



REPUBLIC OF KENYA



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**In re Estate of the Late Francis Muhiga Ndori (Deceased) (Succession Cause 164 of 1996) [2024] KEHC 8850 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8850 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 164 OF 1996  
RN NYAKUNDI, J  
JULY 18, 2024**

**IN THE MATTER OF THE LATE FRANCIS MUHIGA NDORI (DECEASED)**

**BETWEEN**

**FELIX CHUMBA MUHIGA ..... PETITIONER**

**AND**

**HELLEN MURANJE MUHIGA ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD MUHIGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant, Felix Chumba Muhiga through his legal counsel Mr. Mwetich approached this court vide a Summons for revocation of grant dated 22/03/2023. Subsequently, the applicant also filed a notice of motion application dated 9<sup>th</sup> June, 2023. In the first application, the following orders are prayed for:
  - a. Spent
  - b. That there be inhibition on dealing in land parcels Kakamega Shamakhokho/149150,153 & 151, Tiriki/Shamakhokho/453 and Nandi/Koibarak "B"/487 pending the hearing and of this summons for revocation.
  - c. That the grant of letters of Administration and Certificate of Confirmation of Grant issued to Hellen Muranje Muhiga on 6.9.1999, the Respondent herein be revoked and/or annulled.
  - d. That the costs of the application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the same. The applicant contends that the 1<sup>st</sup> Respondent has irregularly disinherited all



survivors/beneficiaries of the estate. That there exists a risk of disposal or dealing in the lands belonging to the estate to the detriment of the applicant herein.

3. The Applicant averred that the confirmation of grant issued did not identify the shares with regard to landed assets but the grant appeared to have been used to transfer all real assets to the Respondent. That the proceedings to obtain the grant were fatally defective in substance.
4. It was further his ground that the grant was obtained fraudulently by the making of a false statement and by the concealment from the court of material facts to the case.
5. 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.
6. That the late Francis Muhiga Ndori, whose estate Hellen Muranje Muhiga is currently the administrator, left behind other beneficiaries who have been disinherited by virtue of that grant obtained fraudulently by the Respondent.
7. It is the Applicant's position that the respondent, through the defective succession proceedings herein, was fraudulently allocated all the assets and properties of the deceased and subsequently in the process of transferring and obtaining title of the properties to herself. That the other beneficiaries did not take part in the proceedings for confirmation of the grant orders issues herein.
8. In response to the application, the 1<sup>st</sup> Respondent deponed as follows:
  - a. That the allegation by the applicant that I have disinherited all survivors/beneficiaries of the estate is not true. A part from the applicant herein and one of my sons called Hillary Ndori; no other child of mine claims to have been disinherited and/or supports the instant summons for revocation of grant.
  - b. That in fact, the applicant has concealed from the court a fact that he was one of the properties of the deceased in his name.
  - c. That since the demise of the deceased herein, it has been about 27 years and I have not alienated even a single property of the deceased.
  - d. That it is dishonest of the applicant to state that at all material times he has been away from the jurisdiction yet the applicant has been visiting Kenya and precisely my matrimonial home every year.
  - e. That I put the applicant to strict proof on how the proceedings to obtain the grant was fatally defective and how I obtained it fraudulently because I am struggling to find proof from his summons for revocation of grant.
  - f. That the applicant is engaging in conjecture at paragraph (h) of his grounds of the summons for revocation of grant. The applicant does not name any beneficiary whom I have disinherited nor is there any affidavit of any beneficiary in support of the said allegations.
  - g. That the applicant is not naming any other beneficiary that I have allegedly disinherited. In fact, apart from him, the applicant has not made aware to the court of any other beneficiaries in the estate of the deceased.
  - h. That I have 11 biological children with the deceased. In order of birth these are: Rosemary Mutetsi Maina, Felix Chumba Muhiga, Kennedy Mayo Muhiga, celestine Matere (deceased), Florida Khayeli Muhiga, Selere Ayuma Muhiga, Martina Muhiga, Hillary Ndori Muhiga, Denis Muranje Muhiga, Phidelia Mikhago Muhiga, Richard Shugh Muhiga.



