



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT PETITION NO. 37 OF 2012

IN THE MATTER OF ARTICLE 2, 19, 20, 21, 22, 23, 40, 47, 165(3), 262

AND

**SECTION 7 OF PART 1 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF SECTION 75 OF THE CONSTITUTION OF KENYA, 1963 (NOW
REPEALED)**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300, LAWS OF KENYA (NOW
REPEALED)**

AND

IN THE MATTER OF TITLE NUMBER SOUTH SAKWA/KOGELO/420

BETWEEN

KENNEDY ODOYO OKELLO PETITIONER

AND

THE DISTRICT LAND REGISTRAR, MIGORI 1ST RESPONDENT

NATIONAL BANK OF KENYA LIMITED 2ND RESPONDENT

BHAVIN ASHWIN 3RD RESPONDENT

JUDGMENT

BACKGROUND:

1. The petitioner herein, **Kennedy Odoyo Okello** (hereinafter referred to only as “**the petitioner**”) is the son of one, **Samuel Okello Ogola**, deceased (hereinafter referred to as “**Okello**”). The Petitioner’s father aforesaid was the son of, one, **Ogola Ondigo**, deceased (hereinafter referred to only as “**Ondigo**”). Ondigo had another son, **Zedekia Onyango Ogola** (hereinafter referred to only as “**Onyango**”). At all material times, Ondigo was the registered proprietor of all that parcel of land known as **LR. No. South Sakwa/ Kogelo/420** (hereinafter referred to as “**the suit property**”) which is said to have been ancestral land. Ondigo was registered as the proprietor of the suit property on 26th September, 1973 and was issued with Land Certificate on 26th June, 1974 under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed)(hereinafter referred to as the “**RLA**”). It is claimed that Ondigo died on 12th September, 1983 and was survived by Okello and Onyango. Okello also died on 11th September, 1994 leaving behind ten (10) dependants, the petitioner included. Onyango is still alive and he has seven (7) children. It is claimed that the suit property was supposed to be inherited by Ondigo’s grandchildren, the petitioner included through ondigo’s two sons, Okello and Onyango. The petitioner claims that the suit property was misappropriated through fraudulent acts of the 1st , 2nd and 3rd respondents as a result of which the suit property has now been registered in the name of the 3rd respondent. The petitioner claims that as a result of the said acts of fraud, the petitioner and the other dependants of the estate of Ondigo have been deprived of their inheritance in contravention of Article 40 of the Constitution of Kenya, 2010 and section 75 of the old Constitution of Kenya (now repealed). The petitioner claims that the fraudulent scheme was hatched when, Ondigo was alleged to have donated a power of attorney to one **John Onango Angolo** (“hereinafter referred to as “**Angolo**”) on 1st July, 1991 for the said Angolo to be his attorney in relation to his interest in the suit property for the purposes of securing a business loan from the 2nd respondent, Kisumu, branch. The petitioner claims that the said power of attorney was purportedly executed several years after the death of Ondigo on 12th September, 1983. The petitioner claims that in furtherance of the said fraud, Ondigo is alleged to have executed an instrument of Charge on 15th November, 1991 for Ksh. 200,000.00 in favour of the 2nd respondent to secure advances made to the said Angolo. The petitioner claims that Ondigo is said have executed the said Charge by was of a thumb print and even appeared before the Land Control Board on 30th October, 1991 to secure consent for the said transaction after he was long dead. The petitioner claims that the said charge was fraudulent and was aimed at depriving of the family of Ondigo of the suit property.
2. The petitioner claims that in further perpetuation of the said fraud, the 2nd respondent without any notice to the family members of Ondigo did put up the suit property for sale by public auction at which auction, the suit property was sold by the 2nd respondent to the 3rd respondent to whom the property was transferred through collusion with the 1st respondent. The petitioner claims that a search carried out on the register of the suit property revealed that as at 28th May, 2003, there was no encumbrance in the nature of a charge or otherwise registered on the title of the suit property. The petitioner claims further that an extract of the register of the suit property issued to Onyango on 20th September, 2012 by the 1st respondent shows that the 1st respondent caused the suit property to be transferred to Onyango on 18th June, 2003 and a title deed for the suit property was issued to him on 11th October, 2005 irregularly and un-procedurally. The petitioner claims that strangely, on 21st June, 2012, the 1st respondent dispossessed Onyango of the suit property and transferred the same to the 3rd respondent without following the due process. The petitioner claims that the illegal and irregular acts aforesaid were calculated to deprive and did deprive the family of Ondigo of their inheritance comprised in the suit property contrary as aforesaid Article 40 of the Constitution of Kenya 2010 and Article 75 of the old Constitution of Kenya (now repealed).The petitioner claims that all efforts made to obtain the instrument of transfer of the suit property by the 2nd respondent to the 3rd respondent in exercise of the 2nd respondent's statutory power of sale did not bear fruit.

THE PETITION BEFORE THE COURT:

3. The petitioner claims that the suit property was unlawfully, un- procedurally and

unconstitutionally charged and transferred by the 2nd respondent to the 3rd respondent. The petitioner claims further that the 3rd respondent acquired title to the suit property through fraudulent and unconstitutional process. The petitioner has petitioned this court on his own behalf and on behalf of the family of Ondigo for several reliefs. The petitioner has sought, a declaration that the suit property belongs to Ondigo and that it was not constitutionally, lawfully and procedurally charged to the 2nd respondent and subsequently sold to the 3rd respondent, a declaration that the 1st respondent failed to maintain an accurate Land Register for the suit property which resulted in compromising the ownership of the suit property in breach of Article 47 of the Constitution of Kenya, 2010, section 6 and 112 of the RLA and section 12 of the Land Registration Act, 2012, an order of mandamus and/or a mandatory injunction to restore the ownership of the suit property to Ondigo for the benefit of the petitioner and/ or the estate of Ondigo, an order cancelling the registration of all charges and transfers allegedly registered against the title of the suit property, an order restraining the 3rd respondent from entering, trespassing or remaining in possession of the suit property and an order that the respondents do pay to the petitioner and the estate of Ondigo damages together with the costs and interest.

THE RESPONSE TO THE PETITION:

4. The petition was opposed by the 2nd and 3rd respondents. The 2nd respondent filed a replying affidavit on 22nd January, 2013 sworn by Alice Okwar while the 3rd respondent filed a replying affidavit on 12th November, 2012 sworn by the 3rd respondent on the same date. In its response to the petition, the 2nd respondent contended that the suit property was charged to the 2nd respondent to secure a loan facility and that after the debtor defaulted in the payment of the loan that was secured by the said charge, the 2nd respondent exercised its statutory power of sale under the said charge by putting up the suit property for sale after serving all the notices required under the law. The 2nd respondent contended that the suit property was sold at a public auction on 30th March, 2012 at Ksh. 1,100,000.00 to the 3rd respondent who was the highest bidder at the auction sale and that the suit property was transferred to the 3rd respondent by the 2nd respondent upon payment of the said sum of Ksh. 1,100,000.00. The 2nd respondent contended that the members of Ondigo family knew all along that the suit property was charged to the 2nd respondent to secure a loan and that they have pleaded in the past with the 2nd respondent to reduce the loan amount outstanding which stood at Ksh. 8, 834,322.50 as at the time when the suit property was put up for sale. The 2nd respondent denied the petitioners claim that the instrument of charge over the suit property was executed after the death of Ondigo. The 2nd respondent contended further that the issues raised in the petition are of a commercial nature and as such should not have been brought to court for determination by way of a constitutional petition. The 2nd respondent annexed to its replying affidavit, among others, a copy of the instrument of charge over the suit property dated 15th November, 1991.
5. On his part, the 3rd respondent termed the petitioner's petition and the affidavit filed in support thereof as full of conscious and deliberate falsehood. The 3rd respondent contended that the death certificate for Ondigo which has been presented to court by the petitioner is fraudulent and a forgery. The 3rd respondent contended that the said death certificate has material alterations on the face thereof as concerns Ondigo's date of death and his age which alterations are apparent on the face of the document. The 3rd respondent contended that inquiries at the District Civil Registry, Migori where the said death certificate is said to have originated revealed that the death certificate that was presented to court by the petitioner was altered to the extent that the date of death which was supposed to be 12th day of September, 1993 was changed to read 12th September, 1983 and that the age of Ondigo as at the date of his death which was supposed to be 110 years was altered to read 100 years. The 3rd respondent annexed to his affidavit, a copy of a letter from the District Civil Registry, Migori date 9th November, 2012 confirming the correct date of death and age of Ondigo in accordance with their records and a copy of the application for the said death certificate that was made by Onyango in which the date of death was given as 12th September, 1993 and the

