



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 41 OF 2019

MICHAEL ODHIAMBO AYIMBA.....APPELLANT

VERSUS

PETER OTIENO OGUTU.....1ST RESPONDENT

ALOYS AYIMBA OGUTU.....2ND RESPONDENT

BETWEEN

PETER OTIENO OGUTU.....1ST PETITIONER

ALOYS AYIMBA OGUTU.....2ND PETITIONER

-VERSUS-

MICHAEL ODHIAMBO AYIMBA.....OBJECTOR

(An appeal from the judgment and decree of Hon. T.M Olando – Senior Resident Magistrate delivered on the 13th September 2019 in Siaya Succession Cause No. 9 of 2018)

JUDGMENT VIA SKYPE

1. This appeal arises from the Judgment and decree of Hon. T.M Olando – Senior Resident Magistrate delivered on the 13th September 2019 in Siaya Succession Cause No. 9 of 2018.

2. Before the trial Court for determination were Summons for Revocation of grant filed by the appellant herein pursuant to Rule 76 of the Law of Succession Act where the appellant herein prayed for the orders that:

a) The letters of administration of the estate of Paul Ogutu Ayimba alias Paulo Ogutu Ayimba –deceased granted to Peter Otieno Ogutu and Aloys Ayimba Ogutu (Respondents herein) on 5th December 2018 be revoked.

b) A Grant of letters of administration intestate to the deceased be issued in jointly to the Applicant (Appellant) Michael Odhiambo Ayimba jointly with Rahael Obong’o Ogutu, Aloys Ayimba Ogutu and Peter Otieno Ogutu.

c) Costs be borne out of the estate of the deceased

3. The said application was opposed by the Respondents herein on the grounds as pleaded by the applicant in his summons for revocation of grant and prayed that the application be dismissed.

4. Vide the orders of 17.7.2019, the parties agreed that the application be canvassed by way of written submissions and after each party’s advocates had filed their respective submissions, the ruling was reserved for delivery and was delivered on 13th September 2019 where the trial magistrate dismissed the application for revocation of grant and proceeded to confirm the grant issued, as prayed in the summons for confirmation of grant.

5. It is the above ruling and decree that gave rise to this appeal lodged vide a Memorandum of Appeal dated 8th October 2019 and filed in court on 10th October 2019. The appellant set out the following grounds of appeal:

- 1. The learned trial magistrate erred in fact and in law in failing to direct his mind properly on the principles governing the revocation of grant and as a result, arrived at a wrong decision in law;*
- 2. The learned trial magistrate erred in fact and in law in failing to ascertain the beneficiaries to the deceased's estate and their respective shares;*
- 3. The learned trial magistrate erred in fact and in law in declining to revoke the grant issued to the Respondent on 5th December 2018 when the Appellant/ Objector had established that the grant had been obtained by means of fraud and concealment of material facts;*
- 4. The learned trial magistrate erred in fact and in law in confirming the grant notwithstanding the Applicants having failed to include a full inventory of all the deceased's assets;*
- 5. The learned trial magistrate erred in fact and in law in confirming the grant of letters of administration intestate notwithstanding having duly observed that the estate of the deceased had been meddled with;*
- 6. The learned trial magistrate erred and grossly misdirected himself in finding and holding that the Appellant (Applicant/ Objector) had intermeddled with the deceased's estate when there was no evidence and basis for such finding;*
- 7. The learned trial magistrate erred in fact and in law by failing to remedy the perceived intermeddling with the deceased's properties;*
- 8. The learned trial magistrate erred in fact and law by failing to resolve that the family dispute and instead compounding it by confirming the grant in the midst of an unresolved protest by the objector;*
- 9. The learned trial magistrate erred in fact and in law in confirming the grant when there was a pending application dated 2nd August 2019 seeking revocation of the grant;*
- 10. In confirming the grant, the trial magistrate was not guided by law but by other extraneous factors; and*
- 11. The learned trial magistrate erred in fact and in law in failing to sufficiently take into account all the evidence presented before him in totality and in particular the submissions and authorities presented on behalf of the appellant.*

6. The appellant prayed that the appeal be allowed and the judgment of the trial magistrate delivered on 13th September 2019 be set aside and thereby be substituted with an order allowing the appellant's application dated 16th July 2019. The appellant further prayed for costs of the appeal and of the application dated 16th July 2019.

7. When the appeal came up for hearing, parties herein took directions that the same be disposed of by way of written submissions and pursuant to these directions, the parties filed their written submissions.

SUBMISSIONS

8. In his written submissions, the appellant in support of the appeal submitted and in support of grounds 1,9 and 11 that the learned trial magistrate failed to address his mind to the principles governing revocation of grant and thus arriving at a wrong decision and that he did not apply his mind to the provisions of section 76 (1) of the Law of Succession Act which creates the locus to apply for revocation of grant and that neither did he hear the evidence of the appellant despite his protest to the confirmation of grant which was done without hearing the parties and despite there being another application for revocation of grant by another beneficiary. The appellant further claimed that the trial court did not take into consideration the consent recorded by the appellant and the 1st Respondent in Siaya SRM ELC No. 7 of 2018 and which was binding on the parties herein and which made the first house to be left without an administrator.

9. It was further submitted on behalf of the appellant that the trial magistrate erred in not considering that notice was never issued to all the beneficiaries and further that there was failure to disclose all assets which amounted to material non-disclosure and concealment of material facts. He claimed that such an asset left out was **LR Siaya/ Karapul Ramba/ 335** where the deceased and his descendants were buried and which had been registered in the names of George Ayimba Ogutu and which was done after the death of the deceased who was the registered owner and which land was subsequently sub-divided and thus the trial court failed to consider that there was intermeddling.

10. Further submission was that copies of green cards and official searches were provided and which showed that the deceased owned other land parcels which were never included and were not part of the assets which were confirmed for distribution. As such, the appellant submitted that the trial court did not consider the contention that the grant was obtained fraudulently and by means of untrue allegation of a fact essential in point of law to justify the revocation of the grant in the circumstances and would which have persuaded the court into revoking the grant and rehear the parties.

