



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 79 OF 2012**

**IN THE MATTER OF THE ESTATE OF YONAH MAHINDO MWAMBAYI also known as JONAH MAHINDO (DECEASED)**

**JUDGMENT**

1. The certificate of death serial number 276275, dated 27<sup>th</sup> March 2012, indicates that the deceased person to whose estate this cause relates, known as Yonah Mahindo Mwambayi, died on 15<sup>th</sup> October 1987. There is a letter on record from the office of the Chief of Lureko Location, dated 17<sup>th</sup> October 2007, which indicates that the deceased had three sons, being Cleophas Sheunda, Zedekiah Inguyesi and Albert Murunga, to whom he had subdivided the land into three portions, and which had existing boundaries on the grounds. The three sons are said to be all deceased, but were survived by their widows, Brigit Awino Olalo, Selina Awino Inguyesi and Ruth Asira Opwembe. He is said to have had died possessed of South Wanga/Lureko/134. There is also on record another letter by the said Chief, of even date, relating to another property, South Wanga/Lureko/144, indicating that it was the late Zedekiah Absolome Inguyesi who had been left on that parcel of land.

2. Representation to the estate was sought in this cause by Brigit Owino Olalo, Selina Inguyesi and Ruth A. Opwembe, vide a petition filed herein on 3<sup>rd</sup> February 2012, in their purported capacities as widows. There is an affidavit in support of the petition sworn on 2<sup>nd</sup> February in an unknown year, but filed herein on 3<sup>rd</sup> February 2012, by Selina Awino Inguyesi, listing four daughters-in-law of the deceased being Brigit Awino Olalo, Selina Awino Inguyesi, Ruth Asira Ombwembe and Pamela Osimbo,; four grandsons, being Paul Olalo Shienda, Patrick Omwolo Shienda, James Mutondo Shienda and Bethwel Omwolo Murunga,; and three granddaughters, being Caroline Okuku, Sarah Anunda and Beatrice Were Inguyesi; and it expresses the deceased to have died possessed of the two assets mentioned in the Chief's letter referred to above. There is also another affidavit in support sworn by Selina Awino Inguyesi on 24<sup>th</sup> August 2012. The deceased was expressed to have been survived by the three daughters-in-law, three grandsons, being Paul Olalo Sheunda, Patrick Omwolo Sheunda and James Mutondo Sheunda, and a granddaughter, Beatrice Were Inguyesi. He was also expressed to have had died possessed of two assets, being South Wanga/Lureko/134 and 144. Letters of administration intestate were made to the three petitioners on 11<sup>th</sup> July 2012. A grant was duly issued, dated 18<sup>th</sup> December 2012. I shall refer to the three petitioners hereafter as the administratrices. The grant was confirmed on 26<sup>th</sup> April 2013, on an application dated 9<sup>th</sup> October 2012. South Wanga/Lureko/134 was devolved upon Brigit Awino Olalo, Ruth Asira Ombwembe, Selina Awino Inguyesi and Omar Muzee Bakari, in diverse proportions, while South Wanga/Lureko/144 was devolved wholly upon Beatrice Were Inguyesi. A certificate of confirmation of grant issued in those terms dated 8<sup>th</sup> April 2013 and was signed by the Judge on 2<sup>nd</sup> May 2013.

3. The confirmation of the grant dated 18<sup>th</sup> September 2012, provoked the filing of the summons that I am called upon to determine, dated 18<sup>th</sup> March 2014, which seeks revocation of the said grant. It was brought at the instance of Apollo Osoma Maindo, who I shall refer hereafter as the applicant, and he has named the three administratrices, together with Omar Mzee Bakari and Beatrice Were Inguyesi, as the respondents. For the purpose of this judgement, I shall refer to the three administratrices as such, and to Omar Mzee Bakari and Beatrice Were Inguyesi as the 4<sup>th</sup> and 5<sup>th</sup> respondents. The grounds upon which he seeks the revocation are set out on the face of the application, while the factual background is given in the supporting affidavit which he swore on 18<sup>th</sup> March 2014. The grounds on the face of the application aver that the grant was obtained on the basis of concealment of material facts as not all the survivors of the deceased were disclosed. The applicant avers that he was the only surviving son of the deceased, while the administratrices were daughters-in-law of the deceased. It is also averred that the deceased had six sons, some of whose families were left out of the cause. It is also averred that, although at confirmation the 4<sup>th</sup> respondent was given 0.56 HA, he has registered himself a portion that was larger than that, being 1.76 HA, and that he was utilizing that portion in a manner that was offensive to the actual survivors of the deceased.