age as 110 years. The 3rd respondent contended that the petition herein has been based on a doctored and/or forged certificate of death which forgery was intended to defeat lawful power of attorney and instrument of charge that had been executed by Ondigo prior to his death. The 3rd respondent contended that Ondigo had charged the suit property to secure a loan that had been advanced by the 2nd respondent to one, John Onango Angolo (Onango) for whom he also stood as a guarantor. The said John Onango Angolo defaulted in the payment of the loan that had been secured by the suit property which resulted in the 2nd respondent exercising its statutory power of sale through public auction at which the 3rd respondent purchased the suit property which is now registered in his name. The 3rd respondent contended that the suit property was transferred to his name after he complied with all procedural and legal requirements and he is the lawful and bona fide proprietor thereof. The 3rd respondent contended that his title to the suit property cannot be impeached and that any aggrieved party's has recourse only in damages as against the 2nd respondent. The 3rd respondent contended further that the issues raised in the petition herein are in the realm of private law and as such should have been ventilated through a normal civil suit rather than through a constitutional petition. The 3rd respondent contended further that the petitioner who has not obtained grant of letters of administration with respect to the estate of Ondigo lacks the requisite *locus standi* to bring this petition.

DIRECTIONS BY THE COURT:

6. On 10th December, 2012, the matter came up for directions on the disposal of an application for conservatory order that the petitioner had filed and the main petition. On that day, the advocate for the 3rd respondent sought directions that a copy of the Death Certificate for Ondigo that had been presented to court by the petitioner which indicated that Ondigo died on 12th September, 1993 be submitted to the District Criminal Investigation Officer, Kisii Central District for investigation so as to ascertain; whether a photocopy of the said death certificate that had been presented to court by the petitioner corresponded with the original copy, whether there were alterations and/or superimposition on the photocopy of the death certificate that was presented to court, and if there were alterations or superimposition, to ascertain the person responsible for the act and to make appropriate recommendation for prosecution. The advocate for the petitioner objected to these directions being given for various reasons more particularly on the ground that this is a civil matter and as such it is not in order to involve the police in it. The court reserved its ruling on the directions that were sought by the 3rd respondent's advocate to 14th December, 2012. In the meantime, the court ordered the petitioner to submit to court for perusal and return to the petitioner the original copy of the death certificate a copy of which the petitioner had produced in court in support of the petition herein and the application for conservatory order. When the matter came up for ruling on directions on 14th December, 2012, the petitioner had not submitted to court the original copy of the contentious death certificate as had been ordered by the court. The petitioner's advocate claimed that the original copy of the said death certificate had been taken back to the District Civil Registry at Migori by Onyango for verification and that the District Civil Registrar had detained it. The petitioner's advocate asked to be given more time to avail the said certificate. The court stood over the matter to 19th December, 2012 to give the petitioner time to avail the said original copy of the death certificate in contention. On 19th December, 2012, the petitioner's advocate notified the court that the petitioner had not obtained the original copy of the said death certificate. The court had no alternative but to proceed to give directions on the matter. The court declined to give directions that had been sought by the 3rd respondent's advocate concerning the need to subject a copy of the death certificate produced herein by the petitioner to criminal investigation by the police. On the failure on the part of the petitioner to furnish the court with the original copy of the death certificate that he has produced herein in support of the petition, the court reserved its comments and conclusions on the same. I will revisit the issue later in this judgment. The court directed in the meantime that the petition herein be heard by way of viva voce evidence.

THE EVIDENCE TENDERED BY THE PARTIES:

7. The petitioner gave evidence and called one witness. The 1st respondent did not participate in the proceedings. The 2nd respondent called one witness while the 3rd respondent also gave evidence and called one witness. The first to give evidence was the petitioner's witness, one, **Gilbert Olick (PW1)**. He testified that; the petitioner is known to him. The petitioner is a grandson to Ondigo who is his maternal uncle. Ondigo used to reside at Rinya village, Kogello West sub-location. Ondigo had land and livestock. He did not know the full particulars of Ondigo's land. He attended and participated in the burial of Ondigo when he died on 12th September, 1983 at his home. Ondigo died of natural causes. He could not tell how old he was when he died. He could remember when Ondigo died because at the time of his death, there was a snap election and there was a campaign rally at Rinya market by the late Hon. Aluoch Polo who donated bread from his bakery to feed the mourners. He testified that the burial of Ondigo was presided over by a priest from Ulanda, Father Joseph. He denied that Ondigo died on 12th September, 1993. In cross examination by the 3rd respondent's advocate, he told the court that the information that Ondigo died on 12th September, 1993 was given to the District Civil Registry by Onyango and that the information was not correct. According to him, Onyango had lied to the registrar of births and deaths. He said however that he had no document to prove that Ondigo died on 12th September, 1983 as he claimed. He only recalled that particular date because the death of Ondigo coincided with the elections that took place in 1983. As concerns the letter dated 19th November, 2012 from St. Martin Deporres Ulanda Catholic Church on the issue of the date of the death of Ondigo that was said to have been signed by him, one, Catechist, Silvanus Onditi and Father Olage Philip, he said that he did not go to Ulanda parish in person to seek the details concerning Ondigo's death. He said that the said letter was brought to him by the grandson of Ondigo who had gone to inquire about the date of death of Ondigo. The letter was brought to him to sign and he did sign it. He confirmed however that he supplied the information that is contained in the letter. In cross-examination by the advocate for the 2nd respondent, he stated that in 1983 he was teaching at Get Primary School which is about 9km from Ulanda and that the current priest at Ulanda Catholic Parish was not the priest in charge between 1983 and 1993. He stated that the letter dated 19th November, 2012 from the said Parish was written on the basis of information given to the priest and not on the basis of the records kept at the parish. He stated further that he was not aware whether or not Ondigo had an identity card. He stated that Ondigo was illiterate and could only sign using a thumb print. In re-examination, the witness maintained that Ondigo was very old as at the date of his death and that Onyango lied to the District Civil Registrar as far as the date of death of Ondigo is concerned. He maintained that Ondigo died on 12th September, 1983 and not 12th September, 1993. He stated further that Ondigo could not have signed the disputed instrument of charge and that the thumb print appended to the said charge could not be that of Ondigo.
8. The next witness was the petitioner himself, **Kennedy Odoyo Okello (PW2)**. In his sworn statement, the petitioner adopted the contents of the affidavit that he had sworn in support of the petition and added that;

