



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 39 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE REUBEN MUTUKU KIVA (DECEASED)

ELEANOR MUTUKU DURHAM.....APPLICANT

-VERSUS-

BEATRICE NGINA.....1ST RESPONDENT

JOYCE MWIKALI KIKO.....2ND RESPONDENT

JUSTUS KAVITA MUTUKU.....3RD RESPONDENT

AND

MAKERRYL COMPANY LIMITED

EVEREDY CONSTRUCTION LIMITED

MAPEMA HOLDINGS LIMITED.....INTERESTED PARTIES

RULING

1. By Summons dated 16th October, 2020 expressed to be brought under Sections 45, 47 and 76 of the *Law of Succession Act*, the applicant herein, **Eleanor Mutuku Durham**, seeks the following reliefs:

1) Spent

2) That an order be issued to respondents to account for all the monies collected for rent, shares from Kwa Mating'i, Muka Mukuu, and Kyanzavi shares and from the coffee farm.

3) An order do issue reversing the transfer of land parcels no. Machakos/Ngulun1/3882 & 3881 which was conducted illegally by the respondents after the demise of the deceased to Markerryl Company Limited and be returned to the names of the deceased herein.

4) An order do issue for nullification and/or revocation of the grant of representation herein issued to the respondents on 17th May 2019.

5) Costs be provided for.

2. The Summons were based on the following grounds:

1. That her father met his death on 15th May 2013.

2. That the transfer was conducted after the death of her father.

3. **There was non-material disclosure upon the transfer of the aforementioned parcel of land.**
4. **That the transfer documents were forged and there was a criminal matter at Kangundo in respect of the transfer.**
5. **That through their advocates the 1st & 3rd respondents negotiated for removal of the caution placed in favour of the 1st Respondent so that they may sell and transfer the same to the said company.**
6. **That the respondents have been intermeddling with the properties of the deceased by selling and leasing to their own benefits.**
7. **That the inheritance of the other beneficiaries of the deceased are at risk.**
8. **That she has never Signed any consent in respect of the petition for letters of administration and consent for grant even as alleged in the sale agreement.**
9. **That the respondent has been forging their signatures to prove to this court that we are in consent with them.**
10. **That she requests this honorable court to consider her application and grant the orders therein.**
11. **That the process of obtaining this title was shrouded in secrecy, full of misleading statements and camouflaged to deny the applicants and all occupants therein their rightful parties of land**
12. **That this honorable court has the jurisdiction to entertain any application.**
13. **That it is in the interest of justice this application be allowed.**

3. The application was supported by an affidavit sworn by the Applicant in which the same grounds were reiterated. I must however state that the affidavit being a homemade is not an epitome of impeccable, elegant or paragon drafting and it is not easy to decipher what exactly it is all about. I will however, try to make the best out of it.

4. According to the said affidavit, the deceased died intestate and left behind nine (9) biological children including the Applicant and the respondents. However, the transfers were effected after the death of the deceased but that the transfer documents were forged. As a result, there was a criminal case in Kangundo Court. The Applicant's further contention was that there was non-material disclosure leading to the said transfer of the aforementioned parcel land. It was contended that the 1st and 3rd Respondents, through their advocates engineered the removal of the caution placed in favour of the 1st respondent so that they could sell and transfer the same to **Markerryl Company Limited**.

5. The applicant accused the respondents of having intermeddled with the properties of the deceased by selling and leasing the same for their own benefits. They have, however, declined to account for the same since 2013 and have side-lined the other beneficiaries of the deceased hence exposing them to hardships. As a result, it was averred that the inheritance of the other beneficiaries of the deceased are at risk.

6. The Respondents were further accused of forging the signatures to prove to this court that the beneficiaries are in concert with them. To the Applicant, the process of obtaining this title was shrouded in secrecy, full of misleading statements and camouflaged to deny the applicants and all occupants therein their rightful parties of land.