4. In the affidavit in support, the applicant avers that he was the only surviving son of the deceased, yet the administratrices had excluded him and other survivors of the deceased from the process. He avers that he was still holding the original national identity card of the deceased, and a certificate with respect to the death of the deceased had never been obtained. He states that the deceased had six sons, whose families had been excluded from the process. The names of the six sons were the late Jason Mwambayi Mahindo, the late Jekonia Were Mahindo, Apollo Osoma Maindo, the late Cleophas Sheunda Maindo, the late Zedekiah Inguyesi and the late Albert Murunga Mahindo. He has also listed the wives or the widows, whichever the case, of the six sons and their children. He confirms that the deceased died possessed of the two assets listed in the petition, but adds that the deceased had given each of the sons a piece of land before he died as follows: South Wanga/Lureko/122 to Jekonia Were Mahindo, South Wanga/Lureko/128 to Jason Mwambayi Mahindo, South Wanga/Lureko/131 to Apollo Osoma Mahindo, South Wanga/Lureko/140 to Cleophas Sheunda Mahindo, South Wanga/Lureko/144 to Zedekiah Inguyesi Mahindo, South Wanga/Lureko/145 to Albert Murunga Mahindo and South Wanga/Lureko/264 to Jekonia Were Mahindo. He complains

that the 4<sup>th</sup> respondent was not a survivor or beneficiary of the estate, and, although he was allocated 0.56 HA out of South Wanga/Lureko/134, he had ended up with a lot more of that land than he deserved.

5. The response to application by the administratrices was through an affidavit, sworn by Bright Awino Olalo, on 2<sup>nd</sup> May 2014. She avers, in that affidavit, that the administratrices were daughters-in-law of the deceased, who had been married to sons of the deceased who had since died. She states that the applicant had been given South Wanga/Lureko/131 by the deceased, which measured 4.6 HA. She further states that Cleophas Sheunda Mahindo had been given South Wanga/Lureko/140, which measured 2.5 acres, Albert Murunga Mahindo had been given South Wanga/Lureko/145 which measured 1 acre and Zedekiah Inguyesi Mahindo had been given South Wanga/Lureko/144 which measured 1 acre. She argues that the late husbands of the administratrices had, therefore, been given smaller parcels of land compared with the applicant who was the eldest son of the deceased. The said late sons of the deceased, the husbands of the administratrices, set up their homes on South Wanga/Lureko/134, which had remained in the names of the deceased, although demarcated in favour of the late husbands of the administratrices. She further avers that South Wanga/Lureko/144 remained in the name of the deceased, even though it was given to the late Zedekiah Inguyesi Mahindo. She avers that the deceased died in 1987, but the applicant, who was not entitled to a share in the estate, did not bother to take out letters, hence the three administratrices took the initiative in 2012. She states that the applicant refused to participate in the succession cause. On his having custody of the deceased person's original identification card, she states that they had always believed that the identity card was lost, and she expresses surprise that the applicant had been holding on to it. She asserts that that they, the administratrices, as daughters-in-law of the deceased, ranked equally in consanguinity with the applicant with respect to entitlement to administration. She argues that since the deceased is not entitled to a share in the estate, the grant ought not be revoked since that would only serve to delay the process of distribution of the estate. She avers that the applicant was party to a meeting where South Wanga/Lureko/134 was shared out, and he had indicated that he was not interested in a share in it. She further discloses that the 4<sup>th</sup> respondent had bought additional land out of South Wanga/Lureko/134 from Selina Awino Inguyesi and Ruth Asira Ombwombe, which was subsequently amalgamated with what the 4<sup>th</sup> respondent was entitled to at confirmation of grant. That explains, according to her, why he ended up with 1.76 HA. She also mentions that the 4<sup>th</sup> respondent had donated part of the land, he had bought, for construction of a mosque.

6. She has attached to her affidavit several documents. There are copies of several official search certificates of a number of the assets. The one for South Wanga/Lureko/131 does not indicate the proprietor, all it shows is that the register was closed on 17<sup>th</sup> June 2009. The one for South Wanga/Lureko/140 shows that it was registered in the name of the deceased on 9<sup>th</sup> January 1967, while that for South Wanga/Lureko/145 shows that the same was registered on 9<sup>th</sup> June 1967 in the name of Albert Omurunga. There is copy of proceedings that were conducted before the Assistant Chief of Lureko, on 1<sup>st</sup> November 2010, chaired by the applicant, where an agreement was reached on distribution of the deceased's land, which is not indicated in the documents. Finally, there are four copies of sale agreements between the 4<sup>th</sup> respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> administratrices.

7. The applicant swore an affidavit on 18<sup>th</sup> September 2014, ostensibly in response to that sworn by the administratrices. He avers that South Wanga/Lureko/134 and 144 were registered in the name of the deceased. He avers that the deceased had distributed his assets before he died, leaving him with only the two, South Wanga/Lureko/134 and 144, under his name, and consequently all the survivors of the deceased were entitled to a share in the same. He further avers the administratrices had no authority to sell estate assets before the cause was concluded, and therefore those sales were nullities. He asserts that he never consented to the construction of the mosque and that he never benefited in any manner from its construction. He reiterates that not all the survivors of the deceased had been included in the process.

