



**Maina & another v Wanyiri & 2 others; Kimani & 4 others (Creditor) (Succession Cause 489 of 1998) [2023] KEHC 23144 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23144 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 489 OF 1998  
HM NYAGA, J  
OCTOBER 4, 2023**

**BETWEEN**

**VIVIAN JEBICHII MAINA ..... 1<sup>ST</sup> APPLICANT**

**KIPKORIR KEITANY ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JAMES WANYIRI ..... 1<sup>ST</sup> PETITIONER**

**HANNAH WANJIRU ..... 2<sup>ND</sup> PETITIONER**

**JOHN MWANGI KAHONO ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ANTONY MAINA KIMANI ..... CREDITOR**

**EVELINE WARIARA NGUGI ..... CREDITOR**

**SAMMY KAMAU CHEGE ..... CREDITOR**

**JOSEPH WAWERU WANGUI ..... CREDITOR**

**FLORENCE WAMBUI IKUMU ..... CREDITOR**

**RULING**

1. This ruling relates to a preliminary objection to the Application dated 8<sup>th</sup> May, 2023 and summons for substitution dated 11<sup>th</sup> July 2023.
2. I will first deal with the Preliminary Objection and the application shall follow.
3. Vide an Application dated 8<sup>th</sup> May, 2023 brought pursuant to Section 76 of the *Law of Succession Act* and Section 44(i) of the Probate and Administration rules, the creditors herein seek that the 1<sup>st</sup> and



4<sup>th</sup> Petitioners be restrained from administering the estate of the deceased; revocation of the rectified certificate of grant issued to the 1<sup>st</sup> to 4<sup>th</sup> Petitioners on the 16<sup>th</sup> March, 2022; for issuance of the rectified grant to the 1<sup>st</sup> to 4<sup>th</sup> respondents as per the attached draft rectified certificate of confirmation of the grant herein; and for costs of this application to be borne by the respondent/administrator personally.

4. The application is premised on the grounds recited on the face of it and is supported by an Affidavit sworn by Anthony Maina Kimani, the 1<sup>st</sup> Creditor, on his behalf and on behalf of other creditors who have duly consented to him acting on their behalf.
5. The Petitioners opposed the application by way of a Preliminary Objection(P.O) dated 31<sup>st</sup> July, 2023 on the following grounds;
  - i. That the Application and suit is non-starter, redundant and incurably inept.
  - ii. That the Applicants have no locus standi to institute the instant application since the Honourable court is functus officio and subsequently lacks the jurisdiction to hear and entertain the application after delivery of judgement on the 16<sup>th</sup> March, 2022.
  - iii. That the Applicants are not beneficiaries of the estate of the late Waithira Maina and neither have they demonstrated that they are creditors to the deceased estate since the deceased never sold any part of her estate during lifetime.
  - iv. That the Honourable Court lacks the requisite jurisdiction to hear and entertain a claim of purchase of land by the applicants since the proper forum could have been the Environment and Land Court.
  - v. That the Applicants have not demonstrated that they truly honoured any terms of the contract for purchase of any portion from the deceased estate to warrant the granting of the prayers sought.
  - vi. That the Applicants have not proven existence of any valid sale agreement between them and the true beneficiaries of the deceased estate.
  - vii. That the Applicants have failed to prove any breach or violations of the provisions of Section 76 of the Law of Succession to warrant the revocation of the grant issued by the Honourable Court.
  - viii. That the Applicants have not commenced any individual suits against any of the beneficiaries in line with the rule of privity of contract and the generalization of their claims is geared towards disinheriting the deceased's beneficiaries through unorthodox means.
  - ix. That the Applicants' proposed mode of distribution is geared towards misleading the Honourable Court on the interpretation of the judgement delivered on 16<sup>th</sup> March, 2022 and hence the same cannot legally stand as it violates the express provisions of the Law of Succession pertaining distribution of the deceased estate.
  - x. That the summons is fatally defective since the provisions of the law cited therein do not warrant the granting of the prayers sought by the Applicants as the proper forum is to seek or review any orders the Applicants feels aggrieved against.
  - xi. That the instant application is frivolous, vexatious and an abuse of the court process hence the same is unmerited to warrant the granting of the prayers sought.
  - xii. That the Application is a gross abuse of the court process and the orders sought are superfluous and incapable of being granted.