- i. That I am not in the process of transferring and obtaining title of the deceased properties to myself. There is no proof before court to even suggest that.
  - j. That the applicant's father, the deceased herein died in the year 1996. The applicant was present here attending the deceased's burial in the year 1996.
  - k. That the applicant has been well aware of the succession proceedings in this matter.
  - l. That the applicant does not state the parcel number of the property that he realized that I had already transferred in my name from the estate of the deceased nor has the applicant annexed the certificate of official search from the lands registry to confirm proof of his averments at Paragraph 6 of his supporting affidavit.
  - m. That I stay in my matrimonial home up to date. The same home that I used to stay with the deceased herein. he same home that I gave birth to and raised all the beneficiaries herein including the applicant.
  - n. That yes, I was the administrator in the estate of the deceased and that I agree that some properties were not listed but it is only because they were not in the name of the deceased.
  - o. That I am ready to transfer and/or distribute equally any property that I did not list among the deceased's assets but was in the deceased's name at the time of the deceased's death.
  - p. That the deceased died leaving behind some properties which were not in his name. Therefore, I could not list the same as his properties.
  - q. That however later on I protected the said properties by ensuring that I got titles to the same and since this was after the demise of the deceased, I could not register the said properties in the name of the deceased person but mine.
  - r. That for avoidance of doubt, I have never sold and/or alienated any of all the properties that I processed title deeds after the demise of the deceased person.
  - s. That in the entire summons for revocation of grant, the applicant does not propose to whom the grant should be issued to in case it is revoked and/or annulled.
  - t. That it is important for the court to take note that I am ready and willing and I have tried numerous times to engage the applicant so that we can settle this matter amicably but he has refused. I do not intend to disinherit anyone or take anything that is not mine.
  - u. That the deceased's land parcels are a total of 12 which are Kakamega/Shamakhokho/453, Kakamega/Nzoia/1094, Kakamega/Serem/700, Kakamega/Shamakhokho/148, Kakamega/Shamakhokho/149, Kakamega/Shamakhokho/150, Kakamega/Shamakhokho/153, Kakamega/Shamakhokho/151, Tiriki/Shamakhokho/452, Nandi/Koibarak/" B"/ 487. Plot No 5 Erusui, Shop AT Serem.
9. On the other hand, in the 2<sup>nd</sup> application, the applicant sought orders to wit;
- a. Spent
  - b. That Respondents, agents, assigns, servants and any person claiming under them be restrained from taking of the Plaintiffs residential home sitting on Kakamega/Shamakhokho/149&150 pending the hearing of the application inter partes.



- c. That Respondents, agents, assigns, servants and any person claiming under them be ordered to remove themselves from the Applicants residential home sitting on Kakamega/Shamakhokho 149& 150 and be restrained from interfering with the applicants' enjoyment of his house pending the hearing of the summons for revocation dated 22.3.2023.
10. The application is based on the grounds:
- a. That 42-year-old 2<sup>nd</sup> applicant has forcefully taken over the applicant's house.
  - b. That the 2<sup>nd</sup> defendant has not built his own house and is threatening to squat on the applicant's house.
  - c. That the applicant has permanent home in his fathers land known as Kakamega/Shamakhokho/149&150 situate on site appointed for him by the deceased person in his lifetime.
  - d. That the applicant arrived from the U.S on 29.5.2023 and found that his younger brother has taken over possession of the house.
  - e. That the 1<sup>st</sup> Respondent has irregularly disinherited all survivors/beneficiaries of the estate of the late Francis Ndori. Transfer of the land by transmission to the 1<sup>st</sup> Respondent is suspect.
  - f. The applicant was not aware of this petition by the 1<sup>st</sup> Respondent until 2022 when he came back to the country from the U.S.
  - g. That the land was irregularly transferred to the 1<sup>st</sup> Respondent without distribution of the estate.
  - h. That the grant was obtained fraudulently by the making of a false statement and by the concealment from the court of material facts to the case.
  - i. That the applicants violent take over of the house is unlawful and prejudicial to the applicant's application fated 22.3.2023
11. As a rejoinder to the application dated 9<sup>th</sup> June, 2023, Richard swore an affidavit in court on 20<sup>th</sup> September, 2023 and averred as follows:
- a. That in response to paragraph 2 of the applicant's supporting affidavit dated 9<sup>th</sup> June, 2023. That the applicant was well aware of the succession proceedings in the estate of the deceased. Further, the applicant is my elder brother and is not our first born.
  - b. That I have never forcefully taken over the applicant's house. As a matter of fact, I have been staying in the house that I currently occupy since the year 2010.
  - c. That the house I currently occupy was built by the joint effort of all of us siblings excluding the applicant herein and I have some of the receipts to show that.
  - d. That I have been advised by advocates on record which advice I verily believe to be true that it is trite law he who alleges must show proof.
  - e. That from a thorough scrutiny of the applicant's supporting affidavits he has not attached any proof to show that the disputed house actually belongs to him.
  - f. That it is a fact that the house was built by the joint efforts of us siblings to the exclusion of the applicant and I have been living in the house since the year 2010 when the house was completed.



