



**In re Estate of Nathan Kimaiyo Tarus (Deceased) (Probate & Administration
68 of 2006) [2024] KEHC 10996 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 68 OF 2006
RN NYAKUNDI, J
SEPTEMBER 20, 2024**

IN THE MATTER OF THE ESTATE OF NATHAN KIMAIYO TARUS (DECEASED)

BETWEEN

EVILINE ABRAHAM APPLICANT

AND

ROSALEEN CHELAGAT KOGO RESPONDENT

RULING

1. What is pending before me for determination is Amended summons for revocation of grant dated 11th May 2023 premised under section 76 of the *Law of Succession Act* and Rule 49 and 73 of the Probate and Administration Rules where the Applicant is seeking orders as follows:
 - a. Spent
 - b. The Rectified Grant of letters of Administration Intestate issued to Rosaleen Chelagat Kogo on 8th June 2022 and confirmed on 25th July 2022 be set aside and revoked.
 - c. The Court be pleased to order that status quo in land parcel number Turbo West/Osongorai Block 3(Tapsagoi)/36 be maintained pending the hearing and determination of this application interpartes.
 - d. The Objector be awarded costs of this application.
2. The application is based on the grounds on the face of it among others that:
 - a. A grant of Letters of Administration were issued to Abraham Kipkorir Tarus who is the late husband of the Objector on 15th June 2006.
 - b. The said Abraham Kipkorir Tarus however passed away on 5th January 2018 before the Grant could be confirmed.



- c. Unknown to the Objector, other beneficiaries of the estate in particular the Petitioner herein approached this court behind her neck and obtained Rectified Grant of Letters of Administration which were issued to the Petitioner.
 - d. Their application for substitution was never served on the Objector or her advocates and the Objector was also never informed or consulted on the application and decision to substitute the administrator of the estate.
 - e. The Objector was not informed of the date fixed for confirmation of grant which proceeded on 25th July 2022 and she was therefore not in attendance.
 - f. The Objector did not sign the consent for distribution of property since she was not aware of the same and further that the Objector did not agree with the proposed mode of distribution.
 - g. The property that is subject in these proceedings being Turbo West/Osongorai Block 3 (Tapsagoi)/36 was purchased jointly by Abraham Kipkorir Tarus (late husband of the Objector) together with Nathan Kimaiyo Tarus (the father in law of the Objector i.e. the deceased) whereby the said Abraham Kipkorir Tarus contributed a greater share of the purchase price. The deceased (Abraham Kipkorir Tarus) was a co-owner of the land.
 - h. The Petitioner in cahoots with other beneficiaries of the estate did not want to inform the Objector of the developments because they knew that her claim in the property supersedes their claim because her late husband was a bona-fide purchaser on top of also being a beneficiary by virtue of being a son of the deceased.
 - i. The objector was therefore completely uninvolved in the process of rectification of the grant and distribution of the estate.
 - j. The objector never consented to the Petitioner applying for and or being granted letters of administration over the deceased's estate.
 - k. The process of obtaining the grant was therefore fraudulent and was done without disclosure of material facts.
 - l. The Petitioners are not fit to administer the estate in view of the facts stated above.
 - m. The participation of the objector is crucial and cannot be wished away.
3. The application is supported by the annexed affidavit of EVILINE ABRAHAM, the Applicant herein in which the applicant deposes as follows;
1. That my husband Abraham Kipkorir Tarus who is now the deceased had an interest on the parcel of land the subject of this proceedings apart from being a son of the deceased Nathan Tarus.
 2. That my husband's interest in the estate as a beneficiary who directly contributed towards its acquisition is 200 acres.
 3. That the payment was made in 1978 through justice (retired) B K Tanui who was then in private practice practicing in the name and style of B K Arap Tanui Advocate.
 4. That justice Tanui then forwarded the payment he received from my late husband to the Settlement Fund Trustees and a receipt was issued.



5. That the payment to the Settlement Fund Trustees was made upon demand by the relevant authority.
 6. That besides the payment of Kshs. 35,767/75 and kshs. 5,115 made by my late husband, my late husband refunded kshs. 14,550/= to David Cherwon Arap Ajon who had paid the same towards purchase of land from the late Nathan Tarus.
 7. That my late husband is therefore entitled to more than half the estate of the deceased by dint of his contribution towards the purchase of the land Kshs. 55,432.75 against the total figure of kshs. 66,052/75.
 8. That my late father in law held the land in trust for himself and his son Abraham Kipkorir Tarus as beneficiaries.
 9. That the issues of my late husband's beneficial interest and his father's trusteeship ought to be adjudicated upon in the Environment and Land Court.
 10. That my late husband's claim cannot adequately be adjudicated upon without the confirmation of grant being revoked.
 11. That I have laid sound basis for seeking revocation of the grant, that is the land comprised in the estate is partially owned by my deceased husband Abraham Tarus.
 12. That besides the documents there are witnesses to the transactions who can only testify on the same once the application for revocation is granted.
 13. That I humbly pray for the revocation of grant of letters of administration to enable me adduce evidence demonstrating my husband's interest on the land not as a dependant but as a joint purchaser of the land.
 14. That my sister in laws were aware of my late husband's interest but deliberately concealed material information from the Honourable Court when the Confirmation of Grant was sought.
 15. That the Honourable court owing to the concealment of material facts proceeded on the erroneous understanding that my late husband had no claim to the estate as a purchaser and or contributor towards its purchase.
 16. That I have already obtained grant to enable me sue of his beneficial interest.
 17. That my late husband through me has been condemned unheard.
4. The application is further supported by an affidavit dated 20th June 2023 sworn by Richard Some Kemboi in which he deposes as follows;
1. That I knew the deceased Abraham Kipkorir Tarus and the deceased Nathan Tarus.
 2. That I was an employee of Nathan Tarus as a driver and farm manager between 1976-1980.
 3. That at some point in 1978 the deceased Nathan Tarus was faced with a situation whereby the land he had bought at Tapsagoi was threatened with auction.
 4. That faced with the danger of his land at Tapsagoi being auctioned the late Nathan Tarus decided to have his son Abraham Kipkorir Tarus's land land reference Moi's Bridge/Moi's Bridge Block 3 (Mogoon) 1 which was about 100 acres sold to salvage the land at Tapsagoi.