11. It was further submitted that the trial court failed to consider the assertion that the respondents failed to disclose the fact that there were other beneficiaries who included adult grandchildren of the deceased and who resided on parcels of land subject of the succession proceedings and which beneficiaries were left out in the affidavit of means (affidavit in support of petition for letters of administration). Further, that several beneficiaries had intermeddled in the estate of the deceased and transferred the same without succession proceedings being undertaken. He submitted that if the trial court opted to hear the parties orally, he would not have confirmed the grant as he would have realized that the same ought to be revoked.

12. In support of the ground 2 of the memorandum of appeal, the appellant submitted that the trial court did not ascertain the beneficiaries and their respective shares as the application for confirmation of grant was never heard and further, that there were other family members who included one Raphael Obongo Ogutu and who was living on land parcel No. **Siaya/ Karapul Ramba/ 2083** and who were never included as beneficiaries of the estate.
13. In support of ground 3 of the memorandum of appeal, the appellant submitted that the trial magistrate failed to consider the two death certificates which were attached to the applicant's affidavit and which belonged to the deceased but issued on different dates (one on 27th January 1993 and the other on 22nd March 2002) and that it was unusual for one person to have two death certificates. Further, that the grant was obtained fraudulently by making false statement or by concealment from court of something material to the case in that there was in existence a court order in Siaya SRM ELC No. 7 of 2018 through consent of the parties to the effect that the appellant together with one Raphael Ogutu Ayimba were to be added as joint administrators of the estate of the deceased to represent the first house and that if the trial court considered this, it could have been persuaded to grant prayer 2 of the application for revocation of grant and exercise its powers under section 66 of the Law of Succession Act.
14. In support of ground 4 (failure to include full inventory of the deceased assets), the appellant submitted that family members of the deceased's family were living on **LR Siaya/ Karapul Ramba/ 355**, where the deceased and all those who predeceased him were buried and that despite the appellant availing the green card and the official search for the said land showing that the deceased was the owner of the said land, and thereby proving that the respondent had failed to disclose all the assets of the deceased, the trial court failed to consider the same and that this would have influenced the court to, at least, hear the parties in evidence.
15. In support of ground 5, 6 and 7 of the memorandum of appeal (intermeddling), it was submitted that the trial court was never persuaded by the fact that there was intermeddling in the estate of the deceased and therefore proceeded to confirm the grant without ascertaining the level of intermeddling and thus it was unsafe to confirm the grant where evidence of intermeddling by the beneficiaries had been availed to the court and without ordering the reversion of the property intermeddled to the names of the deceased.
16. On grounds 8 and 10, it was submitted that it was clear that the grant was obtained by means of untrue allegations of facts essential on a point of law to justify revocation of grant and that the untrue allegations were made deliberately so as to steal a match, settle family scores and to mislead the court and further that the grant was being used as a tool of oppression to harass, intimidate and frustrate family stability and on this ground this court was urged to revoke the grant. Further submission was that the trial court did not hear the affidavit of protest in evidence yet it was supposed to do so.
17. The appellant invited this court to re-evaluate and reconsider the whole circumstances of the case and find that the trial court ought to have revoked the grant as there was sufficient material to prove that the proceedings to obtain the grant were defective; and that the grant was obtained fraudulently and by means of untrue allegations of facts essential in point of law. The appellant prayed that the appeal be allowed, the grant issued be revoked and in exercise of the court's power under section 66 of the Law of Succession Act, a fresh grant be issued as had been prayed in the summons for revocation of grant. The appellants alternatively prayed that upon revocation of the grant, the matter be remitted back to the subordinate court for hearing afresh of the summons for confirmation of grant and the protests against the confirmation on record and thereafter, before confirmation, the family members as may desire, be heard on the distribution and determination of the beneficiaries and their respective shares according to the law.
18. The respondents on their part submitted opposing this appeal and contended that section 29(a) of the Law of Succession Act provides for the priorities and that the appellant did not fall under section 29 of the Act as he was one of the grandchildren to the deceased. Further, that the appellant did take out letters of administration for his deceased father's estate one Michael Ayimba Ogutu alongside his mother Mary Ayimba vide **Nairobi High Court's Succession Cause No. 1587 of 1993** hence, he ought not to interfere with the respondents' taking out of letters of administration to the estate of their deceased father.
19. Further submission on behalf of the Respondents were that the said Michael Ayimba Ogutu had already benefitted from the estate of the deceased as he was given LR Siaya/ Karapul Ramba/ 272 in respect of the 1st family and/ or house and for the 2nd family/ house, the deceased had given out LR Siaya/ Karapul Ramba/ 1718 to Vitalis Nyapola Ogutu (deceased) and who sub-divided into two parcels (LR Siaya/ Karapul Ramba/ 5177 and 5178) and further that to the 3rd family the deceased had given out LR Siaya/ Karapul Ramba/ 1730 to Lucas Wayodi Ogutu (deceased) who had sub-divided the same into two parcels being LR Siaya/ Karapul Ramba/ 3539 and 3540 and further that LR Siaya/ Karapul Ramba/ 1694 was given to Aloys Ayimba Ogutu and Lucas Wayodi Ogutu (deceased).
20. It was submitted that the appellant was in occupation of LR Siaya/ Karapul Ramba/ 4766 where the entire homestead is built and which land was sub-divided from LR Siaya/ Karapul Ramba/ 335 by the late George Ayimba. As such, it was submitted that the only property left behind for succession and which was still in the deceased's name were LR Siaya/ Karapul Ramba/ 2083, 466 and 308 and which the Respondents had distributed equally amongst the 3 families and had included the appellant's mother as the beneficiary by virtue of being the wife to the appellant's deceased father (Michael Ayimba Ogutu).
21. Further submissions on behalf of the Respondents were that efforts to get members of the 1st family after the consent recorded in court were futile and hence the Respondents had filed citations which gave birth to the succession proceedings subject of this appeal.
22. Further submission was that the Appellant filed the Summons for Revocation of grant, 256 days after the date of publication of notice in the Kenya Gazette and that at the time of filing the same, he had already been served with Summons for Confirmation, which Summons had proposed mode of distribution of the estate of the deceased. It was therefore submitted that the Appellant had a window period to object to the making of grant of letters of administration from the date of gazettement, which he ignored therefore, the same could not be revoked as sections 67 and 68 of the Law of Succession Act are clear on the timeframe within which to challenge the issuance of grant of letters of administration.
23. It was further submitted that the said Summons for Revocation of Grant were filed without leave of court to file the same out of time and thus in defiance of sections 67 and 68 of the Law of Succession Act. Further, that under section 76 of the Law of Succession Act, the prayers

therein could only be granted through revocation of Certificate of Confirmation of Grant and/ or that the appellant could only challenge the mode of distribution in the petition for grant in the estate of the deceased and that Form P&A 41 could only be entertained by the court after confirmation of grant as sections 67 and 68 stipulates the manner to be followed by way of filing an objection and not Summons for Revocation of Grant, a chance which the appellant had squandered. The Respondents thus prayed for the dismissal of the appellant's appeal.