- g. That the house sits or is built on the matrimonial property known as Kakamega/Shamakhokho/149 & 150 where my mother the 1<sup>st</sup> Respondent lives up to now.
- h. That in the applicant's supporting affidavit, he has conveniently omitted to show my mother's house which is proof that the disputed house that the applicant claims to be his sits on the matrimonial property which is Kakamega/Shamakhokho.
- i. That further, the applicant's claims cannot be backed up even by himself as he engages in lies, misrepresentation and conjecture. The applicant cannot and/or has not produced the certificate of official search for the properties known as Kakamega/Shamakhokho/149 & 150 which he claims to have built his house on.
- j. That instead in a bid to try and confuse the court, the applicant attached a certificate of official search for a completely different parcel known as Nandi/Koibarak 'B'/487.
- k. That in response to paragraph 5 of the applicant's supporting affidavit, the applicant is really trying to make the court believe that on 29<sup>th</sup> May, 2023 is the first time he has come back to the country which is a complete fabrication of facts.
- l. That the applicant has been visiting the country frequently and when he arrives, he has no other residence apart from the matrimonial home Kakamega/Shamakhokho/149&150 and the disputed house which I used to stay with him together.
- m. That I cannot comprehend why all of a sudden, the applicant has decided that the house that we siblings built to his execution has become his absolutely, yet he has been well aware for over 13 years that I have been staying in the same house.

### Analysis

- 12. Having read through the applications together with the response, the sole issue I find for determination is whether the grant issued on 6<sup>th</sup> September, 1999 to the 1<sup>st</sup> Respondent can be revoked or annulled.
- 13. On revocation of grant, section 76 of *Laws of Succession Act* provides 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 making of a false statement or by 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:
- 14. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed as follows: -
  - “ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 *Law of Succession*. For a grant to be revoked either on the Application of an interested party or on the court's 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 untrue allegations of facts essential in point of law.”

15. The applicant contended that the confirmation of grant issued did not identify the shares with regard to landed assets but the grant appeared to have been used to transfer all real assets to the Respondent. The 1<sup>st</sup> Respondent on the other hand argued that at the time of confirmation, some of the properties were not listed only because they were not in the name of the deceased.
16. At this juncture, I find it significant to point out that in her petition for letters of grant of administration filed way back on 6<sup>th</sup> August, 1996, the 1<sup>st</sup> Respondent in supporting the Petition for grant of letters of administration deponed as follows regarding the beneficiaries of the estate of the deceased person.
  - a. That the deceased died intestate and left the following persons surviving him/her:
    - i. Hellen Muranje Muhiga (wife) 55 years
    - ii. Rosemary Muteitsi Muhiga (daughter) 35 years.
    - iii. Felix Chumba Muhiga (son) – 33 years
    - iv. Kennedy Mayo Maluga (son) – 31 years
    - v. Floridah Khayeli Muhiga (daughter) – 26 years.
    - vi. Emily Selere Muhiga (daughter) – 26 years.
    - vii. Martina Kisia Muhiga (daughter) – 24 years.
    - viii. Hilary Ndori Muhiga (son) – 22 years.
    - ix. Denis Muraiye Muhiga (son) – 20 years.
    - x. Phidelia Mikhago Muhiga (son) – 18 years.
    - xi. Richard Hugh A. Muhiga (son) – 16 years.
    - xii. Conrad Ongaiyi Muhiga (son) – 14 years.
  - b. That the following is a full inventory of all the assets and liabilities of the deceased at the time of death:
    - i. Kakamega/Shamakhokho/453
    - ii. Kakamega/Nzoia 1094
    - iii. Kakamega/Serem/700
    - iv. Petep1 station on plot No. Kakamega/Shamakhokho/148
    - v. Kakamega/Shamakhokho/149.
    - vi. Kakamega/Shamakhokho/150.
    - vii. Kakamega/Shamakhokho/153.
    - viii. Kakamega/Shamakhokho/151.
    - ix. Tiriki/Shamakhokho/453.



