In re Estate of George Munyaka Mulwa (Deceased) (Succession Cause E290 of 2021) [2024] KEMC 35 (KLR) (17 September 2024) (Ruling)

Neutral citation: [2024] KEMC 35 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

SUCCESSION CAUSE E290 OF 2021

CN ONDIEKI, PM

SEPTEMBER 17, 2024

IN THE MATTER OF THE ESTATE OF GEORGE MUNYAKA MULWA (DECEASED)

BETWEEN

JOSEPH KILONZO MWAYA ..... BENEFICIARY

AND

GERALD MULWA MUNYAKA ..... 1ST ADMINISTRATOR

SIMON WAMBUA MUNYAKA ..... 2ND ADMINISTRATOR

ALFONCE MUTISYA MUNYAKA ..... 3RD ADMINISTRATOR

MARY FRANCESCAH MUNYIVA MUNYAKA ..... 4TH ADMINISTRATOR

RULING

Part i: The Summons For Confirmation of Grant and Protest Thereto

1. The Respondents filed a Summons for Confirmation of Grant dated 6th June 2022 and filed on 9th June 2022. In reaction, the Protestor filed an Affidavit of Protest dated 25th July 2022 and filed on even date.

2. This dispute was referred to mediation and registered as Machakos Mediation No. 005 of 2023. It failed to bear fruit.

Part ii: The Beneficiary/protestor's Case

3. This matter proceeded by way of Affidavit evidence.

4. The Protestor describes himself as a grandson of the deceased, being a son to the late Patrick Mwaya Munyaka, who was a son of the deceased. The Protestor that he was called on 28th May 2022 and asked to append his signature on certain documents which were necessary for filing the Summons for Confirmation of the Grant herein. He deposes that he proceeded to the office of the advocates

representing the Respondents herein and he signed the documents, among them being "A consent to Mode of Distribution" exhibited as JKM 1. He deposes that thereafter, he sought legal advice and he was advised that:

i. the said document (JKM1) does not accord with rule 40(8) of the Probate and Administration Rules since it was not attested;

ii. the proposal set out in the said document (JKM1) that the properties be transmitted to the Respondents to hold in trust of the beneficiaries does not meet the stipulation of section 71(2) of the *Law of Succession Act* and rule 40 (4) of the *Probate and Administration Rules* requiring specification of the identities of all persons beneficially entitled and their respective shares in the estate; and

iii. nine properties to wit outstanding sale proceeds of Mavoko Town Block 3/57853; plot numbers 3/3376 Mavoko 20 acres; 3549 Lukenya 3 acres; Mavoko Town Block 3/81221 6.59 Ha; 3/2827 Mavoko 15 acres; Mitaboni plots 230,231, 1360; Kithima plots 2001, 229, 1528; Koma plot 3756; and Kenol plot 1950, have been deliberately omitted from the list of properties of the estate.

5. In his written Submissions dated 22nd December 2023 and filed on 23rd January 2024, learned Counsel Dr. Maingi instructed by Dr. Leonard Maingi & Company Advocates, representing the Protestor, rehashed the contents of Affidavit of Protest.

6. Reliance is placed upon *Re Estate of Makokha Idris Khasabuli [Deceased]* [2019] eKLR; *Re Estate of Malikit Singh [Deceased]* [2022] eKLR; and *Estate of Peter Nyaga Muchunguri [Deceased]* [2021] eKLR.

Part iii: The Administrators/respondents' Case

7. In their joint Replying Affidavit, the Respondents depose that the Protestor is not a legal representative of the estate of George Munyaka Mulwa as deposed in his affidavit. It is deposed that the Protestor is not candid that all members of the family of the deceased sat and agreed to have all the properties of the deceased held by the Respondents in trust of all the beneficiaries and that they also agreed on the mode of distribution. It is further deposed that the Protestor is not candid that the Respondents proceeded to act on the family agreement by instructing the advocate representing the Respondents to draft the documents to reflect the family agreement and ask all the beneficiaries to sign the documents. It is deposed that in any event, the wife of the deceased, Mary Francescah Munyaka, has a life interest in the properties of the deceased.