Analysis and Determination

24. This being a first appeal, the court is obliged pursuant to the provisions of section 78 of the Civil Procedure Act to: **determine a case finally; remand a case; frame issues and refer them for trial; take additional evidence or require the evidence to be taken; or order a new trial and in doing so, the court ought to have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.**

25. The above provisions were the subject of interpretation by the **Court of Appeal in Sielle v Associated Motor Boat Company Ltd. [1968] EA 123** where it was held, *inter alia*:

***“This court must consider the evidence, evaluate it itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*”**

26. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga – versus- Kiruga & Another (1988) KLR 348**).

27. Applying the above established legal principles, and revisiting the evidence adduced in the trial court, the appellant herein filed Summons for Revocation of grant and premised the said Summons on the grounds on the face of the application and further on the supporting affidavit sworn by the appellant herein and basically the appellant's deposed that the grant was defective in substance and was issued contrary to the consent orders which had been recorded in court in Siaya SRM ELC 7 of 2018 (that he be appointed as co-administrator) and that they he had been in occupation of land parcel 308 together with his mother.

28. He deposed further that there was no notice issued to other beneficiaries and further that there was failure to disclose all the assets of the deceased, there was failure to disclose all the beneficiaries, there was intermeddling by the beneficiaries, that land parcel 335 had been left out and yet it was where majority of the beneficiaries were living on and where the deceased and the descendants were buried. As such he was opposed to the mode of distribution as suggested in the summons for confirmation of grant.

29. The said application was opposed by the Respondents herein vide a Replying affidavit dated 31st July 2019 and filed in court on the same day and where they deposed that the Appellant herein lacked the locus standi to file the said application by virtue of section 29 of the Law of Succession Act and further that the appellant did take letters of administration for his deceased father's estate one Michael Ayimba Ogutu alongside his mother Mary Ayimba vide Nairobi High Court's Succession Cause No. 1587 of 1993 as such he ought not to interfere with the respondents' taking out of letters of administration to the estate of their deceased father and further that the appellant's father had already benefitted from the estate of the deceased where he was given LR Siaya/ Karapul Ramba/ 272 in respect of 1st family and/ or house.

30. Further it was deposed that the deceased had started distributing his estate to his households and left behind LR Siaya/ Karapul Ramba/ 2083, 466 and 308 to be shared amongst other beneficiaries. The said distribution was expounded in paragraphs 8-10. That the appellant was in occupation of LR Siaya/ Karapul Ramba/ 4766 where the entire homestead is built and which land was sub-divided from LR Siaya/ Karapul Ramba/ 335 by the late George Ayimba but, that they had included the appellant's mother as the beneficiary by virtue of being the wife to his deceased father (Michael Ayimba Ogutu). That they did not go against the consent recorded in court but only that efforts to get members of the 1st family after the consent recorded in court were futile despite several reminders to the Appellant's advocates on record at the time of recording the consent. That the Appellant had a window period to object to the making of the letters of administration from the date of gazettment but he did not challenge and as such, the same could not be revoked as sections 67 and 68 were clear on the timeframe within which to challenge the issuance of the letters of administration. The Respondents thus prayed that the application be dismissed.

31. The parties took directions that the application be canvassed by way of written submissions and after each party filed its submissions in support of its case and, the trial court delivered its ruling on 13th September 2019 where it dismissed the application for revocation of grant and proceeded to confirm the grant as prayed.

ISSUES FOR DETERMINATION

32. I have carefully considered the appeal herein and the written submissions by both the appellant and the respondents. I have also reassessed the affidavit evidence adduced in the trial court by both the applicant (appellant herein) and the Respondent (Respondent herein).

33. From the trial court record, it is undisputed that the Respondents herein petitioned for letters of administration intestate for the estate of Paul Ogutu Ayimba alia Ogutu Ayimba alias Paulo Ogutu Ayimba (deceased) vide the petition filed in the Principal Magistrate's Court at Siaya (Succession Cause No. 9 of 2018). It is further not in dispute that grant of letters of administration intestate was subsequently issued to the Respondents herein on 5th December 2018. In addition, it is not disputed that the appellant herein is a grandson of the deceased whereas the Respondents are children of the deceased meaning they are brothers to the late father of the appellant. It is this grant of letters of administration which the appellant sought to revoke and have him be included as one of the administrators together with the Respondents

herein.

34. With the above undisputed facts, this court finds the following issues as relevant for determination in this appeal:

1. *Whether the appellant had the locus standi to file the application before the trial court?*
2. *Whether based on the evidence presented before the trial court, the grant issued by the trial court on 5th December 2018 ought to be revoked?*
3. *Whether the proceedings leading to confirmation of the grant were proper?*
4. *Whether the application was proper in court*
5. *Conclusion/ what orders the court ought to grant?*

DETERMINATION OF ISSUES

35. **On Whether the appellant had the locus standi to file the application before the trial court?** It is trite law that pleadings filed in court by persons with no locus standi are void ab initio and the court does not have jurisdiction over such. As it was rightfully observed in by R. Nyakundi J in **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] Eklr:**

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.”

36. In their replying affidavit to the Summons for Revocation of grant, the Respondents herein deposed that the Appellant herein lacked the locus standi to file the said application by virtue of section 29 of the Law of Succession Act. This was reiterated in their submissions before the trial court and in the submissions which they filed before this court in opposing this appeal.

37. Section 76 of the Law of Succession Act provides:

“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...”