- x. Nandi/Koibarak 'B' 487.
- xi. Plot No. 5 at Brusui.
- xii. Shop at Serem Market
- xiii. Suzuki Registration No. KTS 552
- xiv. Volkswagen Registration No. KJL 822.
- xv. Tractor Registration No. KUA 489.
- xvi. Tractor Registration No. KUB 336.
- xvii. Tractor.

17. Therefore, from the initial stages, the 1<sup>st</sup> respondent has acknowledged that the aforesaid properties belonged to the deceased person and the persons listed were the beneficiaries of the estate. The Certificate of confirmation of the grant dated 6<sup>th</sup> September, 1999 has unfortunately not captured all of the said properties.

18. Pursuant to a partial mediation agreement signed by both made on 17<sup>th</sup> November, 2023, they had a consensus on the properties forming part of the estate as follows:

- a. Kakamega/Shamakhokho/452
- b. Kakamega/Shamakhokho/453
- c. Kakamega/Nzoia 1094
- d. Kakamega/Serem/700
- e. Kakamega/Shamakhokho/148.
- f. Kakamega/Shamakhokho/149.
- g. Kakamega/Shamakhokho/150.
- h. Kakamega/Shamakhokho/151.
- i. Kakamega/Shamakhokho/153.
- j. Nandi/Koibarak 'B' 487
- k. Plot 11/5
- l. Shop 959

19. Hon L Achode J (as she then was) in *Betty Sation Kisoso v Priscilla Jeruto Kisoso*, Succession cause No 2119 of 2010, rendered herself as follows:

“(24) On the issue of confirmation of grant, the circumstances that can lead to the revocation of grant have been set out in section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court’s 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 untrue allegations of facts essential in point of law.

- (25) A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - *Matbeka and Anor v Matbeka* [2005] 1 KLR pg 456. It 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.”

20. Rule 73 of the *Probate and Administration Rules* provide as follows:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

21. From the foregoing legal provision, a party has room to file an application for the court to make such orders as may be necessary for the ends of justice. In the instant case, the applicant seeks revocation for reasons that he did not take part in securing them together with all his other siblings. In my considered view and given that both parties had attempted mediation and agreed on some of the issues, the certificate of confirmation of grant should be amended to reflect the true account of the properties forming part of the estate of the deceased.
22. From the record, the estate has remained undistributed since the initial filings of the instruments to petition for grant of letters of administration to the estate of the deceased dated 6<sup>th</sup> August, 1996. This is despite the certificate of confirmation of grant having been issued to the administrator Hellen Muhiga on the 6<sup>th</sup> of September, 1999. The impugned grant in question interestingly omitted to say anything on the distribution of the immovable estate despite the acknowledgement of its existence in an affidavit filed in court on 6<sup>th</sup> August, 1996. The record is silent as to whether the acts of omission or commission should be shouldered entirely by the Administrator or is an error on the face the record. It is intriguing to hear of an assertion in the affidavit of Felix Muhiga as one of the heirs to the estate that he was neither consulted nor his consent sought during the process culminating in the confirmation of the grant issued on 6<sup>th</sup> September, 1999. Generally in reference to this justiciable issues the administrator has not denied the affidavit evidence deposed by her son Felix Muhiga in the making of the grant of letters of administration. It is more than 27 years now and the administrator is yet to comply with Section 83(g) of the *Law of Succession Act* in submitting the probate account to demonstrate that she has faithfully administered the estate and effects of the said deceased by paying his just debts and distributing the residue of the said estate and effects according to law. It is trite under Section 76 of the *Law of Succession Act* a grant of letters of administration may be revoked if the administrator fails to proceed diligently with the distribution of the estate or he/she fails to produce to the court such inventory or account of administration as may be required. Unfortunately, this is the case facing the estate of the deceased. From the wording of Section 76 of the Act. The impugned grant is good for revocation. However, the question I ask myself is how best would be the interests of justice be served in so far as the administration of this estate is concerned? In my considered view, revocation of any grant of letters of administration should be a last resort given its consequential orders to reverse the wheels of justice to likely to impair a speedy, fair, proportionate, efficient and effective adjudication of inheritance rights. In the context of this cause, the combined effect of the provisions of the law empowers this court to exercise its wide powers in any particular state of the deceased person on a case-to-case basis to judiciously actualize substantive justice to the parties as stipulated in Art. 159 (2)(d) of the *Constitution*. In taking this view, I bear in mind that revocation of a grant is not a mechanical process. The bone of contention here is the



distribution of the estate to the beneficiaries survived of the deceased under Section 29 of the Law of Succession Act. They have waited for so long to harvest and secure their rights in the estate as stipulated in the law. It also appears to this court that the administrator is not in hurry to pass any of the heritage of the estate to the children. Indeed, as deponed by Felix Muhiga, there are fears that the administrator has wholly taken control of the estate in exclusion of other heirs with equal entitlement of inheritance.