8. Concerning omission of some properties of the estate, it is deposed that the properties not in the list now are those which have not been registered in the name of the deceased and that they will be included as soon as ownership documents are procured.

9. In his written Submissions dated 9th December 2023 and filed on 30th January 2024, learned Counsel Mr. Musili instructed by D.M. Mutinda & Company Advocates, representing the Administrators/ Respondents, rehashed the contents of the Replying Affidavit, placing reliance on section 35 of the *Law of Succession Act* as construed in *Tau Katungi v Margaret Katungi & another* [2014] eKLR; In *Re Estate of Walter Kiplangat Arap Chamdany [Deceased]* [2021] eKLR; and *Ludiah Chemutai Bett v Joseph Kiprop Tanui* [2017] eKLR.

10. Concerning the mode of distribution, it is submitted that it is based on the family agreement which was consented to by all beneficiaries, including the Protestor. It is submitted that the Protestor has not demonstrated coercion, duress, misrepresentation or fraud to enable the Court set the consent aside.

This Court is urged to find the consent binding, therefore, placing reliance upon *M&E Consulting Engineers Limited v Lake Basin Development Authority & another* [2015] eKLR.

Part iv: Questions for Determination

11. Commending themselves for determination - gleaning from the Affidavit of Protest; the Replying Affidavit; and the rival written Submissions – are three questions as follows:

    i. Whether the consent titled "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date does not accord with rule 40(8) of the *Probate and Administration Rules* regarding attestation.

    ii. Whether the consent titled "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date proposing that the properties of deceased be transmitted to the Respondents to hold in trust of the beneficiaries does not accord with the stipulation of section 71(2) of the *Law of Succession Act* and rule 40 (4) of the *Probate and Administration Rules* requiring specification of the identities of all persons beneficially entitled and their respective shares in the estate.

    iii. Whether nine properties to wit outstanding sale proceeds of Mavoko Town Block 3/57853; plot numbers 3/3376 Mavoko 20 acres; 3549 Lukenya 3 acres; Mavoko Town Block 3/81221 6.59 Ha; 3/2827 Mavoko 15 acres; Mitaboni plots 230,231, 1360; Kithima plots 2001, 229, 1528; Koma plot 3756; and Kenol plot 1950, were deliberately omitted from the list of properties of the estate.

Part V: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

(i) Whether the consent titled "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date does not accord with rule 40(8) of the Probate and Administration Rules regarding attestation; and (ii) whether the consent titled "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date proposing that the properties of deceased be transmitted to the Respondents to hold in trust of the beneficiaries does not accord with the stipulation of section 71(2) of the *Law of Succession Act* and rule 40 (4) of the Probate and Administration Rules requiring specification of the identities of all persons beneficially entitled and their respective shares in the estate

12. Because they are joined at the hip, this Court will determine the two questions contemporaneously.

13. It is now settled that distribution of the estate in circumstances of intestacy, can either be based on the consent of all the beneficiaries failing which the Court will distribute it in accordance with the rules enacted sections 32-42 of the *Law of Succession Act*. This model of alternative dispute resolution enjoys affirmation by Article 159(2) (c) of the *Constitution* and further recognized by the *Law of Succession Act* in inter alia section 71, and inter alia rules 26 and 40 of the *Probate and Administration Rules*.

14. The Protestor seeks to resile from the said consent, explaining that his change of mind came after benefiting from legal advice subsequent to appending his signature on the consent.

15. What is the legal import of this change of mind after he had already signed the consent? What is the Protestor obligated to do in order to resile from the consent?