38. What this section means is that applications for revocation of grant is not limited to only beneficiaries but to any interested party. **“Interested party”** was defined in **Mercy Njoki Irungu v Lucy Wamuyu Maruru [2016] eKLR** in the following terms:

“Interested person” or “person interested in an estate” includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a proprietary right in or claim against a trust estate or the estate of a deceased, ward, or protected individual or a person that has priority for appointment as personal representative; and a fiduciary representing an interested person...”

39. The Respondents in their Replying affidavit deposed that the appellant did take letters of administration for his deceased father’s estate one Michael Ayimba Ogutu alongside his mother Mary Ayimba vide Nairobi High Court’s Succession Cause No. 1587 of 1993 as such he ought not to interfere with the respondents’ taking out of letters of administration to the estate of their deceased father. However, as a co – administrator, the appellant had a duty in law to protect his deceased father’s interest in the estate of his deceased grandfather.

40. In **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party (supra)** the Learned judge held as follows:

*“The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In **Otieno v Ougo [1986-1989] EALR 468**, the Court rendered itself thus: “... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”*

41. *Under Section 76 of the Law of Succession Act, any party interested in the estate of the deceased may bring the application contemplated under that section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules.*

Rule 17(1) of the Probate & Administration Rules provides that:-

“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so.”

The evidence on record suggest that the Applicant herein brought these proceedings on behalf of his father; Abdi Ibrahim Hassan

(deceased) who was the beneficiary to his father's estate. The Applicant's interest emanates from the fact that his father was a beneficiary to the suit property, thus the Applicant being dependent to his father Abdi Ibrahim Ibrahim's estate within the provisions of section 29 of the Law of succession Act, he acquires an interest in his grandfather's estate; the suit property by virtue of his father's share. Therefore, in the court's view, the instant Application is properly before this court

42. In my humble view, therefore, it is clear that the appellant had the *locus standi* as he was the co-administrator in his deceased father's estate. His father was the brother to the Respondents herein. He was rightfully before the court so as to fight for the interests of the estate of his late father with regard to the deceased grandfather's estate. The fact that he was a dependant of his father's estate, he acquired interest over the deceased's grandfather's estate and thus he had the necessary *locus standi*.

43. On whether based on the evidence presented before the trial court, the grant issued by the trial court on 5th December 2018 ought to be revoked? Revocation of grant is provided for under section 76 of the Law of Succession Act. The section provides as follows:

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

a) that the proceedings to obtain the grant were defective in substance;

b) that the grant was obtained fraudulently by 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."

44. The question therefore is whether there exists any of the above conditions and whether the appellant was able to prove such a condition? The Appellant raised as one of his grounds in support of his summons for revocation of grant and in the affidavit in support of the said summons the fact that **the grant was defective in substance** as it was issued contrary to the consent orders which had been recorded in court in Siaya SRM ELC 7 of 2018 and further that several other beneficiaries were never issued with notice and thus there was material non-disclosure and concealment of material facts. In their response to the said summons and further in their submissions before this court, the Respondents position was that they had not gone against the said consent but only that efforts to get the members of the 1st family were futile despite several reminders to the advocate who was on record at the time of signing the consent.

45. The Supreme Court of India in **Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others** ([1955] AIR 566, [1955] SCR (2) 270) while interpreting their equivalent of Section 76 (a) held that:

"the expression "defective in substance" means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings."

46. I have perused the trial court record and i have found that indeed there was a consent which was recorded in Siaya Principal Magistrate's Court ELC No. 7 of 2018 and which consent the Respondents do not dispute. The said consent was to the effect that (clause 2) the parties agreed to have co-administrators from the three families of the deceased Paul Ogutu Ayimba and who were to be: Raphael Obongo Ogutu and Michael Odhiambo Ayimba (Appellant) representing first family, Alloys Ayimba Ogutu (2nd Respondent) representing the 2nd family and Peter Otieno Ogutu (1st Respondent) representing the 3rd family.

47. It is trite law that once a court of competent jurisdiction makes an order, the order ought to be complied with. Otherwise the person who does not comply with the same ought to be cited for contempt of court. A person who does not wish to comply with a court order (for any reason) must seek review of the same.

48. In the case of a consent, for it to be reviewed, the party seeking for review thereof must demonstrate that it was entered into by mistake, fraud or misrepresentation.

49. In the instant case, despite there being a consent court order that the appellant be made one of the co-administrators, the Respondents disregarded the said consent court order and petitioned for grant of letters of administration intestate without including the appellant as a co-administrator. The reasons why the Respondents did this can only be inferred, was to try and deceive the court. It is for this reason that I have

no difficulty in finding that the proceedings to obtain the grant were defective in substance as the said grant was obtained in total disregard of the consent order of a court of competent jurisdiction. Any Grant of letters of administration issued in disregard of the consent order is invalid and is therefore amenable for revocation so as to allow a fresh grant to be issued in compliance with the orders of the court of 5th April 2018, making the appellant herein a co administrator of the estate of his deceased grandfather to represent his father's house.

50. By obtaining a grant without the appellant being a co-administrator, it is clear that the Respondents concealed something material to the case and thus making the obtaining of the grant fraudulent.

51. In my humble view, the defense proffered by the Respondents that it was not possible to get the members of the first family even after trying to contact the advocate on record for the 1st family, was no defence at all as they never disclosed this to court when they were applying for the grant and neither did they seek to review the consent order on that ground that the 1st family could not be traced, before a grant was issued to them. Furthermore, in my humble view, it did not require the said first family members to consent any further to have the appellant included as a co-administrator in the petition for grant since the consent order was very clear that the appellant was to represent the first house. Moreover, the Respondents did not adduce any evidence to show that they tried to get the said advocate for the first family.

52. Even if that were to be the case, I find the Respondents to have been dishonest as they claim that the appellant was in no way entitled to be part of the estate of their deceased father since he was the administrator of the estate of his own late father, yet, at the time of entering into the consent, they knew that he was such administrator of his late father's estate and that his inclusion in the proceedings subject of this appeal was necessary to represent the house of the 1st family and not in his own personal capacity as a sole beneficiary of the estate of his deceased grandfather.