23. What is the effect of revoking this estate under Section 76 of the Law of Succession Act? In so far as it meets the yardstick of revocation, it is implicit that the entire process of the making of the grant starts denovo. It is crystal clear from the record that on or about 17<sup>th</sup> November 2023, the beneficiaries under the leadership of court annexed mediator Mr. Valentine Wandera participated in a mediation process which culminated in a partial settlement on the distribution of the estate as hereunder:

No.	PROPERTY	BENEFICIARY
1	Suzuki Registration No. KTS 552 Volkswagen Registration No. KJL 822. Tractor Registration No. KUA 489. Tractor Registration No. KUB 336. Trailor.	All to Hellen Muranje Muhiga
2.	Shares in the standard chartered bank A/c 92973 Shares in Kenya Commercial Bank Shares in George Williamson K. LTD	All to Hellen Muranje Muhiga
3.	PLOT 11/5 SHOP 959, 27 & 47	Jointly shared by Rosemary Mutetsi, Florida Khayeli Muhiga, Selere Ayuma Muhiga, Martina Muhiga and Phidelia Mikhago Muhiga,

24. From the above matrix, the larger share of the estate constituting real estate remains undistributed for as of now, 27 years down the line. This is a tragedy given the import of the law on timelines set to guide distribution of either testate or intestate estate. In the footnote of the partial settlement agreement, that portion of the estate has been apparently referred back for this court to exercise jurisdiction within the text and context of the law. Unfortunately, a perusal of the affidavits filed, none of the beneficiaries has sworn to any proposal on the mode of distribution specific maybe to the uniqueness and characteristics of their family. There is no evidence to go by to exercise discretion on this matter. The administrator to this estate has also neither provided nor adduced any cogent evidence by way of an affidavit or otherwise



- as to the manner in which she swore that she would faithfully administer the estate and effects survived of the deceased.
25. I consider very strongly that the remedy of review under Section 80 of the *Civil procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* should be invoked to correct the errors of fact and law which touch on the implementation and transmission of the deceased estate to the beneficiaries.
  26. This is what Justice Musyoka held *in re estate of Charles Kibe Karanja (deceased)* [2015] eKLR That:  

“Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error.” (see also *Nyamogo and Nyamogo v Kogo* (2001) EA 174.)
  27. The discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant Felix Muhiga is of significance for reasons that during the confirmation proceedings there is no evidence that he was notified to consent or raise his objection to the making of the Certificate of confirmation of grant. The record speaks for itself that the evidence of immovable estate was omitted in the final decree of the court in the form of a certificate of confirmation of grant. This therefore qualifies that the decree so passed on 6<sup>th</sup> September, 1999 was made on account of some mistake or error apparent on the face of the record. A glance at the aforesaid provisions makes it clear that a review application would be maintainable in respect of this estate. This is a glaring omission or patent mistake which is so grave as it majorly impacts the justice of the cause of action and the manifest prejudice occasioned to the beneficiaries. The error is self-evident from the record and it involves a substantial question of law.
  28. It is important to note that ordinarily, this court should have revoked the grant as I appreciate the application has been brought under the provisions of Section 76. I however take the liberty to interpret the application through the lens of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* for reasons that revoking the grant would mean that the parties are taken back to kickstart the whole process afresh, which in effect will occasion inordinate delay in the distribution of the estate.
  29. This court has taken this route to review the certificate of confirmation of grant or otherwise which was capable of being revoked rendering the entire estate inoperative and the petitioner with her children filing the cause of action formerly by signing the necessary forms P&A 4, P&A 80, P&A 54,57 to commence the proceedings on distribution. It is essential that this estate be distributed in earnestly if the partial settlement agreement reached on 17.11.2023 is anything to go by as a new dawn to the family.
  30. As a consequence the certificate of confirmation of grant in my view should not be revoked but amended to include all the properties that belonged to the deceased. Better still, the parties had attempted mediation and agreed on a partial settlement as per the agreement on record. The parties agreed on a few properties save for the following:
    - a. Kakamega/Shamakhokho/452
    - b. Kakamega/Shamakhokho/453
    - c. Kakamega/Nzoia 1094
    - d. Kakamega/Serem/700