8. The parties were directed, on 1<sup>st</sup> December 2016, to file witness affidavits. There has been compliance, for a number of witness affidavits have been filed. There are sworn witness statements by two of the administratrices, Brigit Awino Olalo and Selina Atieno Inguyesi, and by Bethwell Omwolo Murunga and Cammy Inguyesi Otambi and Caleb Jamil Omwolo, all sworn on 13<sup>th</sup> December 2016, and another by Omari Muzee Bakari sworn on 19<sup>th</sup> November 2019. On the applicant's side, there are two witness affidavits sworn by Clement Waswa Chaworo and Patrick Mayindo Were, sworn on 10<sup>th</sup> July 2017.

9. The oral hearing commenced on 23<sup>rd</sup> March 2019, with Apollo Osona Maindo, national identity card number 16097048, the applicant, on the witness stand. He testified that he was not aware of the commencement of the succession proceedings here, and that he only became aware of them when the mosque was being constructed. He stated that the 4<sup>th</sup> respondent was a person he had not known previously, and that he was the person that he was seeing on the deceased's land. He stated that the deceased did not sell his land, but he had distributed it before he died, and retained South Wanga/Lureko/134 under his name. He stated that he wanted the court to give him South Wanga/Lureko/134. He stated that all the other sons of the deceased got their shares.

10. During cross-examination, he confirmed that they sat as a family to set aside the contents of a letter dated 10<sup>th</sup> November 2010. He stated that he was not aware that the Assistant Chief and his assistants wrote letters to court stating that the widows of his late brothers were entitled to inherit from the estate. He was referred to a letter dated 1<sup>st</sup> November 2010, and reacted to it by saying that in that letter he distributed the land to the widows of the deceased, but denied doing the same in the letter dated 10<sup>th</sup> November 2010. He stated that he lived on South Wanga/Lureko/131, which is registered in his name, and which measured eleven (11) acres. He stated that he has been on that land since 1967, and that it had been given to him by the deceased. He stated that South Wanga/Lureko/134 was 15 acres. He explained that Jason Wambayi was given South Wanga/Lureko/128 whose acreage was 15 acres, and Jekonia Were got South Wanga/Lureko/264, whose acreage he could not tell. Cleophas Sheunda got South Wanga/Lureko/140, while Zedekiah got South Wanga/Lureko/144 and Albert South Wanga/Lureko/145. He said he did not know about the acreages of some of those parcels of land, but he said that the homesteads of Cleophas, Zedekiah and Albert were on South Wanga/Lureko/134. He stated that he lived on South Wanga/Lureko/134 up to 1965, when he moved out to his own land. He said that he was older than his three dead brothers. He stated that he has never lived on South Wanga/Lureko/134 since 1965, although he farmed on the land. He said that he was surprised to see a mosque coming up on the land. He said that there never saw a sisal boundary on South Wanga/Lureko/134 and he did not see the deceased fixing a boundary on the land in 1982. He also stated that South Wanga/Lureko/131 and South Wanga/Lureko/134 were not adjacent as they were separated by another parcel of land. He confirmed that his dead brothers had been survived by children and, that the widows of his other dead brothers were not objecting. He confirmed that the 4<sup>th</sup> respondent had put up several permanent houses on South Wanga/Lureko/134. He stated that he was bitter with him because he had put up a mosque on the deceased's land. He stated that the administratrices were not trustworthy and he would not give land to them, instead he would share it out amongst six persons, who he did not name. He concluded by saying that the Chief's

letter, that was used to initiate the succession cause, did not include his name.

11. Patrick Mayindo Were, national identity card number 21404544, also known as Rashid Were, followed. He testified that he was a grandson of the deceased, and that his father was Jekonia Maindo Were, a son of the deceased. He stated that his father lived on South Wanga/Lureko/122 and 264. He stated that he was born in 1974, and that he was 13 years old when the deceased died in 1987. He stated further that South Wanga/Lureko/122 and 264 measured 6½ and 2½ acres, respectively. He stated that his family lived on South Wanga/Lureko/1264, where he was raised, and that they never lived nor worked on South Wanga/Lureko/134. He stated that his late uncle, Cleophas lived on South Wanga/Lureko/134, and was buried there, but he used to cultivate on South Wanga/Lureko/140, which measured 2½ acres. He stated that his widow lived on South Wanga/Lureko/134 and cultivated on South Wanga/Lureko/140. He stated that the Zedekiah was also his uncle, who lived on South Wanga/Lureko/134 and cultivated on South Wanga/Lureko/144, which is 1 acre. He mentioned that his late uncle Albert also lived on South Wanga/Lureko/134 and cultivated on South Wanga/Lureko/145, which measured 1 acre. He stated that the applicant never lived on South Wanga/Lureko/134 and that he cultivated on South Wanga/Lureko/131, which was 1½ acres. When shown letters dated November 2010 and 10<sup>th</sup> November 2010, he said that both had his name, but the signature purported to be his was not his. He said that there were boundaries on South Wanga/Lureko/134, but he could not tell who had fixed them. He said that he saw the boundaries when he came of age. He said that he saw the deceased, and the administratrices were farming on South Wanga/Lureko/134 during the deceased's lifetime.