Ondigo was his grandfather. Ondigo owned the suit property to which he (the petitioner) is entitled to by virtue of being Ondigo's grandson. In the year 2012 he got information that Ondigo had obtained a bank loan and that the suit property was being auctioned. At the time, the suit property had already been auctioned and was being fenced. On making inquiries, he learnt that it was being alleged that Ondigo had guaranteed a loan in the year 1991. According to him, Ondigo died while he was in class 4 at Rinya Primary School. He was born on 27th November, 1973 and in 1991 when Ondigo is alleged to have guaranteed a loan, he was in Form 4 at Kokuro High School. He is the second born to Okello (one of the sons of Ondigo) who died on 11th September, 1994. He stated further that when Ondigo died in the year 1983, Okello was still alive and working as a police officer. Okello resigned from police service and joined Kenya Airways in 1984 after Ondigo's death. He denied that Ondigo took or guaranteed a loan in 1991. In the year 2012, he asked his uncle Onyango to furnish him with all the documents concerning the suit property to which request Onyango did comply. He also asked Onyango to tell him all that he knew about the sale of the suit property. Onyango denied any knowledge as to why the suit property had been

sold. Among the documents that Onyango gave him were a copy of the death certificate for Ondigo and a copy of the title deed for the suit property in his (Onyango's) name which he claimed to have obtained from the Ministry of lands. His (the petitioner's) advocates on record then proceeded to the lands office and obtained a copy of the Green Card which indicated that Onyango was registered as the proprietor of the suit property in the year 2003. He maintained that the suit property belongs to the grand children of Ondigo and that the alleged loan and the instrument of charge that was alleged to have been executed by Ondigo to secure the same were not genuine. He stated that Onyango is the one who had custody of all the documents pertaining to the suit property. In cross-examination by the 2nd respondent's advocates, he testified that his relationship with Onyango is not cordial. He described Onyango as greedy and not a straight forward person. He confirmed that when he confronted Onyango together with his brothers after getting information that the suit property had been sold, Onyango told them that he had deposited the title deed for the suit property with a bank. He testified further that he did not believe that Onyango had obtained a consent from the land control board to charge the suit property. In further cross-examination by the 2nd respondent's advocate, the petitioner disowned the contents of paragraph 21 of his affidavit in support of the petition. He confirmed that in the Green Card annexed to his affidavit in support of the petition there is in the encumbrance section, a charge registered in 1991 and a discharge of that charge. He also confirmed that from that Green Card, there is no indication that that charge was discharged prior to the year 2012. The petitioner confirmed also that it is not normal to have two titles over the same property and he doubted the genuineness of the title that was purportedly issued to Onyango in the year 2005. He maintained that Onyango supplied him with the original documents in the presence of his advocate on record and among the documents that he received was the original death certificate for Ondigo a copy of which he annexed to his affidavit in support of the petition. He stated that he returned all the original documents to Onyango after making photocopies of the same. When referred to a copy of the Death Certificate annexed to his affidavit in support of the petition as annexure "K002", he confirmed that the same was altered with regard to the age of the deceased and the year of death. He told the court that he did not believe that death certificate. He however told the court that he did not know who altered the document. He confirmed that a part from that death certificate, he did not have any other document to show when Ondigo died. He admitted knowing, one Joseph Ocholla who he described as his clan's man. When shown annexure "A010" to the replying affidavit of Alice Okwar sworn on 24th January, 2013 which was a letter dated 27th September, 2011 allegedly written by Onyango asking for the return of the title deed for the suit property that had been deposited with the 2nd respondent as a security for a loan, the petitioner denied any knowledge of the said letter. He testified that no grant of letters of administration have been issued with regard to the estate of Ondigo and that he had not been issued with such grant. He testified that there were two homestead's on the suit property and that one of the occupants of the suit property had been paid to move out and that the only homestead that remains on the suit property is that which belongs to Onyango. He testified that their homestead is on land parcel No. 661 which measures 3.0ha. He clarified however that the said parcel No. 661 is also ancestral land. It was his evidence that he will be rendered homeless if the suit property remains in the name of the 3rd respondent as he has other brothers and sisters. He testified that Onyango has another piece of land the particulars of which he was not aware of and that when Onyango's son moved from the suit property, he went to stay on Onyango's said parcel of land. When asked on whose behalf he had brought these proceedings, he told the court that the petition herein has been brought on behalf of the children of Okello and Onyango and on behalf of Onyango who could not attend court because of sickness. He testified that he suspected fraud in the transaction leading to the use of the suit property as a security and that Onyango was involved in the scam. Asked why he did not include Onyango in the petition as one of the respondents, his response was that he left him out because the people who dealt with Onyango in the transaction did not do the necessary due diligence. He denied the suggestion that he was out to cover up his uncle's misdeeds.

9. In cross-examination by the 3rd respondent's advocate, he testified that he did not know that the suit property was charged until he got the documents referred to herein above from Onyango after the suit property had been sold to a third party. He learnt that it is the 3rd respondent who purchased the suit property through a public auction. He got the information from his brothers. He confirmed that the title of the suit property is now registered in the name of the 3rd respondent and that the suit property had belonged to Ondigo with respect to whose estate he had not obtained a

grant of letters of administration. He confirmed that the suit property belonged to Ondigo, deceased and that he had never been registered as proprietor of the suit property. He stated that Ondigo has many grandchildren and that in these proceedings, he is pursuing the cause of these grandchildren. He claimed to have been nominated to represent them. He claimed to have been given a written authority by his brothers which he nevertheless did not file in court. He confirmed however that he did not obtain written authority from Onyango to act on his behalf although Onyango was in support of the case. He testified that the death certificate that was given to him by Onyango was the original copy which he photocopied and gave back to Onyango. He stated that when he did the photocopying of the document, the alteration had been effected and that the areas that were altered related to the age of the deceased and the date of his death. When he inquired about this alteration from Onyango, Onyango's response was that what he gave him is what he had. He maintained that the information as to the date of death of Ondigo that was given to the civil registry by Onyango was incorrect. He stated however that he has not lodged a complaint with the police concerning this false information that was given by Onyango. He stated that he had asked Onyango for the original copy of the death certificate that he had given them earlier but Onyango claimed to have misplaced it. He confirmed that he has not asked the civil registry to correct the date of death of Ondigo. He denied that Ondigo was alive in 1991 and that Onjala, advocate witnessed his signature. He denied making alteration in the death certificate of Ondigo. He confirmed that none of the grandchildren of Ondigo is disabled.

10. In re-examination, the petitioner reiterated the contents of his affidavit in support of the petition. He stated that it was Onyango who took the title deed for the suit property to the 2nd respondent and that the suit property had two titles, one in the name of Ondigo and the other one in the name of Onyango. He stated that a copy of the Green Card that he obtained showed that Ondigo was the first registered owner of the suit property before it was transferred to Onyango and subsequently to the 3rd respondent. Although he denied altering the death certificate of Ondigo, he maintained that the facts on the altered death certificate as regards the age and date of death of Ondigo are correct. He attributed the alleged fraud involving the suit property to his uncle Onyango. He stated that his complaint against the 2nd respondent arose from the fact that it did not do due diligence.
11. After the close of the petitioners' case, in the absence of the 1st and 2nd respondent's, the 3rd respondent was the second in line to tender his evidence. The 3rd respondent did not testify in person. He however called two witnesses. The 3rd respondent's first witness was one, **Jacinta Ogunda (DW1)**. In her evidence in chief, DW 1 testified that; she is a civil servant working at the civil registration department in the Ministry of immigration and registration of persons. She was employed on 25th October, 1990 and she is currently stationed at Migori district at the registry of births and deaths where she is the one in charge of records relating to births and deaths in the district. They have two types of registration of deaths. There is the current registration and late registration. Current registrations are done up to 6 months from the date of death. Registration of death done from 7 months on words is late registration. When one applies for late registration of death he has to fill certain forms. These are either A3 forms or D4 forms. D4 forms are filled for persons who died from 1991 to date. For persons who died in the year 1990 backwards form A3 forms have to be filled. She testified that she was aware that an application was made for a death certificate for one, Ogola Ondigo(Ondigo). The application was for late registration of death. The applicant was issued with a D4 form to fill and then take it to the area assistant chief to sign and for the area chief to counter-sign. The applicant was supposed to return the form together with a letter of introduction from the area chief. He was also supposed to submit a sworn affidavit for late registration of death and for loss of Identity card of the deceased. The applicant for the death certificate for Ondigo availed all the documents that were required. The application for late registration of Ondigo was assigned entry no. 780302588 which is the death certificate number. The deceased's name was given as Ogola Ondigo(Ondigo). The date of death was given as 12th September, 1993 and his age as 110 years old. The applicant for the death certificate was Zedekia Onyango Ogolla(Onyango) who was indicated as a son to the deceased. The application for late registration was signed by the assistant chief and senior chief. The information in the application form is supplied by the applicant. She confirmed that the application for late registration of death marked as annexure BA3 (b) to the replying affidavit of the 3rd respondent is certified by the Deputy Civil Registrar and that the same corresponds with the original in her records. She