6. The Preliminary Objection was canvassed by way of written submissions.
7. Only the Creditors/Applicants filed their submissions to the objection.

### **Applicants'/Creditors Submissions**

8. On whether the Preliminary Objection meets the legal threshold, the Applicants relied on the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696 where the court held that a preliminary objection raises a pure point of law which if argued sufficiently may dispose of a suit and the case of Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu High Court Civil Case No. 22 of 1999 where the court held that P.O should be capable of disposing the matter preliminary without the court having to resort to ascertaining the facts elsewhere apart from looking at the pleadings alone.
9. The creditors then submitted that only grounds (ii), (iv) and (x) meet the legal threshold.
10. With respect to whether the P.O is merited, the creditors submitted in the negative.
11. In regards to ground 2 of the P.O the creditors cited the case of Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR where the court held functus officio doctrine prevents the reopening of a matter before a court that rendered the final decision thereon and the case of Mombasa Bricks & Tiles Limited & 5 others v Arvind Shah & 7 others [2018] eKLR where the court held that the doctrine of functus officio does not command that the moment the court delivers its judgement in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.
12. The creditors associated themselves with the above holdings and argued that the instant summons for revocation of grant is grounded largely on the fact that the petitioners/respondents proceeded to obtain a rectified certificate of confirmation of grant in a manner and terms totally at variance with the judgement of the court to their detriment and as such this court is being urged to determine new issues that were not the subject of its judgement dated 16<sup>th</sup> March,2022, and therefore the court is not functus officio. To bolster their submissions, reliance was further placed on the cases of In Re Estate of David Wang'ang'a Gichuhi (deceased) [2020] eKLR where the court held that one should look at the order or relief sought in the application despite a ruling having been rendered to ascertain whether the court is functus officio. Also cited was Re Estate of Zipporah Njeri Mwaura(Deceased) [2020] eKLR where it was held that the court can only become functus officio after the estate has been transferred to its respective beneficiaries as ordered in the certificate of confirmation.
13. I was also referred to In re Estate of Yawaya Shitanda Nyatati (Deceased) (Succession Cause 88 of 2002) where the court held that where an account of the completed administration has not been filed, administration is still alive and in the circumstances the court is not functus officio yet.
14. In regards to ground no. 4 of the Preliminary Objection, the creditors submitted that a cursory perusal of the summons in issue reveals that it is grounded on the fact that the petitioners/respondents fraudulently obtained a rectified certificate of confirmation of grant at variance with this honourable court's terms of the judgement and nothing more. They argued that this court has not been asked to determine a claim for purchase of land.
15. They contended that Section 76 of the [Law of Succession Act](#) clothes interested parties with the locus standi to approach the succession court for revocation of grant. To further buttress this fact reliance