5. That Nathan Tarus in my company approached Nathan Morogo and it was agreed that Nathan Morogo buys Abraham's land at Mogoong.
 6. That the money realized from the sale of the land at Mogoong was used to pay for the land in Tapsagoi.
 7. That the land in Mogoong having been sold Nathan Tarus and his son Abraham Tarus agreed to share the land in Tapsagoi.
 8. That Abraham's family then moved from Mogoong to Tapsagoi and settled on approximately 200 acres.
 9. That Abraham Tarus contributed towards the purchase of the land at Tapsagoi currently registered in his father's name.
 10. That I swear this affidavit in verification of the fact that Abraham Tarus at the prompting of his father Nathan Tarus contributed towards the purchase of land reference Turbo West/Osongorai Block 3 (Tapsagoi) 36.
5. The application is opposed by the Respondent vide a Replying Affidavit dated 3rd July 2023 in which she deposes as follows:
1. That a Grant of Letters of Administration Intestate of the said estate was initially made to my late elder brother Abraham Kipkorir Tarus in this matter on the 15th June, 2006.
 2. That unfortunately, he died on 5th January 2018 before these proceedings could be finalized.
 3. That vide an application dated 21st March, 2022, I applied with the consent of my siblings, nephews and nieces to be substituted as Administratrix of the estate which was allowed by the Honourable court and a Grant was issued to me on 6th June 2022.
 4. That I subsequently filed summons for Confirmation of the Grant dated 30th June, 2022 which was fixed for hearing on 25th July 2022 when the Grant was confirmed.
 5. That according to the mode of distribution endorsed by the court, each of the beneficiaries including the Applicant (EVILINE ABRAHAM, our sister-in-law) was to get an equal share of 12.39 Hectares out of our father's land parcel known as Turbo West/Osongorai Block 3 (Tapsagoi)/36.
 6. That I am aware that our sister-in-law EVILINE ABRAHAM and her sons have objected to the said mode of distribution. We met with her sons and her advocate on 3rd November 2022 to attempt an amicable out of court settlement but no agreement was reached on the matters in contention.
 7. That I am informed by our advocate that the summons for confirmation was served personally upon the Applicant upon before the date fixed by the court. Unfortunately, an affidavit of service was not filed as required and the service cannot be verified at this stage. It was not possible for us to serve the firm of Kibichiy & Company Advocates since their client Abraham Tarus had already died.
 8. That nonetheless, the mode of distribution that we proposed and which the court agreed with was to share the entire estate equally amongst ourselves including the Applicant on behalf of our late brother. The onus is now on the Applicant to justify as to why she wishes the court to



change the mode of distribution to favour her at the expense of the rest of us who are biological daughters and heirs of children of our deceased father.

9. That the receipt dated 10th April 1978 for kshs. 35, 767.75 marked 'EA-5' referred to by the Applicant at paragraph 10 of her affidavit have nothing to show that they were paid by our late brother Abraham K. Tarus as they bear the name of B.K Arap Tanui Advocates which was a firm of Advocates who used to work for our father.
10. That nonetheless, we are aware that the amount is what our father requested our late brother to assist him in repaying an AFC loan and for which he was allocated 60 acres. In good faith, our father added him 40 acres in appreciation for his assistance making it 100 acres. The land which was initially one parcel with our father's parcel has since been curved out and registered as Turbo West/Osongorai Block 3 (Tapsagoi)/37 in the name of the late Abraham K. Tarus.
11. That the allegation regarding co-ownership of our father's land parcel Turbo West/Osongorai Block 3 (Tapsagoi)/36 is far-fetched and a figment of our sister-in-law's imagination as they were fully and adequately compensated for the support her husband gave to our father and even had 40 acres added to them ex-gratia.
12. That is the reason we included her name in the distribution of our father's parcel as we recognize that the separate 100 acres is theirs exclusively and they are also entitled to the larger parcel as beneficiaries as well like the rest of us.
13. That I am aware that their main basis for seeking to dislodge us from inheriting our father's land is that they have maliciously and haphazardly occupied and erected structures on our father's land as well as leased out a times even sold portions thereof in bid to lock us out of our father's land which should be discouraged by the Honourable court. I am surprised that they are the ones seeking orders for maintenance of status quo yet they are the ones who should be restrained from undertaking any dealings with our inheritance pending the resolution of the matters herein.
14. That further, I am aware that our brother took up 43 acres of our father's 200-acre land parcel L.R. No. 8309 (Itigo Farm) without involving the rest of us. He sold 30 acres against our father's wishes while our father was still alive and then retained 13 acres to himself (but which he subsequently sold off) while seeking to obtain Land Control Board Consent for the rest of the purchasers upon our father's death.
15. That be that as it may, it has come to our notice that there are two properties that were left out during distribution which we now urge the court to include in the final distribution herein:
 - a. Turbo Town Plot (Unsurveyed)- to be shared into two: ½ to be allocated to Eviline Abraham and the other ½ to be shared equally between Elisha Kaptich's Children Edward Kimurgor And Edna Cheron.
 - b. 2000 shares at Chipokaa House Limited- to be shared equally amongst the surviving daughters Mary Jebet Meto, Milka Jematia Tanui, Rosaleen Chelagat Kogo And Nancy Jeptepkeny Seroney As Well As Eviline Abraham.
16. That as such, save for the additional assets which should be included in the final distribution, equal distribution as per the dictates of the Kenyan Constitution 2010 should be maintained.
17. That I therefore pray that the summons be dismissed with costs for lack of merit and for being an abuse of the court process.