produced the said annexure BA3 (b) to the affidavit of the 3rd respondent as D. Exhibit 1. She stated that she also had the original copy of the letter that was written by the chief whose purpose was to introduce the applicant. It is normally kept by the registry for record purposes. She testified that the person who swore the affidavit in support of the application was Zedekia Onyango Ogolla(Onyango) in which affidavit he stated that the deceased died in 1993 at the age of 110 years. After the submission of the application and the requisite documents the registry completed a D2 form which is an internal document. This is where they write the certificate number and the date of registration and authority number. A copy of the D2 form with respect to the deceased Ogola Ondigo is annexure BA3(c) to the affidavit of the 3rd respondent which copy corresponds to the original which they have in their records. She produced the same as D. Exhibit 2. After filling form D2 they issued a certificate of death bearing registration no. 780302588. The information that was indicated in the death certificate was from their records as was provided by the applicant. The information was obtained from the documents that had been submitted by the applicant. Ondigo's death certificate was collected by one, Polycap Owiti. They don't retain copies of death certificates in their records. When shown annexure "BA1" to the affidavit of the 3rd respondent which is a copy of the death certificate said to be of Ondigo, she confirmed that the entry number is the same as in their records relating to Ondigo. She stated however that the age and date of death in the annexure do not correspond to the age and the date of death in their records. She stated that the same were altered and that the alteration did not originate from their office. She stated that the date of issuance of the death certificate is the same as the date in their records and that the only two items which do not agree with their records are the date of death and the age of the deceased. According to their records, Ondigo died on 12th September, 1993 and not on 12th September, 1983. She concluded that annexure "BA1" to the affidavit of the 3rd respondent is not a true and correct version of the death certificate issued by their office. She produced the said annexure "BA1" as D. Exhibit 3 which she termed as a forgery. She testified further that on 16th November, 2012 a lady came with a copy of a death certificate to her office. She said that the original got lost and she wanted a new one. The deceased in the said photocopy of the death certificate was Ogola Ondigo(Ondigo) and she issued the applicant with another original of the death certificate. The new certificate was made from their records and was duly signed. The lady collected the original and they retained the photocopy which the lady had which they destroyed. The same lady came back complaining that there was a typing error in the certificate. She claimed that the year of death was not correct. They declined to correct the year of death as she had demanded. She denied that the original death certificate of Ondigo was brought back to them and that they retained it. She confirmed that one, Victor Omollo is known to her and that he is the Deputy Civil Registrar Migori. She confirmed that the information given in annexure "BA3(a)" to the affidavit of the 3rd respondent is in accordance with what is contained in their records. She produced annexure "BA3 (a)" as D. Exhibit 4.

12. In cross-examination by the advocate for the petitioner, DW1 maintained that the person who visited their office in November, 2012 seeking another original copy of the death certificate was a lady and not a man and that she complained about the date of death which she was told according to the records for Ondigo to be 1993. The witness admitted that sometimes there are errors at the application stage or processing stage. She stated however that if alleged error concerns the date of death, they cannot change the same as they do not tamper with their records. The only errors that they correct are those committed at their office such as typing errors but not errors attributed to applicants. According to her the initial information provided to them is permanent and that they do not accept changes if the informant comes back and claims that the information he had given was wrong. She stated that they keep records provided to them but not copies of death certificates. They can however verify if a death certificate was issued by their office which verification they do from their records. She maintained that the age and the date of death in D. Exhibit 3 do not agree with their records as according to their records, Ondigo did not die in the year 1983. According to her, the son of Ondigo gave them information that Ondigo died in 1993. In re-examination, she said that they verify the information given by the applicant through the assistant chief and the chief who must also sign the application form. The applicant who applied for the initial certificate was Onyango and that Onyango did come back and claim that he had made an error in his application.

13. The 3rd respondent's second witness was, **Ashwin Ramji Gudka (DW2)**, who gave evidence on

11th July, 2013. In his evidence in chief, he told the court that; he is a business man trading under a company known as Ramji Meghji Gudka Ltd. and that the 3rd respondent is his son and he was attending a conference in Malaysia. The 3rd respondent works with him in the said company. The 3rd respondent gave him a power of attorney to appear for him in this case. He told the court that he was familiar with the contents of the 3rd respondent's affidavit in reply that was sworn on 12th November, 2012 and that the circumstances under which the 3rd respondent purchased the suit property is known to him because he actively participated in the process. He adopted the contents of the replying affidavit by the 3rd respondent aforesaid. He confirmed that the suit property is registered in the name of the 3rd respondent and that the 3rd respondent has planted sugarcane on about 6 hectares thereof. The remainder of the suit property is a homestead with one single house which house has not been touched.

14. In cross-examination by the petitioner's advocate, he stated that he participated in the purchase of the suit property which he said they handled together with the 3rd respondent. He stated that the suit property was put up for sale by the auctioneer and that although the 3rd respondent viewed the suit property before he purchased it, he did not do background check on the land before he bought it. The 3rd respondent did not know in whose name the land was registered before he purchased it. He stated that they did the transfer of the suit property themselves without the use of a lawyer after being issued with a certificate of sale by the auctioneer. He was not sure whether Ogola Ondigo (Ondigo) was the owner of the suit property or not. He noted that according to Exhibit "KOK10" to the affidavit of the petitioner, the proprietor of the suit property before it was sold to the 3rd respondent was Zedekia Onyango Ogola (Onyango). He stated that he did not have a copy of the transfer of the suit property to the 3rd respondent since he only had one copy which they surrendered to the land's office. In cross-examination by the 2nd respondent's advocate, he confirmed that the suit property was sold to the 3rd respondent at a public auction and that the 3rd respondent paid the full purchase price. He stated further that he was not aware that there was a dispute over the ownership of the property as the same had been given as a security to the bank and it is the bank that was auctioning it. In re-examination, he reiterated that before the suit property was transferred to the 3rd respondent the registered owner was Zedekia Onyango Ogola (Onyango). He stated however that the 3rd respondent had no contract with Onyango because the suit property was purchased from at a public auction by the 2nd respondent through an auctioneer. He stated that the 3rd respondent presented to the land's office a copy of the transfer, certificate of sale and the auctioneer's licence before the suit property was registered in his name.

15. The 3rd respondent closed his case with the said two witnesses. On its part, the 2nd respondent called one witness, **Alice Okwar (DD2 (1))**. In her evidence in chief, she told the court that; she works with the 2nd respondent as credit officer stationed at the 2nd respondent's Kisumu branch. Her duties include lending, monitoring the progress of and assisting in loan recovery. She adopted the contents of her replying affidavit sworn on 24th January, 2013. She also relied on the list of documents that had been filed in court by the 2nd respondent and the copies of documents annexed to the said list the originals of which she said are in the custody of the 2nd respondent. She testified that, in the year 1991, one, John Onango Angolo ("**Onango**") approached the 2nd respondent for a loan. Onango offered 2 properties to the 2nd respondent as a security for the said loan one of which was the suit property which was registered in the name Ondigo while the other property was **LR. No. South Sakwa/Kogelo/641 (Plot No. 641)** which was in the name of, **Joseph Ochola**. She stated that this is how the suit property came to be charged to the 2nd respondent. The loanee, Onango aforesaid did not repay the loan and after several demands the 2nd respondent proceeded to exercise its right of sale under the charge which sale was conducted by public auction. The purchase price for the suit property was paid in full. She explained that only the suit property was disposed of through public auction. The other property that had been given by the debtor as a security was not sold because the owner gave the 2nd respondent a repayment proposal. She told the court that until this suit was filed there has never been a complaint that the suit property was wrongfully charged to the 2nd respondent. She mentioned that prior to the

auction of the suit property Onyango approached the 2nd respondent through a letter in which he acknowledged that the title of the suit property had been surrendered to the bank as a security for a loan. Onyango offered to pay to the 2nd respondent a sum of Kshs. 50,000/= to redeem the title. In the said letter, Onyango did not raise the issue that the suit property was wrongfully charged to the 2nd respondent.