12. Clement Waswa Chaworo, national identity card number 16009413, testified next. He described himself as a clansman of the deceased, but not a member of the family. He stated that the applicant had his own farm, which was not South Wanga/Lureko/134. He stated that he knew the administratrices since birth, and they got married while he was of age, and their houses are on South Wanga/Lureko/134. He stated that he knew Cleophas, Zedekiah and Albert, and said that they lived on South Wanga/Lureko/134, but farmed elsewhere. He stated that the applicant did not live on South Wanga/Lureko/134, although he used to farm it in the past, but not at the time of the deceased's death. He said that he did not know about boundaries on South Wanga/Lureko/134, saying that what he used to see were homes. He said that he did not know whether the 4<sup>th</sup> respondent bought the land, but he built on it, and he did not see anyone chase him away. He said that the 4<sup>th</sup> respondent built a mosque, a shop and a home. He said that the deceased had allocated land to his sons, and retained South Wanga/Lureko/134 to himself. He described Cleophas, Zedekiah and Albert as the youngest sons of the deceased, and explained that the portions of land given to them were the smallest.

13. The case for the administratrices opened on 26<sup>th</sup> November 2019, with Brigita Awino Olalo, national identity card number 0362854, on the stand. She testified that prior to applying for representation, the family had sat and agreed on distribution. The meeting was held on 1<sup>st</sup> November 2010, and minutes were kept by the applicant, and a village elder was in attendance. She stated that at that meeting it was agreed that South Wanga/Lureko/134 would be shared between Cleophas Sheunda, Zedekiah Inguyesi and Albert Murunga, who were all children of the deceased. She described her husband, Cleophas, as having been the eldest son, followed by Zedekiah and the third born was Albert Murunga. She stated that the family did not sit thereafter on 10<sup>th</sup> November 2010 to undo what they had agreed upon on 1<sup>st</sup> November 2010. She stated that the 4<sup>th</sup> respondent bought land from Selina Inguyesi, who needed money to file an affidavit. He then developed the property, by putting up a mosque and a home. He then bought another parcel of land from the widow of Albert Murunga. She stated that the applicant lived 500 hundred metres from South Wanga/Lureko/134, and he could see the constructions going on. She stated that the applicant never lived on South Wanga/Lureko/134, but had been allocated another piece of land elsewhere, where he lived. She identified the piece of land as South Wanga/Lureko/131, which she said measured 12 acres. She stated that she opposed the applicant's application as he was not entitled to South Wanga/Lureko/13 South Wanga/Lureko/134. She said further that the boundaries on South Wanga/Lureko/134 were fixed by the deceased before he died, and nothing had been given to the applicant.

14. During cross-examination, the witness conceded that the applicant had not been listed in the petition as a survivor of the deceased, even though he was a child of the deceased. She conceded that before the deceased died he had given each of his children a farm. Her husband, Sheunda Mahindo, was given South Wanga/Lureko/140 measuring 2½ acres, Albert was given South Wanga/Lureko/145 measuring 1 acre, Zedekiah was given South Wanga/Lureko/144 measuring 1 acre. She said that South Wanga/Lureko/134 remained in the name of the deceased. She said that the administratrices did not involve the applicant in the case as he had given them his okay to go ahead. She stated that the 4<sup>th</sup> respondent was not a son of the deceased, and had not bought land from the deceased, but from the administratrices, after they had obtained the grant in this cause. She stated that the construction of the mosque began after the cause had commenced.

15. Selina Awino Inguyesi, national identity card number 087327, was the next witness. She stated that South Wanga/Lureko/134 was shared amongst three sons of the deceased who have since died. She stated that they left out the applicant of the succession process because he had already been given land, and because South Wanga/Lureko/134 was for the youngest sons of the deceased. She said Hannington Okwako Mwambai, Daniel Inguyesi Mwambai and Naftali Noah Mwambai were sons of one of the elder sons of the deceased, Jason Mwambai Maindo, who had since died, and who had his own land, being South Wanga/Lureko/129, which measured about 20 acres. She stated that the said sons lived on that parcel of land. She further said that another son of the deceased known as Jekonia Were had a piece of land known as South Wanga/Lureko/122 and 264, measuring, in aggregate, 9 acres. She asserted that his children were not laying a claim or stake to South Wanga/Lureko/134. She concluded her examination in chief by saying that it was the applicant who allowed them to apply for representation. She said that at the date of death of the deceased South Wanga/Lureko/144 was still registered in the name of the deceased.

16. During cross-examination, she stated that the families of Jekonia and Jason were not involved in the proceedings, because they were not entitled to a share in the estate, since the deceased had already given them land. She conceded that her husband had also been given land, and what she wished to do in the cause was to take his inheritance. She stated that not every son of the deceased was entitled to a share in South Wanga/Lureko/134. She conceded too that the applicant had not been listed as a survivor of the deceased. She said that when she sold land to the 4<sup>th</sup> respondent, she had involved the applicant, by informing him, although he was not a witness to the sale agreement. She also stated that the family did not sit to agree on the sale. She stated that the land was sold to the 4<sup>th</sup> respondent before they completed succession.