7. It was the Applicant's case that Machakos/Nguluni/3881 and 3882 form part of the estate of the deceased and that they resulted from the subdivision of Machakos/Nguluni/811 which was the mother title. According to her, when a person dies intestate the property is deemed as the property of the deceased and only the court that has power over it and if a transfer occurs thereafter it is deemed as fraud and illegal and the court has unequivocal powers to reverse any transaction thereof which are conducted after the death of the deceased. Her position was therefore that this court has powers to reverse all transfers and subdivision thereof which resulted from a criminal process.

8. It was averred that the said company has been carrying destructive activities on the said property by digging holes on the deceased's property and mining ballast and raw materials thereon.

9. According to the Applicant the process of obtaining the title deeds was shrouded in secrecy, full of misleading statements and camouflaged to deny the applicant and the occupants therein their rightful parties (sic) of the land and unless the court restrains the company from carrying on the said activities, the deceased's estate will suffer irreparable loss and damages.

10. According to the Applicant, the 1st and 2nd Respondents testified under oath in criminal case no 997 of 2015 that the land was fraudulently transferred and that their late father did not transfer the same to the 3rd respondent and that no evidence was adduced that she consented to the sale of the property of the deceased. She stated that she was never involved in any of the sales. To her, the withdrawal of Kangundo Criminal Case No. 997 of 2015 by the complainants was a scheme to give way to the subsequent sale. She further alluded to the fact that her sister, **Rose Mueni Kasina** had applied for the revocation of the grant and to that application was attached bundles of documents which were alleged to have been forged.

11. It was averred that the letters from the chief used to institute the succession cause were fraudulently issued since she was not present when she was alleged to have signed the same since she was in the United States of America.