Objector/Applicant's submissions

6. The Applicant filed her submissions dated 8th May 2024 on the amended summons for revocation of grant dated 11th May 2023, in which she submitted only one issue for determination:
 - a. Whether the applicant has presented sufficient material to warrant revocation of the grant.
7. The learned counsel for the Applicant submitted that the Honourable court can only distribute what constitutes the net estate of a deceased person and once an issue of trust on the (land) Property held by a deceased's person in favour of another arises then the Honourable court is estopped from proceeding to deal with the distribution of the estate of the deceased person till the issue of trust is resolved. Also, counsel submitted that previously when this Honourable court was vested with unlimited jurisdiction, it used to deal with the issues of trust on land through an application under order 36 of the Civil Procedure Rules in which case a minitrial was held within the succession proceedings to deal with the issues of trust to land relating to a deceased person's estate. Further, counsel stated that with the advent of *the Constitution* of Kenya 2010 the jurisdiction of the Honourable Court which was hither to unlimited was limited and part of the jurisdiction assigned to the Employment and Labour Relations Court as well as the Environment and Land Court.
8. The learned counsel submitted that the objector's application seeking revocation of grant is double pronged: -
 - a. The existence of a trust over the property(land) the deceased Nathan Kimaiyo Tarus held in favour of his deceased son Abraham Tarus.
 - b. The rules of natural justice and or the right to a hearing.
9. The learned counsel for the Objector submitted as follows as regards to the subsistence of a trust in favour of Abraham Tarus;
10. The deceased Nathan Kimaiyo Tarus was the father of the deceased Abraham Tarus and the deceased Nathan Kimaiyo Tarus was unable to pay for the parcel of land the subject of the estate and this forced the father to invite his son to dispose his property in Ziwa and transfer the proceeds to Turbo West/Osongorai/Block 3 (Tapsagoi) 36. He also stated that it was mutually agreed that the deceased son who had paid Kshs. 55,437.75 out of the total sum of kshs. 66,052.75 of the purchase sum to the Settlement Fund Trustees and refunded a purchase sum to a purchaser was to receive 300 acres out of the 600 acres and that the sum of kshs. 55,437.75 was paid by Abraham Tarus as follows Kshs. 5115/=, Kshs. 35,767.75 and Kshs. 14,550 being a refund of a purchaser of land from Nathan Tarus. Further, counsel noted that the deceased Nathan Tarus only paid Kshs. 10,620 out of the total purchase sum, the land which forms subject of the succession cause was therefore held in trust for the deceased Abraham Tarus by the deceased Nathan Tarus and from the 247 acres left the deceased Abraham Tarus claims 200 acres on account of the constructive trust leaving the net estate for distribution 47 acres and that as a matter of fact arithmetically, the deceased paid 83% of the purchase sum.
11. The learned counsel opined that the dispute relating to how much land the deceased father held in line with the constructive trust in favour of his son Abraham Tarus ought to be resolved through adduction of evidence and for the same to be done, the confirmation of the grant and distribution of the estate of the has to be set aside as this can only be achieved through the revocation of the confirmation of the grant in which the estate has been distributed. Also that the revocation of the confirmed grant will pave way for the filing of a case in the Environment and Land Court against the petitioner by the objector who is the administrator to her late husband's estate. He also stated that in the light of