17. Ruth Asira Ombwombe, national identity card number 10004106, was the next witness. She stated that the deceased had given his farms out to his sons. Her husband, Albert Murunga, had been given South Wanga/Lureko/145. She said that she had developed that parcel of land, as she had a home there, and her husband was buried there. She described the property as the place where her matrimonial home was. She said that South Wanga/Lureko/134 was also her land. She conceded that she did not involve the applicant and the families of the other sons

of the deceased in the succession cause. She clarified that she lived on South Wanga/Lureko/134 and tilled on South Wanga/Lureko/145.

18. Omari Muzee Bakari, national identity card number 0520750, followed. He stated that he bought land from two of the administratrices. After which sale he built a mosque and other houses on the land. He stated that he lived on the land. He said that the applicant helped him with the construction, and that he took four years, from 2012 to 2016, to complete the works. He stated that his property on South Wanga/Lureko/134 and the applicant's property on South Wanga/Lureko/131 are separated by a road. He asserted that the applicant knew that he had bought the land and that he was developing it. He conceded that at the time he bought the land, the sellers were not the registered proprietors of the land, since the same was still in the name of the deceased.

19. The last witness was Caleb Jamil Omwolo, national identity card, 3509309. He described himself as a village elder. He testified that the three administratrices visited his home and informed him that they wished to file a succession cause to their husbands' estates. He advised them to go home and sit and agree amongst themselves. They came back and informed him that they had sat under the leadership of the applicant and had agreed that South Wanga/Lureko/134 be shared out between their families of their three dead husbands. They gave him a document that was dated 1<sup>st</sup> November 2010, which he took to the Assistant Chief, who, upon receiving it, the Assistant Chief summoned them. They attended before the Assistant Chief, and confirmed the contents of that document to be what they had agreed upon. The Assistant Chief then wrote for them a letter to facilitate their filing the instant succession cause. He stated that the deceased had in 1982 shared out the land amongst his sons. He fixed boundaries, which the witness said were still intact. He stated that each of the sons were based on South Wanga/Lureko/134, but the applicant was said to be on another piece of land, South Wanga/Lureko/131, which measured 12 acres. During cross-examination, he confirmed that he only met the administratrices, and that the applicant was not with them. He stated that he met with them twice. He further said that he saw the document dated 1<sup>st</sup> November 2010 for the first time when they went to the Assistant Chief. He stated that all the sons of the deceased had been allocated land, save for Zedekiah. The deceased had retained the two parcels to himself, but South Wanga/Lureko/144 was intended for Zedekiah, while South Wanga/Lureko/134 was to be shared out amongst the three sons. He stated that the applicant's land was nearly 12 acres, Albert and Zedekiah's land was 1 acre each, while that for Cleophas was 2 acres.

20. At the conclusion of the matter, the parties were directed to file written submissions, which they did. I have gone through the proceedings and noted the arguments made therein. It is disappointing though that none of the said written submissions make any points of law, for they cite no statutory provisions, nor case law. They are practically of little value to the court in terms of assisting the court with the applicable law.

21. A revocation application is grounded on and its determination pegged on the three general grounds set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The first general ground is captured in section 76(a) (b) (c) of the Law of Succession Act, and it focuses on the process of obtaining a grant. If the process is found to be tainted with defects or improprieties, fraud, misrepresentation and concealment of material facts from the court, then the grant would be liable to revocation. Representation ought to be obtained in a clean and open process that is defined by integrity and propriety. The office of administrator is an office of trust. It is an office in equity. It should be underpinned by fairness and confidence. The process of appointing any person to an office of trust must itself not be undermined by lack of integrity and fairness. Where these qualities lack at these very initial steps of obtaining appointment to office, then the trust and confidence, that the persons beneficially entitled to the assets to be managed by the person seeking that office, would be lost.

22. The second general ground, captured in section 76(d) of the Law of Succession Act, concentrates on the administration of the estate. At this point the court would be dealing with a situation where the process of obtaining the grant is adjudged to have been proper and above board, but the administrator faced challenges with the administration process itself. Such would be the case where an administrator fails to apply for confirmation of their grant within the period prescribed by the law, see sections 71(1), 73 and 76(d) (i). The law envisages that confirmation ought to be sought six months after the grant is made, and at any rate within the year of its making. Going beyond that period without seeking confirmation of the grant would invite revocation of the grant. Distribution of the estate, which comes with confirmation of the grant, is a critical responsibility of the administrator. Indeed, it is the only duty after collection and preservation of the estate and payment of debts and liabilities. An administrator who fails to apply for confirmation of their grant, to pave way for distribution of the estate, would have totally failed in his duties as an administrator.

23. The other case would be where the administrator fails to proceed diligently with administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased, including pursuing debts owing to the estate and moneys payable to the estate by reason of the deceased's death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the timelines set out by the Law of Succession Act. The very fact of being of an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required in law. The office of a personal representative is one of trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason of having appointed the personal representatives through the grants of representation.