12. According to the Applicant, she never instructed the firm of **M/s Muema & Associates Advocates** to represent her in this matter or any other matter. According to her they were not her advocates in the sale transaction and are no longer her advocates.
13. It was her view that since no leave was granted to **Viktar Ngunjiri** to participate in the application dated 16th October 2020, his response ought to be expunged from the record on the ground that it was unprocedurally filed and the court process should not be abused. She however accused the said person of having fraudulently purchased a property of a deceased person when he was aware of an existing criminal offence at Kangundo and where he recorded a statement and the 3rd respondent was charged with fraud and obtaining money from him by false pretence.
14. It was submitted on behalf of the Applicant that the deceased was the registered owner of the parcel of land Machakos/Nguluni/811 and also owned rental houses, shares at kwa Mating'i, Muka Mukuu, Kyanzavi shares and a coffee farm from which the respondents have been receiving income but have failed to account to the other beneficiaries.
15. It was submitted that after the death of the deceased, the parcel of land Machakos/Nguluni/811 was fraudulently and illegally transferred to the 3rd respondent herein and later sub-divided into parcels Nos. Machakos/Nguluni/3881 and 3882 and thereafter the resultant parcels were illegally transferred to a third party. The said fraudulent transfer led to the institution of criminal case No. 997 of 2015 at Kangundo Law Courts in which the 1st Respondent was the complainant and in which the 3rd respondent was charged with various counts of forgery of signatures in regard to documents used to facilitate transfer of the said land.
16. According to the Applicant, there was a material non-disclosure of the existence of the said parcel of land and other properties. Further, she never signed any consent in respect to the petition for grant of letters of administration; that the respondents forged her signature and those of the other beneficiaries to lie to the court that they had consented to the application for grant of letters of administration of the estate of their deceased's father and issuance of the grant of representation to the respondents. It was submitted that the allegation that the applicant consented to the sale of the deceased's property to the third party are untrue since the process of the transaction and the transfer of the title to **Markerryl Company Limited** which company is a third party was shrouded in secrecy and designed to deny the applicant and other beneficiaries their rightful entitlement of the deceased's estate.
17. According to the Applicant, the respondents have been intermeddling with the properties of the deceased by selling and leasing out the same for their own benefit and have since 2013, failed to account for the proceeds earned from the estate of the deceased.
18. In support of her submissions, the Applicant relied on section 47 of the **Law of Succession Act** and Rule 49 of the **Probate and Administration Rules** as empowers this court to entertain any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice. It was submitted that since the applicant is one of the beneficiaries to the estate of the deceased who died intestate and survived by his nine children who have equal rights to the Estate under Rule 26 of the **Probate and Administration Rules** prior to the filing of the petition for grant of letters of administration, the respondents never obtained consent from the applicant nor was the applicant notified of the application for the grant of representation despite having equal right to that of the respondents. That her signature and those of other beneficiaries were forged by the respondents in a bid to purport that consent had been given by the applicant who at the time was in the United States of America where she resides. This, it was submitted, is contrary to Rule 26 of the **Probate and Administration Rules** which require a mandatory notice to all persons entitled in the same degree as the applicant of a grant. In this regard the Applicant relied on the case of **In re Estate of Festo Lugadiru Abukira (Deceased) [2019] eKLR**.
19. According to the applicant there was material non-disclosure of pertinent issues to the court during the process of obtaining the grant and also the whole process leading to the application of the grant is tainted with fraudulent illegalities being committed by the respondents. Based on section 76 of the **Law of Succession Act** it was submitted that land title No. Machakos/ Nguluni/811 is the property of the deceased and formed part of the free property of the deceased at the time of his death. This is a fact proved by the death certificate of the deceased and a copy of the green card/abstract title which is on record and exhibited by the applicant herein. That whilst the deceased herein died on 13th May, 2013; according to the copy of the abstract title from the register, the property was registered in the name of the deceased on 23rd July, 2009 and it was transferred to the 3rd respondent on 18th March, 2015 which is 2 years after the death of the deceased and before issuance of the grant. The respondents' act of leaving out the said property during the application of grant of letters of administration for the estate of the deceased amounts to a material non disclosure of facts and demonstrates how the whole process for the application of representation has been tainted with illegalities.
20. According to the Applicant, pursuant to section 3 of the Law of Succession Act the subject property clearly formed part of the Estate of the deceased as at the time of his death, the property was registered in his name and the deceased was legally competent to dispose of during his lifetime. Accordingly, the 3rd respondent's action to transfer the property to his name two years after the death of the deceased without any authority and eventually sub-dividing the same and selling the resultant parcels of land to a third party without the knowledge and consent of the other beneficiaries is an illegality. This is given credence by the lodging of Criminal Case No. 997 of 2015 at Kangundo where the 1st respondent herein was the complainant. Further, it is discerned from the 1st and the 2nd respondents who testified under oath in Criminal Case No. 997 of 2015 that the land was fraudulently transferred and that their deceased father did not transfer the property to the 3rd respondent. Moreover, no evidence has been adduced that the applicant herein had consented to the sale of the property of her deceased father since she was out of the country when the transactions took place and could not avail her signature to approve the transaction nor was the proceeds from the sale shared to her.
21. It was submitted that pursuant to section 82 (b) (ii) of the **Law of Succession Act** no immovable property shall be sold before confirmation of the grant while section 45(1) of the **Law of Succession Act** forbids any person from inter- meddling with the property of a deceased person. In support of this submission reliance was placed on the case of **In re Estate of Kakua Kioko (Deceased) [2018] eKLR**.
22. It was the Applicant's view that the illegalities referred therein are the same ones that the respondents herein perpetrated with impunity.
23. According to the Applicant, when a person dies intestate and the property deemed as the property of the deceased, this court has powers

over such property and when a transfer of that property is deemed fraudulent and illegal; then this court has unequivocal powers to reverse any transaction thereof which is conducted after the death of the deceased. Therefore, the third party in whose favour the subdivisions out of the deceased's parcel of land known as **Machakos/ Nguluni/811** were fraudulently transferred, cannot in law lay a claim against the estate of the deceased as it did not purchase from the deceased. Their claim is against the respondents in a different forum since their matter is not for a succession cause. In this regard reliance was placed on the case of **In re Estate of Kakua Kioko (Deceased) [2018] eKLR** (supra).