53. It was also the appellant's contention in the lower court that the Respondents herein did not serve the other beneficiaries with a notice of the intended petition for letters of administration and thus there was material non-disclosure and concealment of material facts. In reply, the respondents averred that they did not get the 1st family for their consent. This issue was not responded to by the Respondents in their replying affidavit and neither did they submit on the same in their written submissions. Section 67 (1) of the Law of Succession Act provides that:

***“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.*”**

54. Sub-section (2) further provides that:

“A notice under subsection (1) shall be exhibited conspicuously in the courthouse, and also published in such other manner as the court directs.”

55. In practice however, the need for notice is satisfied by publishing the notice of filing the application in the Government Press Gazette. The rationale for the said notice is to protect the beneficiaries of the estate and other persons like creditors who have an interest in the affairs of the estate of a deceased person. Therefore, before a grant is made, the court must ensure that section 67 of the Law of Succession Act is complied with.

56. In the instant case, there is a gazette notice of **2nd November 2018 Volume CXX- NO. 135 where in Gazette Notice Number 11513**, the application for grant by the Respondents herein was published. It cannot therefore be said that there was material non-disclosure and concealment of material facts to the effect that all the beneficiaries were never served with a notice as the law does not contemplate personal service.

57. However, I observe that the Respondents did list as beneficiaries and persons who were alive and who were either their brothers or sisters to include; Raphael Obonyo Ogutu (son to the deceased), Consolata Adhiambo (daughter), Teresia Ogutu (daughter), Mary Onbul Ayimba (daughter –in- law), Vitalis Nyapola Ogutu (son), Alice Akoth Ogutu, Peter Otieno Ogutu, Edwin Ogutu, Anna Anyango and Mary Auma Otip. Legally, these persons were of equal priority with the Respondents. However, in the consent to making of grant of letters of administration intestate to person of equal or lesser priority, it was signed by a David Otieno who was a grandchild to the deceased, Edwin Ogutu, Anna Anyango and Mary Auma Otip. The other brothers and sisters were left out of the consent.

58. It should be recalled that the deceased herein died in 1983 after coming into force of the Law of Succession Act. As such, even his daughters had an equal right to apply for letters of administration intestate and thus their consent was required mandatorily. Failure to get the consent of all the persons of equal or lesser priority to the Respondents herein made the grant defective in substance. The issuance of the grant was therefore in violation of *Rule 26(1) of the Probate and Administration Rules which provides that:*

“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.”

59. **The import of this provision is that** consent from **ALL** the deceased's beneficiaries must be availed as to the appointment of the administrator and before an application for grant of Letters of Administration is granted. **In The Matter of Re the Estate Of Ngaii Gatumbi Alias James Ngaii Gatumbi (H.C. Succession Case No. 783 Of 1993)**, the court held and I concur that:

“A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of his intention to apply and that person's consent to the petitioner's application is not sought' As such the grant to this extent ought to fail as it was defective

in substance.”

60. I find that failure to obtain consent of all beneficiaries of the estate before petitioning for grant was fatal to the grant which was issued and later confirmed by the trial court.

61. The appellant also pleaded in the trial court (in his affidavit in support of summons for revocation of grant) that there was failure on the part of the Respondents to disclose all the assets of the deceased and which amounted to concealment of facts as the property on which the deceased was buried had not been disclosed to the court and which property was intermeddled with by the 1st Respondent and his elder brother, one, George Odhiambo Ayimba. He further deposed that majority of deceased's descendants were living and residing in the deceased's homestead situated on land parcel number Siaya/ Karapul- Ramba/ 355. He further deposed that it was his belief that several land properties of the deceased had been left out of the proposed mode of distribution including the land on which the deceased was buried and thus there was need for an enquiry to be made before the confirmation of grant as to why such assets were left out, including the properties which were registered in other people's names in 1987 and 2002 long after the death of the deceased.

62. The appellant deposed further that he had scanty evidence as was evidenced by the copies of the green cards he had obtained from the land's office that some properties the subject of the instant succession proceedings could have changed hands after the death of the deceased without going through succession proceedings and thus there was need that the true position in relation to their registration be ascertained before the actual distribution of the residuary estate. The appellant herein attached copies of green cards for land parcels numbers Siaya/ Karapul- Ramba/ 308, 2083, 335 and 466. As per the said green cards, LR Siaya/ Karapul- Ramba/ 308 was initially owned by the deceased but later transferred to one George Ayimba Ogutu on 28.02.2002 by way of transmission. In the case of LR Siaya/ Karapul- Ramba/ 2083, the same was initially registered in favour of the deceased but later transferred to Raphael Obonyo Ogutu on 5.07.2009 by transmission but the said registration was cancelled and the land reverted back to the deceased. For LR Siaya/ Karapul- Ramba/335 the same was initially registered in the names of the deceased but later transferred to George Ayimba Ogutu on 13.12.2006 by transmission and subsequently sub-divided into No.s 4766, 4767 and 4768 and the mother title closed on 29.6.2007. For LR Siaya/ Karapul- Ramba/466, the same was registered in the name of the deceased.

63. From the above, the only land which formed the estate of the deceased as per the Appellant's evidence was LR Siaya/ Karapul- Ramba/ 2083 and Siaya/ Karapul- Ramba/466. LR Siaya/ Karapul- Ramba/ 308 and 335 did not form part of the estate of the deceased.

64. In the Affidavit in support of petition for letters of administration intestate, the Respondents herein listed the assets of the deceased to include:-

a. Parcel No. Siaya/ Karapul- Ramba/ 2083

b. Parcel No. Siaya/ Karapul- Ramba/ 466

c. Parcel No. Siaya/ Karapul- Ramba/ 308

65. In the search certificates which were attached to the said petition, the above land parcels were registered in the name of the deceased. It was these parcels which were included in the mode of distribution as was proposed in the summons for confirmation of grant.