- the admission of the Petitioner that she knew of the existence of the constructive trust between father and son and it therefore follows that there was concealment of material facts and it follows that the grant was obtained through the making of the false allegation to the extent that the Petitioner falsely asserted that the entire parcel of land constituted the net estate of the deceased while she was aware of her deceased brother's stake in the estate on account of a constructive trust having contributed at least 8/10 of the purchase sum.
12. Counsel also submitted that since the estate could only be distributed once the debts owed on account of the constructive trust had been paid had the existence of the trust been brought to the attention of the court, the court could not have proceeded with the distribution had it been brought to its attention and that it will have directed that the issue of trust be dealt with or addressed first before delving into the issue of distribution of the net estate. Counsel relied on the case of Supreme Court in *Shah & Others Vs Mombasa Bricks & Tiles Limited (Petition No. 18 of 2022)* on the issue of the existence or subsistence of a constructive trust.
 13. On this issue, it was counsel's final submission that in light of the Supreme Court decision the applicant submits that a constructive trust arises in the circumstances of this cause where the father convinced the son to dispose his property and transfer the proceeds to the property the subject of the succession cause with a view of according a beneficial interest on the same to the son.
 14. On the issue of Rules of natural justice –the right to be heard, the learned Counsel submitted as follows:
 15. The learned Counsel submitted that the distribution and confirmation of grant was pursued without the involvement of the other beneficiaries and there is no dispute that one of the beneficiaries to the estate was Abraham Tarus who is the deceased and his interest was to be protected by his widow, the objector herein. Counsel stated that for reasons which the Petitioner has failed to disclose the objector was never served with the application seeking the confirmation of the grant and the distribution of the estate and she was never notified of the date on which the confirmation was to take place to enable her attend court and either confirm her agreement or disagreement with the distribution.
 16. Counsel noted that the fact that the Objector was unaware of the application and the proceedings to have the grant confirmed was not disclosed to this Honourable court and that had the court been informed that there were beneficiaries to the estate who had been left in the darkness it will not have proceeded with the distribution and the confirmation of the said grant. Further, he stated that it is worth noting that the family of Abraham's brother who is deceased was not involved in the distribution and confirmation process.
 17. Counsel opined that the right to a hearing is highly cherished and protected under our constitution, it is the cornerstone of any process of justice and that the proceedings were undertaken *ex parte* and the grant was not issued on merit after according whoever desired to be heard a chance to be heard. Counsel made reliance to the case of Supreme Court *Petition No. 13 of 2019* Stephen Maina Githiga & 5 Others Vs Kiru Tea Factory Co. Ltd; Evans Odhiambo Kidero & 4 Others Vs Ferdinand Ndungu Waititu & 4 Others SC *Petition No 18 of 2014* as consolidated with *Petition NO 20 of 2014* (2014) eKLR.
 18. On the issue of evidence to warrant revocation, learned counsel submitted as follows:
 19. That the power to revoke or uphold a grant is a discretionary one and this principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa Vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000*. Also, counsel stated that the mere fact that the objector's deceased husband Abraham's Tarus interest in the estate of his deceased father's estate was concealed renders the entire process of obtaining the confirmation of the said Grant defective and a nullity. He also stated that the Objector's husband's



sisters have always been aware of his interest in their father's estate as a beneficiary who directly contributed towards acquisition of land parcel number Turbo West/Osongorai Block 3 (Tapsagoi)/36 measuring approximately 247 acres but they deliberately concealed that material information from the honourable court.

20. Moreover, it was counsel's submission that concealing of this information misled the court to proceed on the erroneous understanding that the Objector's husband had no claim to the estate of his father as a purchaser and/or contributor towards its purchase.
21. On the issue of whether hearing of a party is optional, counsel made reliance on the decision in *John Lurence maritime services limited & another vs Cabinet secretary, transport and infrastructure & 3 others* (2021) eKLR where it was held that thus: - "The court record of the high court proceedings demonstrated that the court accorded the appellants two justifiable elements of a fair hearing. The elements were an opportunity to be heard which amounted to a reasonable opportunity." He also made reliance to *Onyango Oloo Vs Attorney General* (1986-1989) EA 456; *General Medical Council Vs Spackman* (1943) 2 AII ER 337; *Ridge Vs Baldwin* (1963) 2 AII ER 66; *Egal Mohammed Osman Vs Inspector General of Police & 3 Others* (2015) eKLR and *Nairobi CACA NO. 297 of 1997 Dickson Ngigi Ngugi Vs Commissioner of Lands*.
22. On the issue of which court is to determine disputes of trust over land, counsel made reliance on the decision of in *Re Estate of Atibu Oranje Asioma (Deceased)*, succession cause no.312 of 2008. It was counsel's submission that Article 162(2) of *the Constitution* envisaged a court with jurisdiction to handle disputes relating to the title of land and under Article 165(5) of *the Constitution*, it was asserted in no uncertain terms that the high court should not exercise jurisdiction over matters to be placed under the court contemplated by Article 162(2). Further, he stated that the court envisaged in Article 162(2) was subsequently established under the *Environment and Land Court Act*, the *Land Registration Act* and sections 2 and 150 of the *Land Act*.

Analysis and Determination

23. I have considered the Application, the Supporting Affidavit, the Replying Affidavit in opposition thereto, the Annexures therein and the parties' submissions. There is only one issue for determination: Whether applicant has met the requisite threshold for revocation of grant within the meaning of Section 76 of the *Law of Succession Act*.
24. Section 76 of the *Law of Succession Act* provides for Revocation of grant. The grounds upon which the grant may be revoked have been well laid out therein. The said provision provides that revocation can either be at the instance of an applicant or can be by the court suo moto. However, it is a requirement that the conditions for revocation as set out under section 76 must be proved. The *Law of Succession Act* provides for revocation of grants under section 76, which states as follows:

“76. 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. In the case of *Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi* (2015) eKLR the court highlighted circumstances when a grant can be revoked. The court observed:

“ 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.”

26. Similarly, Section 76 was clearly expounded on by the court in *re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“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.”