16. A consent is by all standards a contract binding on the parties. It thus bears a contractual effect.

17. It follows that a consent can only be set side on vitiating grounds which would justify setting a contract aside. Such grounds, which are similar the grounds for setting aside a consent Judgment or Order, were discussed in great depth in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, per Hancox JA (as he then was) with Nyarangi & Platt Ag JJA (as they then were) concurring; Purcell v F C Trigell Ltd [1970] 2 All ER 671, at page 676, per Winn LJ.; Kinch v Walcott [1929] AC 483. Also, see Law v Law [1905] 1 Ch 140, at 158; *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd*, per Githinji J., (as he then was); *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, per Harris, J. (as he then was).

18. What then are these specific grounds? The specific grounds are fraud, mistake, misrepresentation, duress, coercion, undue influence, collusion, unconscionability, et alia. In the locus classicus decision in such matters namely *Flora N. Wasike v Destimo Wambok*o [1988] eKLR, Hancox JA (as he then was) with Nyarangi & Platt Ag JJA (as they then were) concurring held that "It is now settled law that a consent Judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out... "The mode of paying the debt, then, is part of the consent Judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contact between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7th edn), vol 1, P 124, as follows: "Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside an agreement." See also *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266, at 269, per Law Ag P (as he then was); *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, at page 676, per Winn LJ.; *Kinch v Walcott* [1929] AC 483. Also, see *Law v Law* [1905] 1 Ch 140, at 158; *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd*, per Githinji J., (as he then was); *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, per Harris, J. (as he then was); *de Lasala v de Lasala* [1980] AC 546; *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR, per Koome, Kantai, JJA; Azangalala, JA (as he then was).

19. Also in *Hirani v Kassim* [1952] EACA 131, the Court of Appeal of East Africa adopted the following passage from Seton on Judgments and Orders, 7th Edition Vol. 1, at page 124 as the correct reflection of the principles governing setting aside of Consent Judgments and/or orders: "Prima facie, any order made in the presence and with a consent of Counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to policy of the Court ...or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable Court to set aside an agreement." Also, in *Ndirangu v Commercial Bank of Africa Nairobi* [2002] 2 KLR 603, Oguk, J. (as he then was) held that "a. It is well settled law that a consent Judgement can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. b. An Application for review can only succeed if the Applicant proves an error or mistake apparent on the face of the record, discovery of new evidence or any sufficient reason. c. An Application for review on the ground of new evidence will only succeed only of the Applicant proves that he did not have it in his possession at the time and could not have obtained it despite due diligence."

20. Similarly, in *Mursal Guleid & 2 others v Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. expressed himself as follows: "8...A consent Judgment can only be set aside if the consent was actuated by illegality, fraud or mistake. Consent Judgments can be set aside on limited grounds...A consent

Judgment is not an ex-parte Judgment... 10. Reasons that would enable Court to set aside an agreement are fraud, mistake, misapprehension or contravention of Court policy must be furnished by an Applicant before the Court can embark on the journey towards interfering with the subject consent."

21. What is the best way out of a consent of this nature? Parties to a contract can always resile the agreement. Just like contracts, whether or not there are no grounds upon which a contract can be invalidated, parties can by a subsequent agreement set aside the consent. In *Munyiri v Ndunguya* [1985] eKLR, on May 31, 1983 in the presence of Mr. Ndirangu for the Applicant and Mr. C.C. Patel for the Respondent, the following entry was made by V.V. Patel, J. (as he then was): - "By consent it is ordered that this case will be marked settled upon payment by the Plaintiff of a sum of Kshs. 25,000 to the Defendant, which the Defendant hereby agreed to accept in full settlement by monthly instalments of Kshs 3,000 each with effect from July 5, 1983 and then on 5th of each month UDC. In default execution to issue. Earlier orders for costs are set aside. It is ordered that there be no order for costs. The land registrar to remove the caution lodged by the Defendant on the land parcel No Mwerua/ Mukure/28 forthwith. V.V. Patel, Judge 31/5/83." The consent order was entered in the presence of the Advocates for the parties. However, the Advocates did not sign the consent in open, Court. The appeal revolved around this failure to sign. While upholding the consent Judgment on grounds that Advocates bind their clients, Platt, JA (as he then was) with Nyarangi, JA and Gachuhi Ag. JA concurring expressed himself as follows: "However, we may observe that as there appears to be a good deal of argument about the contents of some consent Judgments and orders, it would be wise to obtain the signature of the Advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time that the consent order or Judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well-recognised feature of life, despite instructions earlier given to their Advocates. Indeed, if the parties wish to resile, they can always do so, by consent." {Emphasis supplied}