24. The third general ground is where the grant has become useless or inoperative on account of subsequent events, that is subsequent to the making of the grant. It would arise where a sole personal representative has died. There would be no person to carry on administration under his grant, rendering the document useless and inoperative. It would also be the case where the administrator suffers disability, whether physically or mentally, rendering him incapable of discharging his duties, such as where he becomes senile or of unsound mind or lapses into a coma from which he does not come out or suffers such debilitating physical injuries that make it practically impossible for him to do anything for himself. An administrator who is adjudged bankrupt would also fall under this category for he would lose capacity, by virtue of section 56 of the Law of Succession Act, and he cannot possibly act as administrator, and the grant he holds would become a useless piece of paper.

25. Section 76 of the Law of Succession Act provides 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.”*

26. In the instant case, the applicant pegs his application for revocation of grant on section 76(a) (b) (c) of the Law of Succession Act, on grounds that the process of obtaining the grant was attended by procedural flaws, fraud and concealment of matter from the court. His principal claim is that the administratrices did not disclose to the court the existence of a large number of survivors of the deceased. The administratrices have responded to the application, and taken the position that they proceeded without the applicants and other survivors because they, the administratrices, were the persons entitled to the property available for distribution, that is to say South Wanga/Lureko/134 and 144, to the exclusion of the other survivors of the deceased, and there was, therefore, no need for them to consult the applicant and the others. They have also argued that the applicant had consented to their going ahead to apply for representation to the estate of the deceased.

27. It is common ground that when the administratrices sought representation to the estate, they projected themselves as the sole survivors of the deceased. The letter they obtained from the Chief only listed the three of them. They swore an affidavit to support her petition where they presented themselves and their children as the only survivors of the deceased. That was repeated in their affidavit in support of the application for the confirmation of grant. They have conceded that there were other survivors of the deceased, that is to say a surviving son of the deceased and children of two other sons of the deceased who had themselves died.

28. The deceased died intestate in 1987, after the Law of Succession Act had come into force on 1<sup>st</sup> July 1981. Representation to his estate was, therefore, subject to administration in accordance with the provisions of the Act. The persons who qualify to apply for administration in intestacy, for the deceased died intestate, are set out in section 66, which gives an order of priority or preference, to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

*“66. Preference to be given to certain persons to administer where deceased died intestate*

*When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect.”*

29. According to that provision, the court should to be guided by Part V of the Act, which sets out the order of priority in entitlement to a share in the estate of the deceased. Priority is given to the surviving spouse, followed by the children of the deceased, followed by parents of the deceased, in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter. The same applies with regard to entitlement to administration by dint of section 66. The surviving spouse has priority to administration, followed by the children, parents of the deceased, siblings, other relatives up to the sixth degree, the Public Trustee and creditors in that order. When that that provision is applied to the instant case, it would follow that the daughters-in-law of the deceased, the administratrices herein, do not have priority to appointment as administratrices over the children of the deceased, including the applicant, and the grandchildren of the deceased.

Indeed, daughters-in-law do not feature at all in Part V and section 66 of the Law of Succession Act. They are not ranked anywhere in those provisions, instead it is their children, in their capacity as grandchildren of the deceased, who have a ranking, and, therefore, priority over their mothers with respect to administration of the estate.

30. I note that when they lodged their petition herein on 28<sup>th</sup> June 2012, the administratrices also lodged a consent in Form 38, signed by the three of them administratrices. Was the said consent necessary in the circumstances? Rule 7 of the Probate and Administration Rules sets out the procedure for applications for representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitioner to apply for representation. The provisions of section 66 of the Act, which I have set out above, should be read together with Rule 7(7) of the Probate and Administration Rules, which states as follows:

*“7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*

*(a) renounced his right generally to apply for grant; or*

*(b) consented in writing to the making of the grant to the applicant; or*

*(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. “*

31. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

*“26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*

*(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”*

32. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

33. The administratrices in the instant cause, being daughters-in-law, had no right to administration over the children and the other relatives of the deceased, going by section 66 of the Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the daughters-in-law had to comply with requirements of Rules 7(7) and 26, since those provisions apply to persons like them, who seek representation while they had lesser right to administration or no right at all. They should have obtained the consents of the children and grandchildren of the deceased. The two provisions require execution of Form 37, or its equivalent, by individuals who had a superior right to representation over the administratrices. There were such persons, the applicant herein and grandchildren of the deceased, being children of the dead sons of the deceased. The administratrices should have obtained the consent of applicant and of the grandchildren of the deceased. They did not, and, therefore, there was no compliance with Rules 7(7) and 26 of the Probate and Administration Rules. The administratrices filed a consent in Form 37, but the same was a useless piece of paper, as it was not signed by the persons who ought to have signed it, instead it was signed by the administratrices themselves. Much as I have tried to, I have been unable to understand what they were consenting to.