24. The Applicant submitted that she also seeks an order for the respondents to account for all monies collected for rent, shares from Kwa Mating'i, Muka Mukuu and Kyanzavi shares and from the coffee farm and relied on section 83 of the **Law of Succession Act** that administrators are duty bound to render accounts of the estate of the deceased to the beneficiaries and the court. To the Applicant, rendering of accounts in this matter is critical given how the administrators clandestinely petitioned for letters of administration and the process of administering the estate as stated in the foregoing. Reliance was placed on the case of **In re Estate of Festo Lugadiru Abukira (supra)**.

25. To the applicant, the appointment of the respondents as the administrators of the estate of the deceased was not in accordance with the law and clearly violates Rule 26 of the **Probate and Administration Rules** for failure to obtain consent or notify the applicant of the application. Further, the activities undertaken by the respondents in regard to the deceased's estate are to waste the estate and amount to intermeddling. The grant ought to be revoked as it was illegally obtained by concealing material facts to this Court.

26. In opposing the application, the 1st Respondent swore an affidavit on her behalf and on behalf of the 2nd Respondent in which she deposed that the application is bad in law, misconceived an abuse of the court process and ought to be struck out.

27. According to the deponent, it stands, parcels of land numbers Machakos/Nguluni/3881 and Machakos/Nguluni/3882 do not form part of the estate of the deceased and that the Applicant has not demonstrated any prior or latter irregular transfer document and the property at the time of transfer was clearly registered in the name of the 3rd respondent Justus Kavita unencumbered.

28. It was her averment that Kangundo Principal Magistrates Criminal case number 997 of 2015 - **R vs. Justus Kavita** was settled within the law through case settlement in the spirit of reconciliation at Kangundo law Courts resolving a myriad of imminent disputes with the proceeds of the sale of the subject property by agreement between them as siblings going to settling the costs of litigation and the balance being shared among them as agreed. She denied that they intermeddled with the estate of the deceased but averred that on the contrary they have been fighting to preserve the estate of the deceased while the applicant is the one actually renegeing on their family agreement entered in good faith instead of embarking on lengthy criminal and environment and land court tussles. The Applicant was accused of not being keen on having the grant confirmed hence the reason she is filing numerous applications. It was disclosed that the Applicant, also known as **Elina Katumbi Mutuku**, has all through been involved in this succession proceedings as clearly discernible from the court record showing her signature to consent. Therefore, it is a mere allegation without proof when the applicant alleges that she never signed the consent in respect of the petition for letters of administration.

29. Based on legal advice, it was deposed that the applicant's applications do not meet the threshold for revocation or grant of an injunction as the properties in question have not been demonstrated to be part of the estate of the deceased and the same can only be done through challenging the titles currently held through the environment and land court.

30. The said Respondents therefore prayed that this application be dismissed in the interest of justice and fairness.

31. It was submitted on behalf of the 1st and 2nd Respondents that the prayer for nullification of titles is res judicata having been dealt with by this Court in its ruling of 25/1/2021.

32. According to the said Respondents, as it stands, parcels of land numbers Machakos/Nguluni/3881 and Machakos/Nguluni/3882 do not form part of the estate of the deceased since they are already in the names of 3rd parties who bought them with the applicant's knowledge and consent and have been utilizing the same for years. It was submitted that though the applicant is claiming the transfers of land were irregular, she has not presented any alleged irregular transfer document for any prior or latter implemented transfer to prove the same. Moreover, at the time of transfer to the Company, the suit land was clearly registered in the name of the 3rd respondent, **Justus Kavita**, unencumbered.