- e. Kakamega/Shamakhokho/148.
  - f. Kakamega/Shamakhokho/149.
  - g. Kakamega/Shamakhokho/150.
  - h. Kakamega/Shamakhokho/151.
  - i. Kakamega/Shamakhokho/153.
  - j. Nandi/Koibarak 'B' 487
31. Before I pen off, it is instructive to note that the applicant Felix Muhiga raised substantial issues as to the ownership of a permanent house erected on L.R Kakamega/Shamakhokho/ 149&150. His greatest grievance is that the residential home built with his own resources is currently being occupied by the 2<sup>nd</sup> respondent. In the rejoinder affidavit by the 2<sup>nd</sup> Respondent, certain facts are admitted that he is indeed in occupation of the said house with a reservation clause that the claim is a misrepresentation on grounds that all that improvement is a joint effort of the siblings. Therefore, none is entitled to claim exclusive rights of ownership. This was also alluded to by the mother and administrator to the estate in her affidavit dated 20<sup>th</sup> September, 2023. She vehemently denied the allegations fronted by his son Felix Muhiga in his affidavit dated 9<sup>th</sup> June, 2023.
32. I have reappraised the evidence as deducible from the affidavits which demonstrate non-concurrence by the administrator and part of the siblings as to the true ownership of the whole property described as a permanent house built by Felix Muhiga and sitting on Kakamega/Shamakhokho/149&150. One can say that there is prima facie evidence that Felix Muhiga is the rightful owner of the permanent house but the exchanged affidavits assail a different tapestry. So far as the grievance of the disputed house is concerned, the relief on the merits should wait the outcome of the Certificate of confirmation of grant of the entire estate. The court observes that the house sits on a property yet to be identified in its shareholding and the mode of distribution, either consented by the parties or by an order of this court. At this stage, it is apposite to observe that the threshold evidence of such a character is lacking to sufficiently sever the house from the land in which it sits on to conclusively rule in Favor of the claimant.
33. It is appropriate to borrow the very profound extract from the persuasive case of *S. Nagaraj and others v. State of Karnataka and another* (1993) Supp (4) SCC 595 in which the supreme court of India held thus:
- “ 18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature if mistake and scope of rectification, depending on if it is of fact or law, But the root from which the power flows is the anxiety to avoid justice. It is neither statutory or inherent. The latter is available where the mistake is of the court.”



34. As can be seen from the above exposition of the law, an order of the court can be open to review on any of the above grounds illustrative in both re estate of Charles Kibe Karanja (Supra) and S. Nagaraj and others v. State of Karnataka (Supra).
35. It is for the aforesaid reasons I invoke the inherent powers of this court granted under Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules to determine this application not essentially under Section 76 of the Law of Succession Act but under review jurisdiction given the sequence of events as specifically observed elsewhere in this Ruling. In light of these, the following orders shall abide:
- a. That a fresh summons for confirmation grant based on the structural amendments as adverted to in this ruling, incorporating proposals by the administrator and or each of the beneficiaries by way of an affidavit detailing their proposals on distribution.
  - b. The Partial mediation agreement made by the parties on 17<sup>th</sup> November, 2023 is hereby adopted as an order of the Court.
- A. The parties are directed to initiate internal mediation within a period of 30 days on distribution of the remaining properties, noting to dispense with the issue of Felix Chumba's house as well as file a proposed mode of distribution.
  - B. The Parties shall report before the Deputy Registrar on 19.08.2024 on the status of their negotiations/ mediation and in the event they would not have reached a settlement, the Deputy Registrar shall refer the matter back to the High Court for determination.
  - C. That the issue of the house raised by the applicant Felix Muhiga raises serious triable issues, given the background of the non-distribution of property Kakamega/Shamakhokho/ 149&150.
  - D. That prima facie evidence from the administrator raises a flag that the suit property in its nature and character falls squarely within the matrimonial property.
  - E. That the initial status conference be held on 19<sup>th</sup> August, 2024) before the Deputy Registrar of the High Court to monitor compliance. That in any event, for any justiciable issues on matters arising from the mediation directions before this court on 23<sup>rd</sup> September, 2024
  - F. The costs shall abide by the outcome of the cause.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 18<sup>TH</sup> DAY OF JULY 2024**

.....

**R. NYAKUNDI**  
**JUDGE**