27. The Applicant submitted that the grant of Letters of Administration were issued to Abraham Kipkorir Tarus who is her late husband on 15th June 2006; the said Abraham Kipkorir Tarus however passed away on 5th January 2018 before the Grant could be confirmed; unknown to her, other beneficiaries of the estate in particular the Petitioner herein approached this court behind her neck and obtained Rectified Grant of Letters of Administration which were issued to the Petitioner.
28. Furthermore, it was the Applicant’s submission that the Petitioner’s application for substitution was never served on her or her advocates and she was also never informed or consulted on the application and decision to substitute the administrator of the estate; she was not informed of the date fixed for confirmation of grant which proceeded on 25th July 2022 and she was therefore not in attendance and that she did not sign the consent for distribution of property since she was not aware of the same and further that she did not agree with the proposed mode of distribution.
29. Moreover, the Applicant submitted that the property that is subject in these proceedings being Turbo West/Osongorai Block 3 (Tapsagoi)/36 was purchased jointly by Abraham Kipkorir Tarus (her late husband) together with Nathan Kimaiyo Tarus (her father in law, the deceased) whereby the said Abraham Kipkorir Tarus contributed a greater share of the purchase price and that the deceased (Abraham Kipkorir Tarus) was a co-owner of the land. The Applicant also stated that she was completely uninvolved in the process of rectification of the grant and distribution of the estate; she never consented to the Petitioner applying for and or being granted letters of administration over the deceased’s estate and that the process of obtaining the grant was therefore fraudulent and was done without disclosure of material facts.
30. On the part of the Petitioner/Respondent, she stated that the summons for confirmation was served personally upon the Applicant upon before the date fixed by the court and that unfortunately, an affidavit of service was not filed as required and the service cannot be verified at this stage. She also stated that it was not possible for them to serve the firm of Kibichiy & Company Advocates since their client Abraham Tarus had already died. She also noted that nonetheless, the mode of distribution that they proposed and which the court agreed with was to share the entire estate equally amongst themselves including the Applicant on behalf of their late brother. She also stated that the onus is now on the Applicant to justify as to why she wishes the court to change the mode of distribution to favour her at the expense of the rest of them who are biological daughters and heirs of children of their deceased father.
31. The real question is whether there is any just cause for revocation within the meaning of section 76 and whether, such “just cause” notwithstanding, an order for revocation of the grant should be refused in this case. I shall proceed to elucidate this statement. Section 76 deals with revocation or annulment of grants. Under this section “a grant of representation, whether or not confirmed, may at any time



be revoked or annulled if the court decides...” The section also lays down and explains what would be just cause within its meaning and enumerates the circumstances which would make out a just cause under the section or, in other words, the grounds for revocation admissible in law. It is almost beyond controversy now that such enumeration is exhaustive and not merely illustrative. I, accordingly, proceed upon that view.

32. In the above view the applicant for revocation must, in order to succeed, bring his case within one or other of the different clauses of section 76. Otherwise, his application would fail. It is clear, however, on a reading of the section, that, even if just cause be established, the applicant would not be entitled to an order for revocation as matter of course. The matter seems to be pretty clear. The section says that the grant may be revoked which prima facie leaves a discretion to the court.
33. The net position then is that an applicant for revocation must, in order to succeed, establish just cause within the meaning of section 76 (a) to (e) thereof, but, even if just cause be established, revocation may still be refused by the court in the exercise of its discretion under that section, if the facts and circumstances of the particular case would warrant such refusal. In this view I shall consider first whether the applicants have succeeded in proving any just cause for revocation in the present case and if I hold in the affirmative on that question, I shall consider next whether, in the circumstances of the present case, an order for revocation should be made in the exercise of this court’s discretion under the section.
34. It is well settled that an application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the court but also binds all other persons in all proceedings arising out of the will or claims under or connected to the estate. Being a judgement in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. However, talking about an aggrieved person, it is important to bear in mind the language of section 76.
35. Under this section, it is a requirement that a party to a probate claim must have an "interest" in the estate. The foundation of title to be a party to a probate or administration action is "interest" - so that whenever it can be shown that it is competent to the court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest or possible interest of any person such person has a right to be a party to such a suit in the character either of plaintiff, defendant, protestor or intervener.
36. Thus, from the foregoing, under section 76 of the *Law of Succession Act*, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant.
37. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of