33. It was contended that since Kangundo Principal Magistrates Criminal case number 997 of 2015, **R vs. Justus Kavita**, alluded to by the applicant was settled within the law through case settlement in the spirit of reconciliation at Kangundo law Courts hence resolving a myriad of imminent disputes, he proceedings cannot be used to prove his guilt as no such judgement was rendered. The resultant sales of land were conducted in agreement among the siblings and the proceeds thereof went to settling the costs of litigation and the balance was shared among them as agreed.

34. According to the said Respondents, the applicant is not keen on having the grant confirmed hence the reason she is filing application after application herein. It was averred that the applicant who is also known as **Elina Katumbi Mutuku** has all through been involved in these succession proceedings as clearly discernible from the court record showing her signature to consent. It is therefore a mere allegation without proof when the applicant alleges that she never signed the consent in respect of the petition for letters of administration.

35. It was therefore submitted that the applicant's applications do not meet the threshold for revocation of grant and issuance of an injunction as the properties in question have not been demonstrated to be part of the estate of the deceased but rather in the names of other parties. It is the Respondents' position that the issue of whether the same were fraudulently/irregularly transferred can only be done to the required evidential threshold through challenging the titles currently held in the environment and land court and they urged the court to dismiss the application in the interest of justice and fairness.

36. Regarding the prayer for accounts, it was submitted that the prayer to account for alleged monies collected is totally not supported by any evidence that there are actual monies receivable as rent and shares. There is therefore no basis whatsoever laid for an order to account.

37. It was reiterated that the applicant is not keen on having the grant confirmed hence the reason she has been and is still filing application after application herein and that the applicant who is also known as **Elina Katumbi Mutuku** has all through been acknowledged and involved in these succession proceedings as clearly discernible from the court record showing her signature to consent. It is therefore a mere allegation without proof when the applicant alleges that she never signed the consent in respect of the petition for letters of administration.

38. It was therefore submitted that this application is unmerited and should be dismissed with costs.

39. In opposing the Application, the 3rd Respondent denied that he has together with his co-administrators sold the shares belonging to the deceased and that they have mismanaged the estate of the deceased in any way. He averred that their appointment was done through a consent letter filed and adopted by the Court. In his view, the Applicant is only out to delay the quick disposal of the cause by raising numerous unnecessary interim applications.

40. He admitted that Markerryl Company is currently the registered and legal owner of land parcels Machakos/Nguluni/3881 and 3882 though the same were previously registered in his name having been created from Machakos/Nguluni/881 which was similarly registered in his name. According to him Machakos/Nguluni/881 was given to him by his deceased father during his lifetime a position known to all his siblings.

41. It was his deposition that the said company first bought Parcel No. 3881 measuring 70 acres or thereabouts for Kshs 45,500,000.00 which sum was paid directly to him. Later, the said company also bought parcel 3882 and though he was the registered owner, he agreed with his siblings including the applicant that all of them would benefit from the purchase price thereof. This, according to him, was meant to settle all complaints in and out of court regarding the two parcels. He therefore stated that the applicant now wants to renege on the same to the detriment of the said company.

42. He averred that in the second sale the applicant was represented by Muema and Associates Advocates who were until recently on record for six of the sisters including the applicant herein and who represented the applicant in the said sale where the purchase price was divided equally amongst the eight daughters of the deceased each receiving Kshs 1,300,000/= and it was not until one and half years later that the applicant filed the present application.

43. He disclosed that in the sale agreement all the sisters confirmed that the whole family had agreed to sell the said land and the said company is only an innocent buyer for value. According to him the applicant is driven by malice since even before the company bought the first parcel, the applicant had given the 1st Respondent a consent to sell the entire original land Machakos/Nguluni/881. It was his case that the company paid the full purchase price for both parcels which were transferred and registered in its name in accordance with the law.