34. The other issue for consideration is the question of the omission of the applicants, and other immediate survivors of the deceased, from the list of beneficiaries. The record before me indicates that the administratrices approached this matter in a manner that suggested that they were the only persons who survived the deceased. The letter they obtained from the Chief implied so. One would have expected that the Chief, who was expected to know the individuals who had survived the deceased, or should have at least enquired before he wrote the letter, so that he could give the court more reasonable or credible information on the actual state of affairs. Instead, he appears to have had colluded with the administratrices to paint the unreal picture that the deceased had been survived by only three individuals, themselves. They perpetuated that lie in the petition. They swore an affidavit to support their petition, where they averred that they were the sole survivors of the deceased. They compounded that lie when they sought confirmation of their grant. They swore an affidavit to support that application where they listed themselves as the sole survivors the deceased. They conceded in their response to the revocation application that the deceased had other children apart from their husbands, Cleophas, Alfred and Zedekiah. They also conceded that their dead brother-in-law had been survived by children. These individual brothers were concealed from the court.

35. Does the law require disclosure of these other relatives of the deceased? The framework for applications for grants of representation is section 51 of the Law of Succession Act. The most relevant provisions are in section 51(2)(g)(h), which state as follows:

*“Application for Grant*

*51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and*

witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(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)..."

36. Under section 51(2) (g) the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administratrices herein only disclosed themselves, but not the only surviving son of the deceased and the children of the other dead sons of the deceased. They have conceded in their response to the revocation application, and at the oral hearing, that such close relatives of the deceased existed, yet they did not disclose them in the petition, and, therefore, there was no compliance with section 51(2) (g).

37. The administratrices were obliged to disclose the surviving son of the deceased and the grandchildren of the deceased, whose own parents were dead. This is required because, as daughters-in-law, they were not entitled to the intestate estate of their deceased father-in-law. I appreciate that they were claiming the share due to their own dead husbands, who were themselves children of the deceased. However, the scheme of distribution provided for in Part V does not give daughters-in-law any right to inheritance, for inheritance is to the blood relatives of the deceased. A daughter-in-law is not a blood relative of the deceased, and, therefore, she is not entitled directly to inherit from the estate of her father-in-law. It is her children who have a blood connection with the deceased. It is her children who are entitled to inherit, and, therefore, it is them who ought to be disclosed.

38. Closely related to that is the issue of appointment of daughters-in-law as administratrices. The entitlement to appointment as administrators in intestacy is stated in section 66. The application of section 66 is itself dependent on Part V of the Act. Daughters-in-law do not feature at all in the list of the persons who are entitled to appointment as administrators. As stated elsewhere their children have a superior right than them. The only time they, as daughters-in-law, qualify, and, are suitable for appointment, is where, the children are minors, or have consented to their mothers applying, and the daughters have obtained representation to the estates of their own late husbands. Holding the grant would entitle them to stand in the place of their dead husbands as children of the deceased. That is the only way they can play a role in administration, otherwise, without a grant of representation to the estates of their dead husbands, they are rank outsiders. Their position is very weak.

39. The daughters-in-law have justified their exclusion of the persons that they ought to have disclosed on grounds that those persons had benefited from *inter vivos* transfers by the deceased. Indeed, all the sons of the deceased were shown to have had benefited from the lifetime transfers. The case by the administratrices is that the applicant and the other dead sons were older than their own husbands, and they got larger portions of the land compared with them, and, therefore, it was their husbands who were entitled to the two parcels of that were in the deceased's name.

40. The position stated by the administratrices may well be so, but distribution of estates is the prerogative of the court. It is not for the parties to decide who gets what and who should not get a share in the estate of the deceased. That is the responsibility of the court, guided by the law. The persons, who approach the court for representation to the estate of the deceased, are expected, by section 51(2)(g) of the Law of Succession Act, which I have set out above, to disclose all the persons who survive the deceased, be they spouses or children or siblings. That is the law. Disclose them, whether they take a share in the estate or not. The question of who should get a share in the estate is resolved at confirmation of grant, and not at the stage of appointment of administrators. Part V generally envisages equal distribution of the property of an intestate amongst his children. To achieve that equal balance, section 42 of the Act, requires the court to take into account any *inter vivos* transfers in determining the share of the net intestate estate finally accruing to each of the children. That should mean that lifetime distribution of the assets by an intestate is taken into account at confirmation. It is often referred to bringing such property to the hotchpotch. For such *inter vivos* transfers to be taken into account, the persons who benefited from them must be part of the process of confirmation, and they cannot be part of it unless they have been disclosed in the petition and generally involved in the whole matter.

41. For avoidance of doubt, section 42 of the Law of Succession Act provides as follows:

“42. *Previous benefits to be brought into account*

*Where—*

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”*

42. The exclusion of persons who previously benefited from the assets of the intestate, no doubt, creates the scenario that we are currently in, where the administrators come to the tail end of the process, at confirmation, only for those excluded from it to surface and drag the process back to the beginning. If they had been involved right from inception, the issues they now raise would have been tackled at confirmation of grant. Indeed, all the material that was placed before me, with respect to the revocation application, is material that should have been placed before the court at the confirmation hearing, so that the court could apply section 42 to the situation. The failure to include crucial stakeholders in the process created gaps, which are now sought to be sealed through the revocation process.