16. In cross examination by the 3rd respondent's advocate, she stated that the sale of the suit property was authorized by the 2nd respondent as chargee and that the auctioneer that was retained by the 2nd respondent was Colinet Investments which successfully sold the suit property through public auction to the 3rd respondent. She confirmed that the purchase price was paid in full to the bank and that the 2nd respondent bank had put up the property for sale after its rights under the charge had accrued. The charge over the suit property was executed by the chargor before an advocate, one, Nicholas Ombija which charge was duly registered. She explained that under the said charge the bank had a right to sell the suit property in default of payment of the loan which right they accordingly exercised.
17. In cross examination by the petitioner's advocate, DD2(1) stated that; the owner of the suit property was Ondigo who executed the charge through a thumb print. She stated that she could not verify the authenticity of the thumb print in the charge. She pointed out that there is an ID number below the thumb print but could not confirm whether the ID belonged to the person who had put the thumb print in the said charge. She stated that it is not the 2nd respondent's procedure to retain copies of ID's of chargors and that they did not have a copy of the ID card for Ondigo. She confirmed that she was aware of the allegations that Ondigo did not execute the charge because he was dead then having died in 1983 and that if the allegation is true the charge would be improper. She stated that the 2nd respondent had in its possession all along the original land certificate for the suit property. She confirmed that before the suit property was put up for sale they did carry out a valuation. They did not however carry out a search. She stated that the valuer who valued the property indicated the registered owner as Ondigo. When shown a copy of the Green card marked as annexure "K0010" to the petitioner's affidavit in support of the petition, she admitted that Ondigo was issued with a title deed on 26th June, 1974 and that there was an entry on 18th June, 2003 indicating that Onyango was the owner of the suit property and that Onyango remained the owner until the suit property was transferred to the 3rd respondent. She confirmed that the valuation report that was provided to the 2nd respondent did not provide this information. She stated that the loan was not advanced to Ondigo or Onyango but to John Onango Angolo(Onango). She told the court that the bank identified a buyer before putting up the suit property for sale which buyer was the 3rd respondent who showed interest in the property. She confirmed that the advertisement of the suit property for sale was done with the 3rd respondent in mind. She pointed out however that the suit property was given to the auctioneer to market for sale and that the sale was subject to a reserve price and the 2nd respondent knew that the 3rd respondent could meet the reserve price. She confirmed that they put up the property for sale after following all due processes. She stated that the 2nd respondent learnt of the death of Ondigo sometimes in the year 2003 which information was within their knowledge as at the time of putting up the suit property for sale. They did not however find out the name of Ondigo's administrator. She confirmed that the person who was served with the statutory notice was Onyango who had claimed to be illiterate but was nevertheless served. She confirmed that the title held by the 2nd respondent since 1991 was in the name of Ondigo and that they did not have in their custody a title in favour of Onyango. She clarified that after the purchase price was paid in full, the bank executed a transfer by chargee which transfer and the original title were handed over to the auctioneer. She stated that their duty ended at that point and she did not know how the actual transfer was done. She was not aware therefore how the suit property moved from the name of Onyango to the 3rd respondent.
18. In re-examination, DDW2 (1) stated that after the charge was executed the 2nd respondent bank had in its custody the original title for the suit property and as such there was no way the suit property could have been transferred to Onyango. She stated that Onyango has not come forward to complain that his property was sold wrongfully. She confirmed that the charge over the suit

property was registered on 18th November, 1991 and that it was discharged on 21st June, 2012. She explains that the 2nd respondent normally market properties before putting the same up for sale to save on costs which would be incurred on failed auctions and that the marketing is normally done by 3rd parties. She stated that the suit property could not have been transferred to Onyango while there was the 2nd respondent's charge in existence. She explained that charges are normally executed before advocates and that the 2nd respondent does not participate in the execution.

19. After the close of the 2nd respondent's case, the parties agreed to file written submissions. The petitioner filed his submissions on 12th August, 2013, the 2nd respondent on 30th August, 2013 and the 3rd respondent on 23rd August, 2013. I have considered the petitioner's petition, the affidavits filed in support thereof and the evidence tendered in proof thereof. I have also considered the written submissions filed by the petitioner. Equally, I have considered the affidavits filed by the 2nd and 3rd respondents in opposition to the petition, the evidence tendered by the respondent's witnesses and the written submissions filed by their respective advocates in opposition to the petition. I have also perused and considered the authorities cited by the parties.

SUMMARY OF THE PARTIES' RESPECTIVE CASES:

20. **The Petitioner's case:** The petitioner has brought the petition herein in his capacity as the grandchild of Ondigo who at all material times was the proprietor of the suit property which was registered in his name on 26th June, 1974. He has contended that Ondigo died on 12th September, 1983 and was survived by two children (Onyango and Okello) and 16 grandchildren. The petitioner contended that the petitioner and Ondigo's other grandchildren were entitled to inherit the suit property through Ondigo's two sons, Onyango and Okello. The petitioner's complaint against the respondents is that through a series of acts of fraud, forgery and collusion in which all the respondents were involved, the respondents caused the suit property to be transferred and registered in the name of the 3rd respondent with the effect that the petitioner and other grandchildren and heirs of Ondigo have been deprived of their inheritance. The petitioner has claimed that several years after the death of Ondigo on 12th September, 1983, the 1st and 2nd respondents in collusion with third parties through acts of forgery and fraud caused the suit property to be charged to the 2nd respondent in the year 1991 to secure a loan that was purportedly guaranteed by Ondigo. The petitioner has claimed further that in furtherance of the said fraud, the 2nd respondent purported to sell the suit property through public auction to the 3rd respondent in purported exercise of its rights under the said fraudulent charge. The petitioner's contention is that the aforesaid acts on the part of the respondents were carried out in contravention of the provisions of section 75 of the old constitution of Kenya and Article 40 of the constitution of Kenya 2010. It is on account of the foregoing that the petitioner has sought the reliefs prayed for in the petition.

21. **The 2nd respondent's case:** The 2nd respondent has denied all the claims put forward by the petitioner in support of the petition herein. The 2nd respondent has contended that the suit property was charged to the 2nd respondent by Ondigo to secure a loan that had been advanced by the 2nd respondent to Onango and that when Onango defaulted in the payment of the said loan to the 2nd respondent, the 2nd respondent put up the suit property for sale by public auction in exercise of its rights under the said charge at which auction, the suit property was sold to the 3rd respondent. The 2nd respondent denied the allegation that Ondigo died on 12th September, 1983 and that it was involved in any forgery in the charging, sale and transfer of the suit property to the 3rd respondent. The 2nd respondent contended that the issues raised in the petition are in the province of private law and should have been brought to court through a civil suit.