44. On behalf of the company, an affidavit was sworn by its director, **Viktar Maina Ngunjiri**, who confirmed that the company is the current registered and legal owner of Machakos/Nguluni/3881 and 3882 which were previously registered in the name of the 3rd Respondent and which were created after the subdivision of Machakos/Nguluni/881 which was also registered in the name of the 3rd Respondent. He reiterated what was deposed to by the 3rd Respondent as to how the company purchased the two parcels and added that from the sale agreement in respect of parcel no. 3882, it was revealed that the 3rd Respondent held the said land in trust for his sisters because the agreement provided that upon the sale, the said sisters including the applicant would be the sole beneficiaries of the total purchase price in equal shares. In the said agreement, the said sisters including the applicant were represented by the firm of Muema & Associates. Based on the information received from their advocates they believed that every daughter received Kshs 1,300,000/=. He stated that in the sale agreement all the sisters confirmed that the whole family had agreed to sell the said land and if the applicant suffered in any way her recourse should be to seek damages from her sisters and not the company which was an innocent buyer for value.

45. It was averred that in the two transactions the company paid the full purchase price and followed the law to the letter including the requisite due diligence and obtaining the relevant statutory consent. According to him, at no time were the properties registered in the name of the deceased but were in the name of the 3rd Respondent and the company later learnt that the 3rd Respondent got the said property from their father as a gift *inter vivos*. It was disclosed that during the sale of land no. 3882, all the vendor's siblings in the settlement agreement assured the company of the safety of the sale agreement and the investment generally.

46. It was deposed that the company has heavily invested on the said parcels including buying the surrounding and neighbouring parcels hence the size has grown to more than 150 acres from the 70 that it bought from the 3rd Respondent and the current values of its investment is way above half a billion. It was disclosed that the company runs a business of mining and milling construction material from the said land as a legalised user thereof. It further supplies construction material for both building premises and for road construction to a lot of companies and institutions hence suspending its operations even for a day would cause a lot of customers as well as the company untold loss. On the other hand, in the event that the applicant is successful in her application, her remedy lies with her siblings and besides the company has no intention of alienating the land.

47. It was further averred, based on legal advice, that the applicant ought to have commenced her case before the ELC and not in a succession court. The court was urged, in the event that it decided to cancel the said transactions, to order that the value of the company's investment as per the valuation report plus the costs of the infrastructural developments on the land be first paid by the applicant or any other party.

48. It was therefore sought that the application be dismissed with costs.

49. It was submitted on behalf of the three companies joined as interested parties and the 3rd Respondent that the third respondent sold Machakos/ Nguluni/ 3881 and 3882 to Makerryl Company Limited for a total sum of Kenya shillings 62,800,000. The first land to be sold was parcel number 3881 which was sold in the year 2015. The second parcel of land was sold in February 2019. The said company bought the said land while already registered in the name of the third respondent. An official search of the two parcels of land was conducted and

confirmed that the third respondent was indeed the true owner of the said parcels of land. Today the two parcels of land are in the name of Markerryl Company Limited. A copy of the title deed for the second parcel is on page 54 of the said replying affidavit.

50. It was submitted that all the siblings of the third respondent including the applicant gave consent to the sale of the said land.

51. It was submitted that the problem here is that the applicant claims she did not get her share of sale proceeds for the second parcel hence this dispute and denial of involvement in the sale. However, the children of deceased signed an agreement for settlement of all existing disputes and the said agreement appointed the three administrators in this case as explained by the 1st respondent who had filed a criminal case in Kangundo because of transfer of Machakos/ Nguluni/ 3881. Pursuant to the aforesaid case settlement agreement the advocates appointed filed a consent order in court appointing the three respondents administrators which consent was adopted by Justice Kimei as an order of the court.

52. It was submitted that the administrators are not aware of any shares comprising the estate of deceased which were sold leave of court since no evidence has been tendered to that effect by the Applicant. Similarly, the applicant has never sworn a further affidavit to show the existence of the said shares, income from coffee and rent.