43. A case for revocation of the grant herein has been made out successfully. The conduct of the administratrices, from the very inception of the matter to its conclusion, clearly points to the fact that they did not merit appointment as administratrices, since there were persons alive who had prior right to administration over them, who they excluded from the process. The process of obtaining the grant was defective, and was attended by fraud, misrepresentation and concealment of matter from the court.

44. The grant herein ought to be revoked. After revocation, fresh administrators ought to be appointed, who should thereafter seek confirmation of their grant in a process that should include all the children, grandchildren and other persons beneficially entitled in the estate. The fresh administrators should strive to comply fully with the requirements of section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules.

45. The last thing to deal with is with respect to the position of Omari Muzee Bakari, the 4<sup>th</sup> respondent, who allegedly bought some of the estate’s assets from two of the administratrices. The said sales took place on 15<sup>th</sup> August 2012 and 8<sup>th</sup> October 2012. The grant herein was confirmed on 26<sup>th</sup> February 2013, where the interests that the 4<sup>th</sup> respondent had allegedly acquired were incorporated and he was allocated 0.56 HA. The applicant has raised issue with that. Is there any merit in that challenge?

46. Section 82(2)(ii) of the Law of Succession Act states as follows:

*“82. Powers of personal representatives*

*Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*

*Provided that—*

*(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*

*(ii) no immovable property shall be sold before confirmation of the grant;*

*(c) ...”*

47. The provision in section 82(2)(ii) is to the effect that immovable property of an estate ought not be sold before the grant is confirmed. The provision is in mandatory terms. Sometimes the exigencies of the estate may require that an asset be sold before confirmation to settle a debt or to pay for maintenance of survivors. Under section 82 of the Act, the administrators have power to sell estate assets, however section 82(2)(ii) bars exercise of that power with respect to immovable property. Where immovable has to be sold, to avoid conflict with section 82(2)(ii), the administrators ought to obtain leave of court to sell it.

48. The transactions that the two administratrices entered into with the 4<sup>th</sup> respondent happened in 2012, while the grant was confirmed in 2013. Consequently, the said transactions fell afoul of section 82(2)(ii), since they were with respect to immovable property. There is no evidence that this court authorized the sales. It means, therefore, the said transactions were not sanctioned by the law. It would appear that such transactions are illegal since they would have been effected against the law.

49. However, there is section 93 of the Law of Succession Act, which appears to provide some cover for such transactions. The provision reads:

*“93. Validity of transfer not affected by revocation of representation*

*(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the*

*commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.*

*(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”*

50. I believe section 93(1) is what is relevant for the purpose of this application. It appears to cover all forms of transfers of immovable property to a purchaser, and it appears to say that such transfers are protected from the revocation of grant. If it applies to all transfers, then it would mean that it completely renders section 82(2)(ii) ineffective. It would suggest that when section 82(2)(ii) is read together with section 93(1), a sale of immovable property before confirmation would be valid and would be unaffected by revocation of the grant. I doubt that that was what was intended by the drafters of the Law of Succession Act. To hold otherwise would be to give a licence to administrators to dispose of immovable property before confirmation, with the comfort of knowing that such transactions would be protected under section 93. I shall, therefore, hold that the provisions of section 93(1) do not include transactions carried out in violation of section 82(2)(ii) of the Law of Succession Act.

51. Regarding the transactions between the 4<sup>th</sup> respondent and the two administratrices, I shall make no pronouncement on their validity, and shall leave it to the court that shall be seized of the confirmation application to be filed by the administrators to be appointed hereafter.

52. In the end, the final orders that I shall make in this matter are as follows:

**(a) That I hereby revoke the grant of letters of administration intestate made herein on 11<sup>th</sup> July 2012 to Brigit Awino Olalo, Selina Awino Ingyesi and Ruth Asira Opwombe;**

**(b) That as a consequence of (a) above, the orders made on 26<sup>th</sup> February 2013 confirming the said grant are hereby vacated, and the certificate of confirmation of grant issued on and dated 8<sup>th</sup> April 2013 is hereby cancelled;**

**(c) That if any transactions were carried out on the strength of the said certificate of confirmation of grant, now cancelled under (b) above, the said transactions shall be unaffected and their validity shall be addressed at the hearing of a confirmation application to be filed hereafter;**

**(d) That fresh administrators shall be appointed hereafter, who shall include the applicant and three other individuals to represent the families of the five dead sons of the deceased;**

**(e) That the matter shall be mentioned, on a date to be appointed at the delivery of this judgment, for the purpose of appointment of fresh administrators;**

**(f) That the new administrators shall thereafter file for confirmation of their grant, in which they shall comply fully with section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules;**

**(g) That each party shall bear their own costs; and**

**(h) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF MAY, 2020**

**W. MUSYOKA**

**JUDGE**