- subsequent circumstances, such as where the sole administrator died or lost the soundness of his mind or was adjudged bankrupt.
38. Be as it may, I take a cognizant fact that according to the mode of distribution endorsed by the court, each of the beneficiaries including the Applicant (EVILINE ABRAHAM, our sister-in-law) was to get an equal share of 12.39 Hectares out of our father's land parcel known as Turbo West/Osongorai Block 3 (Tapsagoi)/36.
 39. The learned counsel for the Applicant submitted that the objector's application seeking revocation of grant is double pronged including The existence of a trust over the property(land) the deceased Nathan Kimaiyo Tarus held in favour of his deceased son Abraham Tarus. On this issue, counsel submitted that the deceased Nathan Kimaiyo Tarus was the father of the deceased Abraham Tarus and the deceased Nathan Kimaiyo Tarus was unable to pay for the parcel of land the subject of the estate and this forced the father to invite his son to dispose his property in Ziwa and transfer the proceeds to Turbo West/Osongorai/Block 3 (Tapsagoi) 36. He also stated that it was mutually agreed that the deceased son who had paid Kshs. 55,437.75 out of the total sum of kshs. 66,052.75 of the purchase sum to the Settlement Fund Trustees and refunded a purchase sum to a purchaser was to receive 300 acres out of the 600 acres and that the sum of kshs. 55,437.75 was paid by Abraham Tarus as follows Kshs. 5115/=, Kshs. 35,767.75 and Kshs. 14,550 being a refund of a purchaser of land from Nathan Tarus.
 40. Further, counsel noted that the deceased Nathan Tarus only paid Kshs. 10,620 out of the total purchase sum, the land which forms subject of the succession cause was therefore held in trust for the deceased Abraham Tarus by the deceased Nathan Tarus and from the 247 acres left the deceased Abraham Tarus claims 200 acres on account of the constructive trust leaving the net estate for distribution 47 acres and that as a matter of fact arithmetically, the deceased paid 83% of the purchase sum.
 41. The learned counsel opined that the dispute relating to how much land the deceased father held in line with the constructive trust in favour of his son Abraham Tarus ought to be resolved through adduction of evidence and for the same to be done, the confirmation of the grant and distribution of the estate of the has to be set aside as this can only be achieved through the revocation of the confirmation of the grant in which the estate has been distributed.
 42. On the other hand, the Petitioner/Respondent submitted that the receipt dated 10th April 1978 for kshs. 35, 767.75 marked 'EA-5' referred to by the Applicant at paragraph 10 of her affidavit have nothing to show that they were paid by their late brother Abraham K. Tarus as they bear the name of B.K Arap Tanui Advocates which was a firm of Advocates who used to work for their father. Also the respondent stated that nonetheless, they are aware that the amount is what their father requested their late brother to assist him in repaying an AFC loan and for which he was allocated 60 acres, that in good faith, their father added him 40 acres in appreciation for his assistance making it 100 acres and the land which was initially one parcel with their father's parcel has since been curved out and registered as Turbo West/Osongorai Block 3 (Tapsagoi)/37 in the name of the late Abraham K. Tarus.
 43. Moreover, the Respondent noted that the allegation regarding co-ownership of their father's land parcel Turbo West/Osongorai Block 3 (Tapsagoi)/36 is far-fetched and a figment of their sister-in-law's imagination as they were fully and adequately compensated for the support the Applicant's husband gave to their father and even had 40 acres added to them ex-gratia. The respondent opined that is the reason they included her name in the distribution of their father's parcel as they recognize that the separate 100 acres is theirs exclusively and they are also entitled to the larger parcel as beneficiaries as well like the rest of them.
 44. The law is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist. The burden of proof in



a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. The standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In *Miller v Minister of Pensions*, {1947} 2ALL ER 372 Lord Denning said: “The ...standard of proof...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”

45. The reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.
46. An assessment of probabilities is not possible without analyzing the facts of the case which are contained in oral and documentary evidence. A court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* {1939} 3 All ER 722 (HL) at 733 must be carefully distinguished from conjecture or speculation: -

“There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

47. The burden placed upon the applicant by the law was to establish a prima facie case. In civil cases, the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.
48. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others* 2003 (1) SA 11 (SCA) at para 5 the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of



particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed probabilities prevail.”

49. The judgment in *Randall v Randal* {2016} EWCA Civ 494 makes it clear that the courts will adopt a very broad approach in assessing whether a person claiming interest has an interest in a deceased's estate, particularly where the person may have no other form of recourse to explore. It is a common law requirement for persons claiming interest to show they have an interest in the deceased's estate, an interest that is capable of being recognized by the law or an interest that gives them legal standing to bring the probate claim.
50. I note that the Respondent filed summons for Confirmation of the Grant dated 30th June, 2022 which was fixed for hearing on 25th July 2022 when the Grant was confirmed and that according to the mode of distribution endorsed by the court, each of the beneficiaries including the Applicant (EVILINE ABRAHAM) was to get an equal share of 12.39 Hectares out of their father's land parcel known as Turbo West/Osorongai Block 3 (Tapsagai)/36. This was done in consonance with the principles of equity while distributing the intestate estate of the deceased.
51. My overall assessment of the facts of this case as presented by the objector, is certainly one in which a promise was genuinely made in complete good faith by Abraham Kipkorir Tarus now deceased, typical of the relations between a father and his only son and it was adhered to without the detriment and prejudice to the other beneficiaries. It is an act which is usually undertaken freely and willingly at the time it was being incurred necessarily to support his late father from liquidating the amount owed to the Agricultural Finance Corporation. It is true from the record the monetized harm which could have been caused by non-payment of the loan amount in fulfilment of that compensation, the deceased Abraham was sufficiently allocated a portion of the estate quantified at 100 acres.
52. The fundamental principle that runs through the applicant's claim for more land in this case is that premised on equity which is concerned to prevent unconscionable conduct which permeates on all of the elements of the doctrines as asserted by the applicant in her affidavit seeking revocation of the certificate of confirmation of grant. In the end, this court must look at the matter in totality in order to do justice to the parties. To recapitulate the facts of the case, as between the benefactors being the son and his father and the instant applicant, reasonably one can conclude the clear terms of facilitating the loan repayment owed with AFC did not amount to a contract for sale. Incidentally, during the lifetime of the deceased Nathan Kimaiyo Tarus, out of all the proportion to the detriment in which his son may have suffered by releasing a sum of money to settle debt owed by AFC, recognizing that humanitarian act, he compensated it by an appropriate measure of relief by a whopping 100 acres of land. This parcel land was heavily caveated in favour of Abraham nearer to elevating the compensation for the financial settlement in favour of his late further. There is now a lively controversy by the applicant and the widow aimed at seeking leave of this court to exercise its broad judgmental discretion to make a finding



that the shares allocated to her household in the Certificate of Confirmation dated 26th July, 2022 are disproportionate to the interest and expectation made by his late husband to the intestate.