66. In their replying affidavit to the summons for revocation of grant, the Respondents deposed that the deceased had started distributing his estate to households leaving behind three parcels being LR No. Siaya/ Karapul- Ramba/ 308, 2083 and 466 to be shared amongst other dependants and which were subject of the succession proceedings. They gave a breakdown of the said distribution to the effect that - Michael Ayimba Ogutu (appellant's father) had already benefitted from the estate of the deceased where he was given LR Siaya/ Karapul Ramba/ 272 in respect of 1st family and/ or house. For the 2nd family/ house, it was deposed that the deceased had given out LR Siaya/ Karapul Ramba/ 1718 to Vitalis Nyapola Ogutu (deceased) and who sub-divided it into two parcels (LR Siaya/ Karapul Ramba/ 5177 and 5178). For the 3rd family it was deposed that the deceased had given out LR Siaya/ Karapul Ramba/ 1730 to Lucas Wayodi Ogutu (deceased) who had sub-divided the same into two parcels being LR Siaya/ Karapul Ramba/ 3539 and 3540 and further that LR Siaya/ Karapul Ramba/ 1694 was given to Aloys Ayimba Ogutu and Lucas Wayodi Ogutu (deceased). They maintained that the appellant was in occupation of LR Siaya/ Karapul Ramba/ 4766 where the entire homestead is built and which land was sub-divided from LR Siaya/ Karapul Ramba/ 335 by the late George Ayimba. They further deposed that they had included the appellant's mother as the beneficiary by virtue of being the wife to his deceased husband (Michael Ayimba Ogutu) who was the father to the appellant. Copies of the green cards and/ or searches for the above land parcels were annexed to the replying affidavit and a perusal of the same indeed shows that the said land parcels were registered in favour of the said named persons.

67. From the above analysis of all the properties mentioned in the pleadings before the trial court, it is clear that LR Siaya/ Karapul- Ramba/ 355 which the appellant deposed and submitted that was left out from the estate of the deceased and was where the deceased was buried and where majority of the deceased's descendants were living did not in fact form part of the deceased's estate as it had been transferred to George Ayimba Ogutu on 13.12.2006 by way of transmission and subsequently sub-divided into No.s 4766, 4767 and 4768 and the mother title closed on 29.6.2007. that being the case, it is my humble view that the same did not form part of the estate of the said deceased.

68. I note however that the same was transferred by transmission on 13.12.2006 long after the demise of the deceased. It therefore follows that where the appellant alleges fraudulent acquisition of land belonging to the deceased grandfather, such allegation ought to be to be challenged in the court and cause where such orders leading to a transmission were made and not before this court. This court in my humble view, cannot determine the legality (or otherwise) of the said transmission.

69. For the above reasons, iam unable to find that the Respondents failed to disclose the other assets which formed part of the estate of the deceased. The asset the appellant claimed was not disclosed (LR Siaya/ Karapul- Ramba/ 355) did not form part of the estate of the deceased and thus the Respondents did not have a duty to disclose the same, as far as these particular proceedings are concerned.

70. However, I further observe that the Respondents included LR Siaya/ Karapul- Ramba/ 308 in the list of assets but as it appears, the same did not form part of the estate of the deceased. This is because albeit the same was initially owned by the deceased, it was later transferred to one George Ayimba Ogutu on 28.02.2002 by transmission. The same must be removed from the assets available for distribution.

71. From the above exposition, I find that the only parcels of land which formed the estate of the deceased as per the Appellant's evidence are LR Siaya/ Karapul- Ramba/ 2083 and Siaya/ Karapul- Ramba/466 and that LR Siaya/ Karapul- Ramba/ 308 and 335 did not form part of the estate of the deceased.

72. Therefore, the fact that the Respondents included the said LR Siaya/ Karapul- Ramba/ 308 in the list of assets of the deceased yet as it appears, and which they knew or ought to have known that the same did not form part of the estate of the deceased, it is my view that the grant issued to the Respondents herein ought to be revoked as it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. The Respondents herein concealed the fact that the said LR 308 had been transferred to one George Ayimba Ogutu on 28.02.2002 by transmission. This was a fact which they would have confirmed by obtaining the Green card from the LONds office.

73. For that reason, as issued and confirmed in favour of the respondents herein must be revoked, not because the Respondents failed to include all the assets of the deceased, but because they made a false statement and further concealed from the court a material fact that the said land LR Siaya /Karapul-Ramba/308 as included had been transferred to another person and did not form part of the deceased's estate. This is so because the question is, how would the Respondents distribute, among the beneficiaries, property that was not registered in the name of the deceased as per the proposed mode of distribution? The answer in law is that it is impossible to distribute the same.

74. Accordingly, the grant as issued and confirmed in favour of the respondents herein finds another ground for revocation.

75. On the averments that there was need for an enquiry to be made before the confirmation of grant as to why such assets were left out, including the properties which were registered in other people's names in 1987 and 2002 long after the death of the deceased and the fact that the appellant had scanty evidence as was evidenced by the copies of the green cards he had obtained from the lands office that some properties subject of the instant succession proceedings could have changed hands after the death of the deceased and thus there was a need that the true position in relation to their registration be ascertained before the actual distribution of the residuary estate, it is my opinion that such an enquiry cannot be made by this court which is devoid of jurisdiction to hear and determine the issues relating to acquisition of title to land and or whether the said acquisition was lawful or otherwise.

76. I am certain that the right forum for such a dispute ought to be in the Environment and Land Court as established under article 162(2) (b) of the Constitution of Kenya and the subsequent enabling statutes among others, the Environment and Land Court Act (see section 13 thereof) as well as the express bar in Article 165(5) (b) of the Constitution which expressly bars this court from entertaining such disputes. I therefore decline to inquire such acquisition for want of jurisdiction.

77. The appellant pleaded in the trial court that there was failure on the part of the Respondents to disclose all the beneficiaries. In his affidavit in support of the summons for revocation of grant, he deposed that the respondents herein failed to disclose that apart from the persons named in the affidavit of means (affidavit in support of the petition for grant of letters of administration intestate), that **there were several other beneficiaries to the estate of the deceased who included adult grandchildren of the deceased** who resided on the same land subject of succession proceedings, **including the land which had allegedly been left out**, with their families (including the objector). It is my opinion that this point was not proved to the required standard, on a balance of probabilities. The Appellant did not provide a list of the said other beneficiaries for the court to consider whether they were eligible beneficiaries. Further, as it appears from the submissions by the appellant on this issue, his contention is that there are adult grandchildren of the deceased who were left out. It is my opinion that grandchildren are not beneficiaries per se of the estate of the deceased. They acquire interest in their grandfather's (deceased's) estate only where their parents are not alive. So long as their parents are alive, then they are not beneficiaries of the estate. The appellant did not provide any evidence to the effect that the parents of the alleged grandchildren beneficiaries are not living, and neither did he provide the list of the alleged grandparents. In addition, if the said grandchildren are adults then they have the capacity to file their own objections to the succession proceedings and not through the appellant herein who did not obtain their written authority to pursue the objection on their behalf.