- was placed on the cases of *Musa Nyaribari Gekone & 2 others v Peter Miyienda & another* [2015] eKLR & *Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche* [2019] eKLR
16. The creditors also submitted that the interested parties were deemed as such by the trial court vide a judgement that has not been appealed or varied and therefore this issue is res judicata and urged this court to so hold.
  17. With respect to ground 10 of the P.O, the creditors submitted that they brought the summons under Section 76 of the *Law of Succession Act* as well as Rule 4 (1) of the Probate and Administration Rules, 1986. It was submitted that the import of Section 76 of the *Law of Succession Act* clothes the honourable court with requisite jurisdiction to revoke the rectified certificate of confirmation of grant made to the petitioners/respondents at any time. They submitted that the impugned certificate of grant does not conform to the judgement of the court and the legal mechanism available for redress by the applicants is vide summons for revocation of grant as filed and not review.
  18. The creditors also stated that this Honourable Court has inherent powers under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration rules to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of court.
  19. Reliance was placed on the case of *In Re Estate Of Masika Tabani Nabutola (Deceased)* [2021] eKLR where the court held that it has inherent powers donated by Rule 73 to prevent the ends of justice from being defeated.
  20. The creditors urged the court to find that the instant summons is not defective as alleged.
  21. The applicants on their part argued that P.O by the Petitioners save for ground (ii) does not meet the legal threshold and would require probing of evidence to ascertain the facts as evident from the issues raised.
  22. The applicants in the application dated 11<sup>th</sup> J supported the Creditors case. They contended that it should be noted that the rectified grant was issued while the petitioners were well aware that one of the deceased beneficiaries Henry Njuguna Kahono was deceased and his name was not removed before confirmation and as such this court can grant the orders sought.
  23. Before I make a determination I will now look at the subsequent application dated 11<sup>th</sup> July 2023.
  24. The summons for substitution of a deceased beneficiary is brought under Section 47 of the *Law of Succession Act*, Rule 73 of the Probate and administration Rules and Article 159(2) of *the Constitution* of Kenya, 2010 whereby the Applicants, Vivian Jebichii Maina & Kipkorir Keitany seek for Orders:-
    - a. Spent
    - b. That this court do grant an order to substitute the name Henry Njuguna Kahono alias Henry Njuguna Maina alias Henry Njuguna (deceased) with the names of Vivian Jebichii Maina and Kipkorir Keitany who are the legal representatives of the estate of Henry Njuguna Kahono alias Henry Njuguna Maina alias Henry Njuguna (deceased)
    - c. That the costs of this Application be in the cause.
  25. The Application is premised on the grounds on its face and supported by an affidavit sworn on 11<sup>th</sup> July, 2023 by Vivian Jebichii Maina on her behalf and on behalf of the Second Applicant.
  26. She deponed that she is the only surviving spouse of Henry Njuguna Kahono alias Henry Njuguna Maina alias Henry Njuguna (deceased) who passed on 28<sup>th</sup> September, 2019.



27. That besides herself, her deceased husband was survived by 5 children who are minors. Namely; Beatrice Jelagat, Jacob Maina, Jane Waithera, Patrick Nganga and Hope Wanjiku.
28. She averred that she has been appointed as legal representative of the estate of her aforesaid Husband together with her brother Kipkorir Keitany and that prior to his death, her deceased husband was joint administrator and beneficiary of the estate of Waithira Maina (deceased).
29. It was her deposition that it is in the interest of justice to substitute the deceased with the said Kipkorir Keitany and herself to safeguard his estate and the children who are beneficiaries of his estate.
30. The Application is unopposed.
31. The Applicants filed submissions in support of the aforesaid summons on 31<sup>st</sup> August, 2023.
32. The Applicants submitted that the law allows the substitution of the deceased beneficiary with the name of the legal representative of his estate.
33. Citing the provisions of Section 79 of the *Law of Succession Act*, the Applicants submitted that there is no dispute that Henry Njuguna Kahono alias Henry Njuguna Maina alias Henry Njuguna( deceased) was beneficiary of the estate of Waithira Maina (deceased) and entitled to 2½ plot in Parcel No. Bahati/ Kabatini Block 1/2503.
34. They similarly submitted that there is no dispute that the first Applicant, Vivian Jebichii Maina is the surviving spouse of the deceased and that there are children who are minors thus appointment of Kipkorir Keitany as a joint legal representative because of the continuing trust.
35. The Applicants referred to the matter of the estate of Edward Kanyiri Kunyihya (DECEASED) [2013] eKLR where the court stated that shares of the deceased beneficiary cannot be reallocated and should pass to his estate.
36. The Applicants then submitted that based on the above reasoning, this application has met the threshold required by the law and the same ought to be allowed with costs to be borne by the estate of the late Waithira Maina.

### **Analysis & determination**

37. This court has considered the Preliminary Objection and the Application in question. In my considered view the following issues arise for determination:-
  - i. Whether the Preliminary Objection dated 31<sup>st</sup> May, 2023 by the Petitioners/Respondents meets the fundamental threshold of a preliminary objection.
  - ii. Whether the Notice of Preliminary Objection is merited.
  - iii. Whether the application for substitution dated 11<sup>th</sup> July 2023 is merited.