22. **The 3rd respondent's case:** The 3rd respondent's case is that the petitioner's case has no leg to stand on as it is based entirely on a forged death certificate for Ondigo. It is the 3rd respondent's case that the petitioner cannot base its case on his own criminal acts which should in fact be investigated and appropriate prosecution commenced against all those found culpable. The 3rd respondent contended that a party like the petitioner herein who is guilty of fraud and concealment

of material facts has no business approaching the seat of justice for recourse. The 3rd respondent contended that Ondigo died on 12th September, 1993 and not on 12th September, 1983 and that in the year 1991 during his life time, Ondigo executed a charge in favour of the 2nd respondent to secure a loan that had been advanced by the 2nd respondent to Onango. The 3rd respondent contended that the suit property was sold and transferred by the 2nd respondent to the 3rd respondent lawfully in exercise of the 2nd respondent's statutory power of sale arising from the charge aforesaid and that all necessary procedures were followed in the sale of the suit property to the 3rd respondent. The 3rd respondent has contended that he is a bona fide purchaser of the suit property at a public auction and that his title is impeachable. Like the 2nd respondent, the 3rd respondent has contended that the issues raised by the petitioner herein should have been brought to court through a normal civil suit and not through a constitutional petition. The 3rd respondent contended further that the petitioner has no *locus standi* to institute these proceedings as he is not the legal representative of the estate of Ondigo.

THE ISSUES FOR DETERMINATION:

23. The parties did not agree on issues for determination. Each party framed its own issues. The petitioner came up with 11 issues, the 2nd respondent 8 issues while the 3rd respondent framed 7 issues. After considering and reconciling the issues framed by the parties, I have come up with the following issues for determination;

- i. **Whether the petitioner has the *locus standi* to institute these proceedings?**
- ii. **Whether the suit property was lawfully charged by Ondigo to the 2nd respondent to secure a loan?**
- iii. **Whether the sale and transfer of the suit property by the 2nd respondent to the 3rd respondent was proper and valid?**
- iv. **Whether the petitioner and his family members were fraudulently, wrongfully and unconstitutionally deprived of the suit property?**
- v. **Whether the petitioner constitutional rights have been violated and/or threatened by the respondents and if so, whether the petitioner is entitled to the reliefs sought?**
- vi. **Which party is to bear the costs of the petition?**

THE DETERMINATION OF THE ISSUES RAISED:

24. Issue No. I

As I have stated herein earlier in my summary of the petitioner's case, the petitioner has brought these proceedings in his capacity as the grandchild of Ondigo. In the petition, he has sought redress on his own behalf and on behalf of the other grandchildren of Ondigo. In his testimony, he stated that the petition was also brought on behalf of Onyango who is his uncle. The petitioner's petition has been brought under the provisions of The Constitution of Kenya, 2010 and the repealed constitution. The provisions of the Constitution of Kenya have been invoked to the extent that the alleged fraudulent acts of the respondents are claimed to have deprived the petitioner and other heirs of Ondigo of their inheritance in contravention of Article 40 of the said constitution. For the repealed constitution, the petitioner has only invoked section 75 thereof. The petitioner has claimed that the alleged acts of the respondents which has led to the suit property being transferred to the 3rd respondent amounted to compulsory acquisition of the suit property contrary to section 75 of the repealed constitution. It is not in dispute that the suit property was at all material times registered in the name of Ondigo. It is also not in dispute that Ondigo is deceased and that the petitioner is not the duly appointed administrator of his estate. The respondents have invoked the provisions of the Law of Succession Act, Cap. 160 Laws of Kenya ("the Act") in support of their contention that the petitioner who is not a legal representative of the estate of Ondigo has no *locus standi* to bring these proceedings which concern a property which formed part of the estate of Ondigo. Citing section 82 of the Act, the respondents have argued that only a legal representative of a deceased has power to enforce by suit or otherwise causes of action

howsoever arising which survives the deceased or which arises out of his death for his estate. The respondents have cited a number of cases including the cases of, **Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another (1982-88) 1 KAR 1049** and **Trouistik Union International & another vs. Jane Mbeyu & another [1993] eKLR** in support of this submission. In response to these submissions, the petitioner has cited the provisions of section 84 of the repealed constitution and Article 22 of the Constitution of Kenya, 2010 as conferring upon him the right to bring these proceedings. Section 84 of the repealed constitution provided that any person who alleged that any of his rights and freedoms protected under that constitution was being or was likely to be contravened had a right without prejudice to any other action with respect to the same matter available to him to apply to the High Court for redress. That right of standing according to the petitioner has been amplified under the Constitution of Kenya, 2010. Article 22 of the Constitution of Kenya, 2010 has given every person whether acting in their own interest or in the interest of another person who cannot act in their own name or as a member of or in the interest of a group or class of persons or in the public interest a right to institute court proceedings claiming that a right or a fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. The petitioner submitted that the breach by the respondents of the provisions of section 75 of the repealed constitution and Article 40 of the Constitution of Kenya, 2010 in relation to the suit property has affected him individually and as a group or class of persons known as grandchildren of Ondigo. The petitioner cited cases from Zambia, Guyana and Trinidad and Tobago in support of his submission that he has a constitutional right to maintain these proceedings.

In the Zambian Supreme Court case of, **Mwamba & Another vs. Attorney General of Zambia [1993] 3 LRC 166** that was cited by the petitioner, it was held in a constitutional petition seeking a declaration that the president of Zambia had acted in breach of the constitution by failing to act with dignity in the discharge of his executive functions that; "**When it came to *locus standi*, a citizen had a right to sue on constitutional issues unless the constitution itself explicitly or by necessary implication had taken a way such liberty. The entitlement of the citizen to go to court on such issues was an important freedom and one which was particularly important to democratic countries as it enabled the citizen to have a say in how the country was governed.**" The petitioner submitted that the provisions of the Law of Succession Act, Cap. 160 Laws of Kenya could not act as a restriction on the petitioner's constitutional right to access this court for the enforcement of his fundamental rights and freedoms. In the Court of Appeal case of Guyana, **Ali vs. Teaching Service Commission [1993] 3 LRC 225** in which an application was brought in the High Court by a teacher who had been summarily dismissed from service for a declaration that his constitutional right to a fair hearing had been violated, a preliminary objection was raised that the action was not maintainable because the applicant had not complied with the provisions of Guyana's Justices Protection Act which provided for procedures to be followed when a statutory body is to be sued which was a condition precedent to bringing the action, it was held that; "**Article 153 of the Constitution permitted anyone who alleged that his constitutional rights were violated to apply to court for relief and also provided the court with the original jurisdiction to determine such matters.....To insist on compliance with the provisions of the Justices Protection Act as a condition precedent to the bringing of an action by a citizen alleging breach of such rights and freedoms would result in their unnecessary and illegal restriction and the Act would not apply in such a case.**" What I have got from the principles set out in the foregoing cases is that where like in the present case, the constitution has given a right of access to court for redress of violation or threatened violation of constitutional rights, such a right can only be limited or restricted by the constitution itself either expressly or by implication. The court should be hesitant to construe provisions of a statute in a manner that limits, qualifies or restricts the exercise of such a right unless such a statute has been enacted pursuant to the provisions of the constitution that has conferred such a right. In our case, the provisions of Article 22 of the Constitution of Kenya, 2010 gives a right to any person personally or as a member of a group who alleges that his rights or fundamental freedoms have been violated or are threatened to institute court proceedings for redress. The only qualification for the exercise of such a right is that there must be an allegation that rights or fundamental freedoms in the bill of rights have been violated, infringed or threatened. Whether the applicant has such rights or is entitled to the alleged freedoms is a question to be answered while considering the merit of the petition. An applicant cannot be said to have no *locus standi* to bring a petition for redress of alleged breach or violation of

rights or fundamental freedoms because in the court's opinion no such rights exist.