53. In my view therefore, this court should firmly reject the theory being agitated and canvassed by the applicant that her claim lies specifically within the spectrum of Section 76 of the *Law of Succession Act* to deal with the unproven unconscionability based on the distribution matrix in the impugned certificate of confirmation dated 26th July, 2022. By contrast the concept of equity and proportionality test does appear to have taken root in the court's exercise of discretion in apportionment of the distribution of the residual net interstate estate. This worked substantial justice between the parties. There is in my view no real merit in the applicant's case under the guise that she was not consulted for full specific enforcement of the undertaking made by the administrator to have the balance of the estate be distributed reasonably and precisely among the beneficiaries regardless of the disparity in value, it may cause due to the earlier shares exclusively set aside for the benefit of his late husband Abraham Tarus. The expectation created or encouraged by the deceased Nathan Tarus in connection with the AFC loan transactions may have created a certain interest in the subject suit land by his son Abraham Tarus but to give effect to that right itself, he acted by excising a portion of quantified acreage from Turbo West/Osorongai Block 3(Tapsagoi)/37. The revival of the claim by the applicant in principle on the same set of facts to claim additional shares to the intestate estate of the deceased is equally unavailable as a remedy under Section 76 of the *Law of Succession Act*.
54. There is yet another argument relied upon by learned counsel for the applicant/objector that the facts of this case satisfies the conditions for the creation of a constructive trust as espoused in the cases of *Shah & Others Vs Mombasa Bricks & Tiles Limited (Petition No. 18 of 2022)* and the principles as set out by the learned author Scott, Law of Trusts, 3rd ed., 1967, vol 5, at 3215.
55. In furtherance of this claim, chronologically the persuasive case of *Re Montagu's Settlement Trusts* (1987) Ch 264, set out some of the key principles deserving quoting:
- “(1) The equitable doctrine of tracing and imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights.
 - (2) In considering whether a constructive trust has arisen in a case of the knowing receipt of trust property, the basic question is whether the conscience of the recipient is sufficiently affected to justify the imposition of such a trust.”
56. Similarly, in *Ajou v Dollar Land Holdings Plc* (1994) 2 ALL ER 685, the applicant must bring herself within the requirements of the following guidelines to claim a benefit to enforce a constructive trust thus:
- “This is a claim to enforce a constructive trust on the basis of knowing receipt. For this purpose, the plaintiff must show first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.”
57. The applicant in this case appears to have proceeded on the assumption that his late husband and the deceased father in-law had entered into some kind of seller-purchase agreement for value which protected the interest and placing the spouse as a bonafide purchaser of the estate by virtue of the



loan advanced to liquidate the debt at the AFC due and owing by the father in-law. It is helpful to clarify at the outset that the transfer of an asset to compensate his son in particular facilitating the loan repayment was precisely dealt with by the deceased Abraham Tarus during his lifetime. I should further make it clear that throughout the analysis of the evidence framed and submitted before this court, there is no continuing trust in this intestate estate as is stipulated in Section 41, 58 and 75 of the [Law of Succession Act](#).

58. In other words, against the view held by the applicant the foundation of this case is that the assets distributed to the beneficiaries do not belong to Rosaleen Chelagat Kogo. She is an administrator duly appointed by this court under Section 66 as reads with Section 82 and 83 of the [Law of Succession Act](#). Therefore, the transmission of the estate to the beneficiaries survived of the deceased cannot be said to be flawed or to be entirely ultra-vires or voidable as submitted by the applicant. There is no breach of trust on the part of the administrator which is usually an essential element in constructive trust because it is the basis on which the beneficial interest can be passed to the applicant. The requirement of a continuing equitable proprietary interest in reference to the assets L.R. Turbo West/Osorongai Block 3 (Tapsagoi)/36 is not traceable as representing the assets of Abraham Tarus.
59. These questions raised by the applicant in her affidavit and submission can be squarely answered by the principles enunciated by Halsbury Laws of England, 4th edition volume 48 which states as follows on constructive trusts:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the



extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

60. This concept was also illuminated by the Court of Appeal in *Twalib Hatayan & another v Said Saggah Ahmed Al-Heidy & 5 others*, Civil Appeal No 51 of 2014 [2015] eKLR

“A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

61. What the applicant has done provides no basis to draw an inference that the deceased Nathan Kimaiyo Tarus and Abraham Tarus had agreed or had reached a common understanding that he was to have a share disproportionate to the rest of the heirs in the property referenced Turbo West/Osorongai Block 3(Tapsagoi)/36. What she is asking is wholly inexplicable even on other grounds even taking into account a measure of justice. There is no purported declaration of a trust which had been made by the deceased Nathan Tarus in favor of his son Abraham Tarus to hold the property in common, for the benefit of the other beneficiaries resulting in the trust being vested in the administrator Rosaleen Kogo. Essentially from the facts of this case, the constructive trust as a remedial device as raised by the applicant is not available to justify the grant of the orders sought in the objection proceedings.