### **Whether the Preliminary Objection dated 31<sup>st</sup> May, 2023 by the Petitioners/Respondents meets the fundamental threshold of a preliminary objection.**

38. A Preliminary Objection was defined by Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 as follows:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law and it is argued on the assumption that all the facts pleaded are correct. It cannot



be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion.”

39. The Court endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696, in the case of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors* (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

40. The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

41. Applying the foregoing precedent, I am persuaded that save for grounds (ii) and (iv), the grounds raised in the objection by the petitioners are not pure points of law to be canvassed by way of a Preliminary Objection. These two grounds touch on whether this court has jurisdiction to determine the Application, whether the creditors have locus standi to institute the application and whether this court is functus officio.

42. The other grounds would require copious explanations and probing of evidence to unravel the correct position and are therefore not within the realm of what constitutes a preliminary objection.

43. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

44. When a preliminary objection is raised on the jurisdiction of a court to hear and determine a matter, then the same must be heard and determined first. A question of jurisdiction is a pure point of law and if successfully raised it has the potential of disposing of the suit/application at a preliminary stage.



If this Court lacks jurisdiction, the matter will be at an end I will have to down my tools and take no further step.

45. The first argument on jurisdiction is premised on the ground that any claim by the applicants as alleged purchasers, ought to be determined by the Environment and Land Court (ELC) and not this court.
46. It is well settled that a claim arising out an alleged right to an estate ought to be determined in the succession cause itself. The prayers sought are based on the orders granted by this court under Section 76 & 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.
47. This issue was argued in court and in its judgment, the court found that the applicants' claim was rightly before it and proceeded to allow the same.
48. In my view this issue is res judicata, having been determined in the judgment in question. No appeal has been filed against that particular issue and I find that this court is barred from revisiting it, even if I may hold a different opinion.
49. The other argument on jurisdiction is based on the doctrine of functus officio.
50. Functus officio is a principle of law that prevents the reopening of a matter before the same Court that rendered the final decision. If a party establishes that the court is functus officio, the court will have no business determining the matter further. Thus, the doctrine of functus officio can also at a preliminary point, dispose of an application/suit.
51. Blacks Dictionary defines functus officio as having performed his or her office without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.
52. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which reads: -

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

53. In Jersey Evening Post Ltd vs Ai Thani (2002) JLR 542 at 550, it was held thus:

"A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available".



54. As per the decision of the Court of Appeal in *Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, the *functus officio* doctrine does not allow

“ a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

55. The creditors are seeking to restrain the petitioners from administering the estate of the deceased, revocation of the rectified grant on grounds that it does not conform to the judgment of the court delivered on 16<sup>th</sup> March, 2022 and for issuance of a rectified grant to the petitioners as per the draft rectified certificate of grant. It is clear that the creditors are not seeking a re-engagement of the Court with its earlier decision. They are saying that the confirmed grant issued on 22<sup>nd</sup> March 2022 does not conform to the judgment herein and are merely asking that the grant be issued as per the orders of the court.

56. In regard to this I find that the court is not *functus officio*. So long as issues regarding the estate remain outstanding the court retains jurisdiction. This was the holding in *re Estate of Yawaya Shitanda Nyatati (Deceased)* (Supra).

57. On whether the creditors/ Applicants have *locus standi* to institute the Application, the respondents answered in the negative.

58. It is also well settled that an issue of *locus standi* raises a pure point of law that touches on the jurisdiction of the court. This was so held in the Supreme Court case in *Mumo Matemba vs Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the court held that:

“ The issue of *locus standi* raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis.”

59. The Court further held that;

“ It is proper to note that the evaluation of *locus* ought to be based upon the constitutional consideration of capacity ( Articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represent the parties in Court”.