Due to the foregoing, I am of the opinion that the provisions of section 82 of the Law of Succession Act, Cap. 160 Laws of Kenya would only become relevant when the court is considering whether the petitioner herein has proved that his rights or the rights of the group that he claims to belong have been violated. It cannot bar or restrict the petitioner's constitutional right to access this court for redress for the alleged violation of his rights. The cases cited by the respondents are good law but only as concerns normal civil suits. They are not relevant in proceedings for the enforcement of constitutional rights under the Constitution. As was stated in the case of, **Mwamba & Another vs. Attorney General of Zambia (supra)**, I am of the opinion that a court considering the issue of *locus standi* under Article 22 of the Constitution of Kenya, 2010 where proceedings have been brought by a person acting on his own interest or as a member of a group or class of persons should only satisfy itself that the petitioner has a legitimate interest in the subject matter of the petition. That should be the threshold to be met. As was stated in the said case, a court considering the question of *locus standi* in proceedings of that nature has to balance two aspects of public interest, namely, the desirability of encouraging individual citizens to participate actively in the enforcement of the law and the undesirability of encouraging meddlesome individuals to bring proceedings in matters which does not concern them. In this case, it is not in dispute that the petitioner is the grandchild on Ondigo and that Ondigo was at all material times the owner of the suit property prior to the transfer of the same to the 3rd respondent by the 2nd respondent. I am therefore satisfied that the petitioner has legitimate interest in the suit property the subject of this petition. That is enough to give him a *locus standi* to maintain this petition. It is therefore my finding that the petitioner has the necessary *locus standi* to maintain this petition. The respondents objection to this petition on the basis of *locus standi* is overruled.

25. Issue No. II:

The petitioner claimed that Ondigo could not have executed a charge over the suit property in favour of the 2nd respondent to secure a loan that the 2nd respondent had advanced to one, John Onango Angolo sometimes in the year 1991. The petitioner contended that the instrument of charge dated 15th November, 1991 that was said to have been executed by Ondigo before one, N.R.Ombija advocate on the same date and subsequently registered on 18th November, 1991 was a forgery. The petitioner claimed that Ondigo died on 12th September, 1983 aged 100 years and as such could not have executed the said charge on 15th November, 1991. In proof of the fact that Ondigo died on 12th September, 1983, the petitioner produced in court a copy of death certificate issued on 29th April, 2003 by the District Registrar of deaths/births, Migori. This death certificate was disputed by the respondents who termed it a forgery. The respondents contended that Ondigo died on 12th September, 1993 aged 110 years and not on 12th September, 1983 as claimed by the petitioner. The respondents claimed that the petitioner had altered particulars relating to the year when Ondigo died and his age at the time in the death certificate that had been issued by the District Registrar aforesaid with a view mislead and deceive the court into granting the reliefs sought in the petition herein. The respondents accused the petitioner of deceit fraud and forgery. When the dispute as to the authenticity of a copy of the death certificate that had been produced in court was raised when the matter came before me on an interlocutory application, I ordered the petitioner to produce for my perusal the original copy of the said certificate. The petitioner failed to do so. At the hearing, the petitioner led evidence that Ondigo died on 12th September, 1983 and not on 12th September, 1993. The petitioner could recall this year because he was still in primary school and that his own father who died on 11th September, 1994 died after the death of Ondigo. He admitted that the date on a copy of the death certificate that he presented to court in support of the petition was altered with regard to the year of death and the age of the deceased. He admitted further that the authenticity of the said death certificate was doubtful although he maintained that the information contained therein as concerns Ondigo's date of death was correct. He however denied the allegation that the said death certificate was altered by him. The petitioner's witness, GILBERT OLICK (PW1), corroborated the petitioner's evidence on the date of death of Ondigo. On his part, he stated that he could recall the year Ondigo died because there was snap general elections in that year and there were political campaigns going on in the area at the time. On their part,

the respondent's maintained that Ondigo was alive as at 15th November, 1991 and that he executed the said charge over the suit property in favour of the 2nd respondent. The 3rd respondent's witness Jacinta Ogunda (DW1) who is an assistant registrar of deaths/births in charge of records at the office of registrar of deaths/births at Migori testified that according to their records, Ondigo died on 12th September, 1993. She confirmed that a copy of the certificate of death that was annexed to the petitioner's affidavit in support of the petition was not consistent with the records held at their office. She confirmed that the certificate was issued by their office but the version that was presented to court had alteration on the year of death and the age of Ondigo, deceased. According to their records the year when Ondigo died was 1993 and that his age was 110 years. DW1 told the court that Ondigo's death certificate was applied for by Onyango and that he is the one who supplied information concerning the date of death and the age of Ondigo. The witness told the court that there was a request made to them to amend the date of death of Ondigo in their records and to issue a new death certificate which request was turned down. The witness denied that their office confiscated the original death certificate that they had issued to Onyango and had it destroyed. According to the 2nd respondent's witness, ALICE OKWAR (DDW2(1)), Ondigo executed the instrument of charge over the suit property before the 2nd defendant's advocate on 15th November, 1991 and that Ondigo signed the said charge using his thumb print and the particulars of his identity card were taken down and noted against his thumb print. She could not however confirm whether the thumb print or the identity card number that was set out in the charge belonged to Ondigo. She told the court that Charges are normally executed before the 2nd respondent's advocates and that the 2nd respondent does not normally participate in the execution exercise.

In his submission, the petitioner submitted that the original certificate of death for Ondigo was repossessed and destroyed by **DW1** and as such the court was not now in a position to determine whether a copy of the death certificate that was presented to court by the petitioner was a true copy of the original certificate that was issued by the registry of births and deaths. The petitioner submitted that DW1's alleged destruction of the original certificate of death for Ondigo was meant to conceal evidence and must be construed against the respondents. The petitioner submitted that a death certificate is not the only means of proving the date of death of a deceased person. The petitioner submitted that he had put sufficient evidence before the court which has proved on a balance of probability that Ondigo died on 12th September, 1983 and not on 12th September, 1991. He termed the evidence given by DW1 as mere hearsay. The petitioner submitted that he had proved that the date of death of Ondigo that had been given by Onyango to DW1 and which was in the records of the registrar of births and deaths was not correct. He urged the court to hold that Ondigo died on 12th September, 1983 and as such could not have executed a charge on 15th November, 1991 which charge is therefore a forgery null and void. The petitioner's entire case herein was based on the fact that the Charge said to have been executed by Ondigo over the suit property in favour of the 2nd respondent was fraudulent on the ground that Ondigo died on 12th September, 1983 several years before the date of the alleged execution of the said Charge. In view of the nature of his case, it was of paramount importance for the petitioner to a certain the correct date of death of Ondigo as the entire case revolved around that. The petitioner swore an affidavit stating that Ondigo died on 12th September, 1983 and annexed to that affidavit a photocopy of what he claimed to be the death certificate for Ondigo. The said photocopy of the alleged death certificate for Ondigo shows clearly on the face of it that the year of death and the age of the deceased have been altered. The alteration on the document is so apparent that anyone looking at the same cannot fail to notice it. When the court noted this anomaly in the document and called upon the petitioner to furnish the court with the original copy from which a photocopy had been made and presented to court, the petitioner failed to do so. When confronted with the overwhelming evidence from the 3rd respondent that a photocopy of the death certificate that he had presented to court was altered as it was not in accord with the records kept at the registry of births and deaths where it was claimed to have originated, the petitioner owned up and admitted that the document had been altered. He however denied any involvement and blamed Onyango who had given him the original of that document as the one responsible for the alteration. The petitioner also maintained that Onyango had given wrong information to the registrar of births and deaths as regards the correct date of death of Ondigo. He urged the court to treat the evidence of DW1 as concerns the date of death of Ondigo as