53. Regarding the issue of revocation of grant of representation, it was submitted that the respondent are not guilty of any misconduct as administrators since they did everything with the consent of the applicant and there is no reason at all why the grant should be revoked.

Determination

54. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

55. In this case, the Applicant seeks three reliefs. First, she seeks an order reversing the transfer of land parcels no. Machakos/Nguluni/3882 & 3881. In this Court's ruling delivered on 25th January, 2021, the Court expressed itself as follows:

“It is clear, whether lawfully or not, that the property is now registered in the name of the company. The process through which that registration was effected will need to be investigated since the company is not a beneficiary to the estate of the deceased herein... In my view, the issues regarding the manner in which the interested parties acquired the said properties ought to properly be dealt with by the Environment and Land Court.”

56. Having so expressed itself, this Court cannot revisit the same issue as the same is caught up by the doctrine of *res judicata*.

57. The second relief is for accounts. In this case the Applicant seeks an order that the Respondents do account for all the monies collected for rent, shares from Kwa Mating'i, Muka Mukuu, and Kyanzavi shares and from the coffee farm.

58. It is expected that a person to whom a grant of representation has been made would immediately get in and commence the process of administration of the estate by identifying the assets and liabilities of the estate and preserve the same for the purposes of distribution in order to ensure that the estate is not wasted. Failure to do so would lead to consequences provided for in section 94 of the *Law of Succession Act* which states as follows:

When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

59. **In re Estate of Eliud Njoroge Kuria (Deceased) [2015] eKLR** the court stated that:

“On the income collected by the estate agents, it must be stated that such agents are trustees. The income collected by them should be accounted for. It is not their property and they collect it on behalf of others. They must account for it. Of course, the relationship between them and the estate is founded on agency, but on all accounts it is one of trust. They are bound to account for what they have collected and for how they have applied the funds.”

60. This position is based on section 83 of the *Law of Succession Act* provides a hereunder:

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities

of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

61. In the case of M K M & 3 Others vs. B N M [2016] eKLR the court, in summarizing the duties of the administrator stated as follows:

“The respondent, as trustee, was to hold the estate for the applicants and beneficiaries. She was supposed to deal with the property in the estate for the benefit of the Applicants. This was not her property which she could deal with as she wished.”

62. It is therefore clear that the administrators are under legal obligation to, within six months from the date of the grant, produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. This is an automatic legal requirement that does not require either an application or an order from the court. However, they are also obliged in any other case to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. In either case, the catch phrase is **full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith**. Any inventory or accounts that is not full and accurate cannot therefore be said to be in compliance with the law.

63. One of the grounds for seeking to have a grant revoked or annulled under section 76(d)(iii) of the *Law of Succession Act* is that the person to whom the grant was made has failed, after due notice and without reasonable cause 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. Where the said provisions have not been complied with, an applicant is at liberty to move the court for revocation of the grant. As was held in Sardar Khan vs. Gulam Fatuma and Public Trustee (1931) 13 LRK 3, the absence from the country of the executor; delay in the administration of the estate; improper keeping of accounts; maladministration and jeopardy of the interests of the minor children constitute a just cause for the purposes of probate and administration.

64. I agree with the holding in re Estate of Festo Lugadiru Abukira (supra) where the court expressed itself as hereunder:

“However, in view of what I have stated above, it cannot be said that the administrator properly administered the estate. He has not demonstrated compliance with section 83(e) of the Law of Succession Act, concerning rendering of accounts six months after the making of the grant. An account is particularly critical where the manner of appointment of administrator is called to question, and challenges are raised with regard to the handling of the assets. Is he likely to continue administering the estate in accordance with the law upon their being confirmed as administrator" I am of the persuasion that he would not do so given the manner in which he caused himself to be appointed administrator without complying with Rule 26 of the Probate and Administration Rules. It is expected that these processes be done democratically, where all the beneficiaries are carried along, by being notified and kept abreast of goings on in the estate.”