60. The issue of *locus standi* was also discussed in *Michael Osundwa Sakwa vs Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR while referring to the matter of *Ms. Priscilla Nyokabi Kanyua vs Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010* . The court asserted that;

“ ...In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”



61. Similarly, in the matter of *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR while canvassing the issue of Locus Standi the Court stated thus:

“...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”

In the case of *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

Lastly, in the case of *Alfred Njau and Others vs..Vs.. City Council of Nairobi* ( 1982) KAR 229, the Court also held that;-

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

62. The applicants were heard by the court and orders were issued in their favour. They are here to ensure that the grant is confirmed in the manner ordered by the court. I am of the view that they have the requisite locus standi to be in court.

63. Having said so I must register my doubts on whether the applicants have the locus to restrain the petitioners from administering the estate as sought in the first prayer of their application. Their claim is only in respect to certain portions of the estate that were to be transferred to them. That does not give them a right over the entire estate. As for the rest of the prayers, I find that they are entitled to address the court.

64. The upshot of the foregoing is that the Petitioners’/Respondents’ Preliminary Objection is not merited and the same is dismissed entirely with costs being in the cause.

65. I will now deal with the second application. The Application has been brought pursuant to Section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate and Administration Rules.

66. Section 47 of the [Law of Succession Act](#) provides: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

67. On the other hand, Rule 73 of the Probate and Administration Rules provides that: -

“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.”



68. The two provisions cloth the High Court with wide discretion to do what is necessary to ensure that the ends of justice are met.
69. The applicants want to be joined in as beneficiaries so that they can get a share which would have gone to the 1<sup>st</sup> Applicant's deceased husband who is entitled to a share from the estate of the deceased in order to safeguard his estate and the interest of the children who are beneficiaries of the 1<sup>st</sup> Applicant's late husband.
70. The Applicants have annexed a grant to demonstrate that they are legal representatives of the estate of Henry Kahono Maina.
71. It is not contested that the deceased Henry Kahono was a beneficiary of the estate of the deceased and he was entitled to 2 ½ share of Plot no. Bahati/Kabatini Block 1/2503. The annexed judgement dated 16<sup>th</sup> March, 2022 delivered by my sister Hon. Rachel Ngetich confirms this position.
72. The beneficiary of the estate (Henry Kahono) is entitled to his share and the Applicants being his legal representatives can be substituted in his place.
73. In The Matter Of The Estate Of Edward Kanyiri Kunyiha (Deceased)[2013] eKLR in regard to the death of a beneficiary, the court held as follows;

“Where a beneficiary dies, his share cannot be reallocated. It should pass to his estate. In this case it is proposed that the shares that had been allocated to the dead beneficiaries be reallocated. That is not the correct procedure. The property allotted to the estate of the widow of the deceased who has died should be allotted to her estate. Regarding the shares to James Mugo Kanyiri, his shares cannot be passed to his widow, unless she is the administrator of the estate of her deceased husband and the shares are allotted to her in that capacity.”
74. Therefore, as administrators of the estate of the late Henry Njuguna Wahono the applicants ought to hold his entitlement for the benefit of his estate.
75. But how is this to be done? Is it by way of substitution as applied for?
76. The *Law of Succession Act* does not expressly provide for substitution of a beneficiary. Thus the court acts pursuant to its inherent powers under Section 47 thereof as read with Rule 73 of the P & A Rules.
77. In my view the correct way to give effect to the orders sought is to revoke the confirmed grant and in respect to Henry Njuguna Wahono, the applicants as the representatives of his estate hold the share for the benefit of the beneficiaries.
78. Accordingly, I allow the Application and order that the grant be revoked and Vivian Jebichii Maina and Kipkorir Keitany hold the share in question on behalf of the beneficiaries of the deceased Henry Njuguna Kahono. Of course the same is subject to the claim by the creditors, as per the orders of my sister in her judgment.
79. As there is an application by the creditors to be determined, and it may lead to revocation of the grant, I direct that the Amended Confirmed Grant shall not issue until that application is determined.
80. Costs to be in the cause.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023.**

**H. M. NYAGA,**



**JUDGE.**

In the presence of;-

Mr. Ouma for creditors

N/A for others