22. The rationale behind this strict rule is to prevent litigants from turning around afterwards after changing their minds to the gross prejudice of their opponents, who had acted on the consent in good faith. See *Mursal Guleid & 2 others v Daniel Kioko Musau* [2020] eKLR, where D.K. Kemei, J. explained the rationale behind these strict principles in the following words: "10...The rationale behind this strict rule is to prevent litigants from turning around afterwards after changing their minds to the prejudice of their adversaries who had acted on the consent in good faith. It is therefore a sound principle."

23. What then amounts to fraud in the context of consent Judgments or orders? In *Mursal Guleid & 2 others v Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. defined fraud as follows: "11. Fraud has been defined as "actual fraud or some act of dishonesty." ... The rules of procedure require that where fraud is alleged it must be specifically pleaded and the particulars thereof given in the pleading. From the evidence on record, I am not satisfied that the Respondent did actual fraud being that he changed figures or altered a letter head; what is on record is a letter that has been placed before the Court and the Court is left to find out for itself what the Respondent did so as to amount to fraud. The letter in itself falls short of the standard required for proof of fraud and I am not satisfied that there was fraud committed by the Respondent so as to induce the appellants' Advocates to record the consent." In *Waimiha Saw Milling Co. Ltd. v Wagon Timber Co. Ltd*. [1926] AC 101 at p. 106. Lord Buckmaster defined fraud to mean some act of dishonesty.

24. And what amounts to misrepresentation in the context of consent Judgments or orders? Misrepresentation is a false statement of fact or law which induces a party to enter into a contract. In *Mursal Guleid & 2 others v Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. adopted the meaning of misrepresentation as defined in the Law Dictionary as follows: "12. With regard to misrepresentation,

the Law Dictionary defines Misrepresentation as: "An intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally; also: an act or instance of making such a representation." 13. My take is that misrepresentation is a false statement of fact or law which induces a party to enter into a contract." Also, in *Esso Petroleum Company Limited v Mardon* [1976] 2 All ER 5, misrepresentation was defined to mean an intentionally or negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally. Similarly, in *Bisset v Wilkinson* [1927] AC 177), it was held that there must be a false statement of fact or law as opposed to opinion or estimate of future events. In *Horsfall v Thomas* [1862] 1 H&C 90, it was held that once the Applicant has established that a false statement was made, the Applicant should take the second step which is to demonstrate that the false statement induced the Applicant to enter into the contract. In *Long v Lloyd* [1958] 1 WLR 753, it was held that if the Applicant does an act to adopt the contract or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation, the Applicant will lose the right to rescind it. Regarding misrepresentation, every party has a duty to verify facts relied upon by the opponent before entering into a contract. A party who has the opportunity to verify facts before entering into a contract should not be heard to complain that there was this and that misrepresentation. Negligence to verify on the part of the Applicant will deny the Applicant the right to entitlement to setting side. In *Mursal Guleid & 2 others v Daniel Kioko Musau* [2020] eKLR, D.K. Kemei, J. expressed himself as follows: "14. The questions that come to mind are, how did the appellant know that the Respondent was not treated at the said facility? Was it possible to verify the information allegedly provided to the appellant by the Respondent before the appellant entered into the consent or to put it another way, how could a stranger give the appellant facts about the accident and they accepted them? Did the stranger know more about the accident than the appellants? Why didn't the appellants verify before concluding the consent? Why didn't the appellant attend the trial that was conducted on 1.7.2015 only later to come up with the said letter? Did it affect the nature of injuries considering that the Respondent underwent a 2nd medical examination? I note that the letter that brought suspicion was authored on 20th July, 2015. The suit in the trial Court stalled since then. However this was after the parties had closed their case. I note that there is a 2nd medical report that forms part of the list of documents that the appellants intended to rely upon. However the same was not tendered and no explanation was given for the appellant's failure to do so. I am of the view that the issue of the medical report had a bearing on the quantum and yet the consent was related to liability and therefore it had no bearing on the consent and cannot be said to have induced the appellants to enter into the consent. In the interests of speedy justice, the matter be allowed to proceed to the logical conclusion where once the Court makes its final decision then if dissatisfied the appellants can appeal against the same. The evidence by the appellants is not enough to meet the legal criteria for setting aside a consent Judgment. 15. The appellants seem to fault the trial Court for entering a consent Judgement. However from the record, I am satisfied that the consent Judgment was entered by the Court after due consideration of the circumstances of the case. It was therefore done diligently. Once parties present consents either written or oral the Court's duty is to adopt the same and thereafter it becomes an order of the Court and binding upon the parties."