62. Finally, the court takes judicial notice on the unchallenged evidence in the affidavit sworn by the administrator Rosaleen Chelagat Kogo dated 3rd July, 2023 in support of the administration of the intestate estate of the deceased. It is also worth noting that the objector has raised no opposition on the evidential material as to the existence of additional properties namely:

- a. Turbo Town plot (unsurveyed)
- b. 2000 shares at Chipokaa house Limited

63. Pursuant to the uncontroverted evidence adduced by the Plaintiff at the hearing of this summons for revocation and the final submission prepared by the advocates for the administrator, there are errors on the face of the record against the certificate of confirmation of grant dated 26th July 2022. The objector in a response canvassed this particular issue as a suitable evidential material for this court to exercise discretion to revoke the aforesaid Grant under Section 76 of the *Law of Succession Act*. In answer to this claim I place reliance on Section 80, 100 of the *Civil Procedure Act*, Rule 73(1) of the Probate and Administration Rules and Order 45 Rule 1 of the Civil Procedure Rules to occasion a review and amendment to the legal instrument issued on 26th July, 2022 to reflect the true a correct position of the subject matter or assets of the intestate estate survived of the deceased, hence it goes without saying that the assets identified by the administrator duly omitted during the initial confirmation proceedings be included in the final decree of this court and the same be distributed in the model proposed in paragraph 18 of the affidavit sworn by the administrator dated 3rd July, 2023.

Turbo Town Plot (unsurveyed) – to be shared into two: ½ to be allocated to Eviline Abraham and the other ½ to be shared equally between Elisha Kaptich’s children Edward Kimurgor and Edna Cheron 2000 shares at shares at Chipokaa House Limited – to be shared equally amongst the surviving daughter Mary Jebet Meto, Milka Jematia Tanui, Rosaleen Chelagat Kogo and Nancy Jeptepkeny Seroney as well as Eviline Abraham.



64. As against the position taken by the applicant, to have the certificate of confirmation of grant be revoked among other grievances being in an inclusion of these assets at present there is no evidence before me to justify annulment or revocation of the final judgment of this court on the pending succession cause. I take it that the administrator introduced this new evidenced which he could not have presented at the time when the summons for confirmation were lodged before this court. I would like to add that there is merit in the nature of these proceedings to exercise discretion to occasion an amendment to the aforesaid certificate of confirmation of grant for no beneficiary suffers prejudice or injustice on the alleged action by this court to settle the real dispute in contestation in this matter.
65. Whether it be constitutional law, substantive law or procedural law implicit in our legal system, limits ought to be imposed and the power of the court to exercise its discretion under Section 76 of the [Law of Succession Act](#) to revoke or annul the Certificate of Confirmation of Grant. Although the provision is overused by the parties, to undertake litigation within the scope of its construction and interpretation, that remedy was never intended by the legislature to render final decisions as the touchstone to bring finality to the distribution of the intestate estate into dispute. In my judgement Section 76 should never be a safety valve for the indolent to re-litigate family disputes over and over again to subvert the legal and authentic decree of the court in a succession cause. Call it by any a name the basic feature of Section 76 of the Act is not to continue dismantling the final orders created by the court in distributing the assets to the beneficiaries under section 29 as read with section 35, 36, 37, 38 and 40 of the Succession Code.
66. The arrangement of the Applicant's late husband and the owner of the estate being Nathan Kimaiyo Tarus reflects the basic principle of a child out of moral duty supporting his father perhaps to secure the estate from being intermeddled or dissipated by third parties. Such a mission is founded on lineage relationships. The arrangement of this purported transaction would have taken cognisance of the duty for families as a union of society to provide the necessary economic and social support intended to sustain the property already acquired by the head of the family but likely to be interfered with by reason of non-payment of an outstanding dues or charges.
67. Ideally everyone who comes within the definition of a family under Section 29 of the [Law of Succession Act](#) should qualify as a beneficiary as this will prevent the exclusions principally responsible for the bickering that often follow most of the Succession Proceedings or rulings. Literally it means that succession interface should be by the sub or nuclear family and by extension the immediate family jointly. The distinctive feature of this application by the Applicant if allowed by this court in exercising discretion undoubtedly it will occasion prejudice and injustice to the rest of the beneficiaries and render anything their father worked for their heritage to be concentrated in one household of their late brother. It seems however from the evidence that the Applicant grievance to revoke the certificate of confirmation of grant already in force for non-disclosure of material fact or misrepresentation as espoused under Section 76 of the Act lacks merit.
68. The second observation which emerges from the application by the Applicant, revolves around the question of some properties not included by the administrator within the ambit of the certificate of confirmation of grant. In spite of the absence of the instruments of ownership as alleged by the administrator in conceiving the whole issue, it does not satisfy the criteria of annulling or revoking the decree of the court in the form of a certificate of confirmation of grant. In accordance with the principles on amendment of pleadings and the inherent jurisdiction of this court, I have an answer for the applicant. That is to the effect of invoking Section 1(A) 1(B), 3(A) of the [Civil Procedure Act](#) and rule 73(1) of the Probate and Administration Rules to cause an amendment to the certificate of confirmation of grant dated 26.7.2022 in order to introduce other assets to the estate in advertently left out by the administrator.



69. For the foregoing reasons, it cannot be and should not be said that the objector applicant's summons for revocation is maintainable for reason of want of merit. With regard to the prayer on non-disclosure of other assets by the time of making the grant of confirmation, the same is remedied by way of amendment of the instrument.

70. Being a family cause of action, no orders as to costs is granted.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 20TH DAY OF SEPTEMBER 2024

.....
R. NYAKUNDI

JUDGE

Coram: Before Justice R. Nyakundi

Anassi Momanyi & Co. Advocates

Kibichy & Co. Advocates

Bett K. & Co. Advocates