78. Accordingly, a grant cannot be revoked on the grounds of the allegations above. A perusal of the affidavit in support of petition for letters of administration clearly indicated the beneficiaries of the estate of the deceased and which list was never controverted.

79. However, I note that despite the Respondents having listed the beneficiaries of the estate of the deceased, at the time of making an application for confirmation of grant, it was not all the beneficiaries who were listed therein who signed the consent to the mode of distribution. This issue has been addressed above.

80. The appellant also pleaded in the trial court that there was intermeddling of the deceased's estate by the beneficiaries. However, this allegation was opposed by the Respondents who deposed that they had not intermeddled with the estate and further blamed the Appellant with intermeddling with parcel 308.

81. Section 45 (1) of the Law of Succession Act provides that:-

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

82. Sub-section 2 provides for the sentence of the offence of intermeddling. In my humble view, therefore, intermeddling being a criminal offence, this court cannot determine the criminality of the allegations in proceedings of a civil nature and on appeal. A higher burden of proof (beyond any reasonable doubt) is required in such instances of alleged intermeddling.

83. It should be noted that the gist of the application for revocation of grant was to revoke the grant. Intermeddling is not one of the grounds upon which a court can revoke a grant. It is for that reason that I find and hold that the trial court erred in law by finding that there was intermeddling on the part of the Appellant.

84. The appellant also claimed that there were two death certificates issued. On this I find that there is no law that bars issuance of more than two death certificates to different persons only that succession cannot be done piecemeal unless the estate is partially testate and partially intestate, and if that happens then the court would not hesitate to order for consolidation of the two causes or strike out one for being an abuse of court process.

85. ***On Whether the proceedings leading to confirmation of the grant were proper?*** Section 71 of the Law of Succession Act provides that after the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets. Sub-section 2 of the Act provides for the options available to the court once such application is brought before it and includes either confirming the grant if the court is satisfied that the grant was rightly made to the applicant, or if the court is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of the Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case; ***Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.***

86. Rule 40 of the Probate and Administration Rules provides that application for confirmation of grant shall be by summons and that (sub-rule 4), where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.

87. Sub-rule 6 provides that any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection. Where no affidavit of protest has been filed, ***the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing*** the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.

88. Applying the above provisions to the facts in this appeal, and as I have opined herein above, despite the Respondents having listed the beneficiaries of the estate of the deceased, at the time of filing summons for confirmation of grant, it was not all the beneficiaries who were listed therein who signed the consent to the mode of distribution. A perusal of the trial court records indicates that after the trial magistrate dismissed the application for revocation of grant, he proceeded to confirm the grant and distributed the estate as per the proposed mode of distribution in the affidavit in support of summons for confirmation of grant. ***What this means, and I concur with the submissions by the appellant is that the court confirmed the grant without hearing the application for confirmation of grant.*** The trial court did not ensure that all the beneficiaries were called to consent to the proposed mode of distribution despite some of the said beneficiaries having been left out in the distribution and further having not consented to the mode of distribution.

89. In addition, as observed above, some of the property which was listed as forming part of the estate of the deceased and which was being distributed by the respondents was not registered in the deceased's name and therefore the question is, how would the Respondents distribute property which did not form part of the estate of the deceased?

90. In my humble view, any purported confirmation of the grant by the trial magistrate, before setting down the Summons for Confirmation for hearing was fatally unprocedural and the same ought to be revoked and the summons for confirmation of grant be heard afresh procedurally, while ensuring that all beneficiaries have consented or if there are any protests, the same are heard on merit and disposed of before the distribution and confirmation of the grant is done.

91. Even assuming that the grant issued was proper, which was not, in my humble view, the summons for confirmation of the said grant was not procedurally heard and as such the confirmation of the said grant was improper and fatally defective. That being the case, the certificate of confirmation of grant is hereby annulled and the summons for confirmation of grant to be heard afresh.

92. On ***Whether the application for revocation for grant was properly made before the trial court, the*** Respondents in their Replying Affidavit to the summons for revocation of grant deposed that the Appellant had a window period to object to the making of the letters of administration from the date of gazettelement but that he did not challenge and as such, the same could not be revoked as sections 67 and 68 were clear on the timeframe within which to challenge the issuance of the letters of administration. In their submissions in opposition to the said summons for revocation of grant (and which submissions were reiterated in this appeal) the Respondents submitted that the Appellant filed the summons for revocation of grant 256 days after the date of publication of notice in the Kenya Gazette and that at the time of filing the same, he had already been served with summons for confirmation of grant and which had the proposed mode of distribution. It was submitted that the Appellant had a window period to object to the making of the letters of administration from the date of gazettelement but which he did not challenge and as such, the same could not be revoked as sections 67 and 68 were clear on the timeframe within which to challenge the issuance of the letters of administration.

93. It was submitted that the said summons were filed without leave of court to file the same out of time and thus in defiance of sections 67 and 68 of the Law of Succession Act and further that under section 76 of the Law of Succession Act, the prayers therein could only be granted through revocation of certificate of confirmation of grant and/ or the appellant could only challenge the mode of distribution in the petition for grant in the estate of the deceased and that Form P&A 41 could only be entertained by the court after confirmation of grant as sections 67 and 68 stipulate the manner to be followed by way of filing an objection and not summons for revocation of grant, a chance which the appellant squandered. They thus prayed for the appeal to be dismissed.

94. As I have observed elsewhere in this judgment, under section 76 of the law of Succession Act, 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.*** As can be seen from this section, any interested party can apply for revocation of grant of representation any time whether before or after confirmation of the same. In the premise, upon issuance of the grant in the present succession, that issuance did not lock out the appellant from the seat of justice to challenge issuance of the said grant of letters of administration intestate, notwithstanding the Act giving timelines as to when one can file objections to issuance of grant (within 30 days from the date of publication of the gazette notice) and protests to confirmation of grant (after the application for confirmation of grant is made and before confirmation).