65. It is true that the Applicant, as a beneficiary of the estate of the deceased is entitled to a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. The problem, however, is that in her application, the Applicant has restricted herself to seeking account for all the monies collected for rent, shares from Kwa Mating’i, Muka Mukuu, Kyanzavi and the coffee farm. The Respondents have denied knowledge of the said properties. The law, as I understand it, is that the administrators are only liable to account for the assets and liabilities of the deceased. Therefore, where the administrators deny that the properties for which they are sought to account belong to the deceased, it is the person seeking the order for account to present the evidence to the contrary. In this case, the Respondents in their affidavits denied that these particular properties belong to the deceased. The Applicant could have through a further affidavit adduced evidence showing that the same were part of the deceased’s estate. No such evidence was forthcoming. Accordingly, the application, to the extent that it seeks the rendering of accounts in respect of specified properties which properties have not been shown to belong to the estate of the deceased herein, cannot be granted.

66. The applicant also seeks for revocation of grant of letters of administration. The reasons for doing this are that there was non-disclosure of material facts. According to the Applicant, her consent was neither sought nor obtained at the time the Respondents applied for letters of administration.

67. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

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;

68. Section 51 (2) of the *Law of Succession Act* provides that:-

An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

69. In this case, it is clear that the Respondents herein did not rank in priority to the Applicant since they are siblings, the children of the deceased. Part VI Rule 26(1) of the *Probate and Administration Rules* provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

70. Therefore, what the law requires is that a notification be given to every person entitled in the same degree as or in priority to the applicant. It follows that the Applicant ought to have been notified of the Respondents' intention to apply for the grant. However, a party who is entitled to apply for the same may, by consent, allow another person to do so. Failure to do so would clearly entitle the Court to intervene. *In re Estate of Festo Lugadiru Abukira (Deceased) [2019] eKLR* the court held as follows;

“In the context of the instant proceedings, the contest herein is between the applicant and the administrator, who are siblings. Rule 26 should apply. That would mean that the administrator was bound to comply with the Rule 26 by notifying all his siblings, as they were equally entitled to administration just like him, of his application for representation. The provision in Rule 26, just as that in Rule 7(7), is in mandatory terms. I have closely perused through the record before me, and it is clear to my mind that the administrator did not comply with section 26(1) (2) of the Probate and Administration Rules. He did not notify his siblings of his application, for they neither filed deeds of renunciation nor written consents in Form 38 or 39. Neither did he file the affidavit envisaged in Rule 26(2). He filed affidavits alright but the affidavits he filed were those envisaged in Rule 7(1) of the Probate and Administration Rules, which are in Forms 3 to 6, and not those envisaged in Rule 26(2). The process of obtaining the grant was, therefore, defective to that extent.”

71. In this case the Applicant contends that she never consented to the Respondents taking out the grant. On the other hand, the Respondents contend that the Applicant did consent and that the said consent was recorded as an order of this Court.

72. A consent judgement or order, it has been held can only be set aside on the same grounds as those that warrant the setting aside of a contract. Accordingly, for this Court to find that the said order was improperly obtained, the Applicant would have to apply for it to be set aside. This Court cannot simply ignore it. Secondly, if the applicant contends that she never signed the documents in question, the signatures that purport to be hers would have to be scrutinised and a decision made thereon. Such a determination cannot be made based on cold-print affidavits. It may, in fact, require the taking of viva voce evidence.

73. Based on the material placed before me I am unable to find that the grounds for revocation of the grant have been satisfied. This application falls short of the threshold for revocation of a grant.

74. Having considered the material placed before me in this application, I find it unmerited and disallow the same with no order as to costs.

75. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 3RD DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musau for Mr Musyimi for the Applicant

Mrs Kingoo for the 3rd Respondent and the interested parties

Miss Kaloki for Mr B. M. Mutuku for the 1st and 2nd Respondents

CA Susan.