assistant.