95. The Act under section 76 further gives any interested person to apply for revocation of a grant even before confirmation of the said grant. The only rider is that the said applicant (by way of Summons for Revocation of Grant) must satisfy the conditions set out under section 76 (which I have discussed elsewhere in this judgment). That being the case, despite the appellant having not filed an objection to the issuance of grant or an affidavit of protest to the confirmation of the same, the application by way of Summons for Revocation of grant before confirmation was properly before the trial court.

96. There is no requirement in law for the appellant to seek leave of court before filing Summons for Revocation of Grant out of time since there is no such time limit imposed by law. The Respondents misconstrued the law and failed to differentiate between the Summons for Revocation of grant and the affidavit of protest which is filed in opposition to the confirmation of grant and which latter basically challenges the mode of distribution of the estate among beneficiaries. In addition, it is worth noting that the objections which are filed opposing issuance of grant to a specific person and which must be filed within 30 days of publication of the petition in the government press Kenya Gazette is not the same as a Summons for Revocation of Grant under section 76 of the Law of Succession Act.

97. I therefore find that the application by the appellant for revocation of grant issued as confirmed was properly lodged in court for consideration by the trial court.

98. ***On what orders the court ought to make, I find and hold that*** the Appellant herein had the locus standi to file the application for revocation of grant before the trial court. I further find and hold that the Respondents herein obtained the grant fraudulently by concealing something material to the case to the effect that there was a consent court order which required the appellant to be made a co-administrator and which order had not been reviewed or set aside. This is a ground for revocation of a grant.

99. I further find and hold that the Respondents did publish the petition in the Kenya Gazette as required by law and thus they cannot be said to have failed to give notice to other beneficiaries as giving of physical notice is not contemplated in law.

100. I find and hold that the failure by the Respondents to get the consent of all the persons of equal or lesser priority to the Respondents herein before applying for the letters of administration made the grant defective in substance as it was against the express provisions of the law (which required consent by persons of equal or lesser priority). This is a ground for revocation of a grant.

101. I find and hold that there was no failure by the Respondents to disclose all the assets of the deceased, as the asset that the appellant claimed was not disclosed (LR Siaya/ Karapul- Ramba/ 355) did not form part of the estate of the deceased since it was not registered in the name of the deceased as at the time of filing the Petition for a grant and therefore the Respondents did not have a duty to disclose the same. The assets which were owned by the deceased and which formed part of his estate were LR Siaya/ Karapul- Ramba/ 2083 and Siaya/ Karapul- Ramba/466 and were both disclosed.

102. However, the act of the Respondents including the said LR Siaya/ Karapul- Ramba/ 308 in the list of assets but which asset did not form part of the deceased's estate, was an erroneous act as such asset is not available for distribution hence on this ground, the grant issued to the Respondents herein ought to be revoked as it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case (that the said land had been transferred to one George Ayimba Ogotu on 28.02.2002 by transmission).

103. On the allegation that not all beneficiaries of the estate of the deceased were disclosed by the Respondents, the appellant, regrettably, failed to provide the names of those persons he verily believes to be the excluded beneficiaries. Further, if as per his depositions the alleged excluded beneficiaries whom he claimed to be adult grandchildren of the deceased, there is nothing that barred the said adult beneficiaries from lodging their own objections as the appellant did not claim to have brought the Summons for revocation on his own behalf and on behalf of the other beneficiaries who were allegedly left out. Furthermore, grandchildren are not beneficiaries per se of the estate of a deceased person except when claiming their entitlement on behalf of the estate of their deceased parents, children of the deceased. In this case, not even the names of the deceased parents of the purported beneficiary grandchildren were provided by the appellant.

104. I further find and hold that the allegation of intermeddling of the estate of the deceased by the appellant or the Respondents in the allegations counter allegations was not proved to the required standard, and even if proved, the same could not lead to revocation of the grant as it is not one of the grounds contemplated under section 76 of the Act.

105. I find and hold that the trial court erred in law and fact in confirming the grant in favour of the Respondents without adhering to the express provisions of the law that before confirming the grant, all the beneficiaries and their respective shares of entitlement to the estate of the deceased must be ascertained. In the instant case, the trial court had nothing before him to show that all the beneficiaries had signed the consent to the mode of distribution.

106. My further finding is that the application (Summons for Confirmation of grant) was never heard before the grant was confirmed and therefore the purported confirmation of grant was unprocedural and the same must therefore be revoked and the Summons for Confirmation of grant be heard afresh and procedurally in accordance with the law.

107. My other clear finding is that the Summons for Revocation of grant as filed by the appellant under section 76 of the Law of Succession Act was proper as there is no legal prohibition or requirement for filing of the same with leave of court. Summons for Revocation of grant

falls in its own category. It is neither an objection to making of a grant per se nor a protest to confirmation of grant.

108. For all the above reasons, and having found that in the instant case the grant was obtained fraudulently, and that the said grant was defective in substance, I hereby order and decree that the grant of letters of administration intestate issued in favour of the Respondents on 5th December 2018 together with the certificate of confirmation of grant made subsequent thereto on 13th September 2019 be and are hereby revoked. In its place, I hereby order that a fresh grant of letters of administration shall issue by the trial court in favour of Raphael Obongo Ogutu, Michael Odhiambo Ayimba (the Appellant), Alloys Ayimba Ogutu and Peter Otieno Ogutu as the co-administrators.

109. Upon re issuance of the said grant, the Co administrators shall then identify all the assets and the beneficiaries of the deceased and upon ascertaining the same, they/ or any of them shall file fresh Summons for Confirmation of grant which should be served on all the beneficiaries so as to enable them to respond to the same and appear in court during confirmation hearing to indicate whether they are satisfied with the proposed mode of distribution of the estate of the deceased before confirmation of the grant can issue.

110. As the appellant and Respondents are family members and in order to promote harmony among them, I hereby order that each party shall bear their own costs of this appeal.

Dated, Signed and Delivered at Siaya this 6th Day of May, 2020 via skype due to covid 19 situation.

R.E. ABURILI

JUDGE