hearsay and to believe his evidence and the evidence of his witness as correct as far as the date of death of Ondigo is concerned. As I have stated above, the petitioner has contended that he has brought this petition on his own behalf, on behalf of the grandchildren of Ondigo and on behalf of Onyango. This is the same Onyango who is being blamed by the petitioner for the alteration of the death certificate that was presented to court by the petitioner. This is also the same Onyango who is being accused of giving the wrong information to the registry of deaths and births as concerns the date of death of Ondigo. Onyango himself never swore an affidavit in support of the petition herein and never attended court to give evidence to explain the circumstances under which the death certificate that was presented to court was altered and why if at all he did not give the correct date of death of Ondigo to the registrar of deaths. The petitioner having admitted that Onyango is part and parcel of this petition, I am unable to resist the 3rd respondent's argument that there was a deliberate attempt on the part of the petitioner to deceive and mislead this court through acts of forgery and fraud. The petitioner has now called upon me to disregard a copy of the death certificate that he had presented to court in proof of death of Ondigo and find that it is not only through a death certificate that the date of death of a deceased can be proved. He has now sought to rely on his parole evidence and that of PW1 to prove that Ondigo died on 12th September, 1983 and not on 12th September, 1991. To start with, it is my finding that the death certificate that was annexed to the affidavit of the petitioner in support of the petition herein as annexure "KOO 2" was a forgery and that it was intended to deceive and to mislead the court. Having made this finding, I would say that I am unable to believe the evidence of the petitioner as concerns the date of death of Ondigo. This is because, first, this court is unable to believe the testimony of a person who has been proved to have set out to mislead and deceive the court through forgery of documents presented to court. Secondly, even if it is assumed that the petitioner was not involved in the alteration of the death certificate for Ondigo that was presented to court, as between the petitioner and Onyango, I would believe Onyango rather than the petitioner on the issue as to when Ondigo died. DW1 tendered in evidence the forms that were submitted by Onyango to the registrar of deaths when he applied for late registration of the death of Ondigo in which forms he stated that Ondigo died on 12th September, 1993. It is on the basis of this application that the registrar issued the death certificate that was altered and used to support this petition in which the date of death of Ondigo was indicated as 12th September, 1993 and Ondigo's age as at the date of death was given as 110 years. No reason was advanced as to why Onyango should have given a wrong date of death of Ondigo to the registrar of deaths. There is a period of 8 years between 12th September, 1983 and 12th September, 1993. I don't think that even if Onyango was confused, he could have missed the date of the death of his father by such a large margin. Onyango was an adult in the year 1983 and must have participated more in the funeral arrangements for his father Ondigo if he died in that year than the petitioner who testified that he was then in class 4. In the circumstances Onyango would know better when Ondigo died. Failure on the part of the petitioner to call Onyango who he claimed to be in support this petition as a witness or even to have his affidavit filed must be construed to mean that he would have tendered adverse evidence against him. A part from stating that Ondigo died in the year Kenya had snap general elections, the petitioner's witness PW1 had nothing else to prove that Ondigo died on 12th September, 1983. PW1 according to his affidavit sworn on 20th November, 2012 went to Ulanda Catholic Parish to confirm that date from their records but found no records available. PW1's evidence when considered against the evidence of DW1, I am inclined to believe the evidence of DW1. According to the evidence of DW1, the information as to the date of death of Ondigo that was provided by Onyango was confirmed by the area senior assistant chief and senior chief who endorsed Onyango's application for late registration of the death of Ondigo. Onyango gave information to the office of DW1 before any dispute arose over the suit property. As I have stated above, no reason has been advanced as to why Onyango would have supplied DW1's office with wrong information regarding Ondigo's date of death.

Due to the foregoing, I have not been persuaded by the petitioner that Ondigo died on 12th September, 1983. In the circumstances of this case and from the evidence on record, I am inclined to accept the evidence tendered by the respondents that Ondigo was alive as at 15th November, 1991 when he is said to have executed a charge in favour of the 2nd respondent. No evidence has been placed before me to prove either that the thumb print endorsed in the said charge and the identity card number given in the said charge do not belong to Ondigo. I therefore have no reason to find that the charge dated 15th November, 1991 and registered on 18th November, 1991 is a forgery and as such invalid. In my view,

the said charge is valid and proper in law. I am unable at all to appreciate the petitioner's alternative argument on the admissibility in evidence of the charge dated 15th November, 1991 that was produced in evidence by both the petitioner and the 2nd respondent. I would not wish to say more on the same save only to state that the onus was upon the petitioner to rebut the presumption by law under section 96 of the Evidence Act, Cap. 80 Laws of Kenya that the charge dated 15th November, 1991 was properly executed by Ondigo and attested by N.R.Ombija, advocate. The petitioner having failed to rebut the presumption, the onus could not shift to the 2nd respondent to prove the proper execution and attestation of the said document. A mere allegation without proof is not enough to rebut a statutory presumption.

26. Issue No. III:

I have already found above that Ondigo executed a charge over the suit property in favour of the 2nd respondent to secure a loan that was given by the 2nd respondent to Onango. The 2nd respondent tendered evidence to the effect that Onango defaulted in his loan repayment to the 2nd respondent as a result of which the 2nd respondent put up the suit property for sale in exercise of its statutory power of sale under the said charge. The 2nd respondent served all the necessary notices after which it put up the suit property for sale through public auction at which auction, the suit property was sold to the 3rd respondent who was the highest bidder. There is no evidence before me that the 2nd respondent breached any law or term of the charge in putting up the suit property for sale and in selling and transferring the same to the 3rd respondent. It is my finding therefore that the suit property was lawfully sold and transferred by the 2nd respondent to the 3rd respondent. I don't know how and in what circumstances Onyango was registered as the owner of the suit property. The petitioner himself testified that he doubted the validity of Onyango's alleged title a copy of which was never produced in court. What I can say is that there is no way Onyango could have had the suit property transferred to him while the 2nd respondent's charge remained in force. If the property was at all transferred to him by whoever, such transfer was subject to the 2nd respondent's charge that remained in force until it was discharged by the 2nd respondent on 21st June, 2012 when the suit property was transferred to the 3rd defendant. The petitioner who in his testimony casted doubt on the validity of Onyango's alleged title over the suit property cannot now turn round and submit that Onyango was also dispossessed of the suit property without due process.

27. Issue Nos.III, IV and V:

As I have already held above, the suit property was lawfully charged by Ondigo to the 2nd respondent to secure a loan that was advanced by the 2nd respondent to Onango. Under the said charge, the 2nd respondent had a right to sell the suit property in the event that Onango defaulted in the payment the loan that was secured by the said charge. There was uncontroverted evidence that Onango defaulted in the repayment of the said loan as a result of which the 2nd respondent exercised its rights under the charge aforesaid by putting up the suit property for sale to recover monies that were secured under the charge. I am of the opinion that the whole process leading up to the sale of the suit property by the 2nd respondent to the 3rd respondent was proper and lawful. I am unable to find any statutory or constitutional provisions that were breached or violated by the respondents. The petitioner had claimed that his fundamental rights and the fundamental rights of other grandchildren of Ondigo to the suit property have been violated by the respondents. First, as I have already found, the respondents have not violated any provisions of the constitution in relation to the suit property. Secondly, the petitioner has not established that he and the said grandchildren of Ondigo have a right to the suit property which is protectable under the constitution. I doubt if the mere fact of being a grandchild of a deceased person gives one a right to the property of such deceased. Under the Law of Succession Act, Cap. 160, Laws of Kenya, the property of a deceased person belongs to his estate and the only person who has a right over the same is the legal representative of such estate. The petitioner and the persons whose interest he claims to represent which includes Onyango have therefore not only failed to establish a proprietary right over the suit property capable of protection under section 75 of the repealed constitution or

Article 40 of the Constitution of Kenya, 2010 but also to show that such right if it exists has been violated. The petitioner having failed to prove violation of any of his fundamental rights, it is my finding that the petitioner is not entitled to the reliefs sought in petition.

28. Conclusion:

The upshot of the foregoing is that the petition herein lacks merit. The same is hereby dismissed with costs to the 2nd and 3rd respondents.

Delivered, dated and signed at KISII this 14th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mageto holding brief for Oduk for the Petitioner

N/A for the 1st Respondent

Mr. Nyanchoga holding brief for Onjuro for the 2nd Respondent

Mr. Nyanchoga holding brief for Oguttu for the 3rd Respondent

Mobisa Court Clerk.

S. OKONG'O

JUDGE