25. Having carefully analysed the Affidavit of Protest, this Court finds and so concludes that none of the named vitiating factors was proved, to enable this Court set aside the said consent.

26. It is instructive to underline that whenever there are documents governing a contractual relationship, the parole rule applies. In this context, in *Fidelity & Commercial Bank Ltd v Kenya Grange vehicle Industries Ltd* (2017) eKLR, the Court of Appeal stated thus: "So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible

to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it."

27. Put differently, a Court cannot rewrite the contract of parties. It is nowan established principle of contract that a Court cannot re-write a contract for and on behalf of parties. Contractual liberty belongs to the parties to the contract. As Mwera, J. (as he then was) in *Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999 (UR), took a view that "Parties only bind themselves by the terms contracted and executed and not anything else e.g. charging interest rates not in accord with what was covenanted cannot make a total figure a chargee considered having fallen in default and therefore entitling it to exercise its statutory power of sale... Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract." See also *National Bank of Kenya Ltd. v Pipeplastic Samkolit & Another* [2001] KLR 112, at p. 118, the Court of Appeal held that "A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No. 51 of 2000) (unreported): "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain." See also *Attorney General of Belize Et Al v Belize Telecom Ltd & another* (2009), 1WLR 1980 at page 1993, where the Court cited Lord Person in *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) I WLR 601 at 609, where the Court stated that "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable." See also the Court of Appeal decision in *Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahimji Pothiwalla v Kidogo Basi Housing Corporative Society Limited & 31 others* [2009] eKLR, per Tunoi, O'Kubasu and Githinji, JJA (as they then were); *The National Bank of Commerce Ltd v Nabro Ltd & Another* [2008] 1 EA 432; *Orion East Africa Ltd v Housing Finance Co. of Kenya Ltd* Nairobi HCCC No. 914 of 2001; *Harilal & Co. & Another v The Standard Bank Ltd*. Civil Appeal No. 41 of 1966 [1967] EA 512; *Maithya v Housing Finance Co. of Kenya and Another* [2003] 1 EA 133; *Givan Okallo Ingari & Another v Housing Finance Co. (K) Ltd* Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232; and *Spares & Services & 2 Others v Trans-National Bank Kisumu* HCCC NO. 439 of 1994.

28. In this case, this Court is permitted to infer the intention of the parties only from the "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date, with no liberty to permit parole evidence from the Protestor. It cannot rewrite it.

29. Finally, it is also instructive to underscore the tenor of a signature. The signature rule, prevalently known as the rule in L'Estrange v Graucob postulates that upon proof that a party to the contract signed the contract document, the party is presumed to have read and is bound by the contractual terms set out therein. And so, barring any vitiating factor, the person who signed the contract is bound regardless whether the person read the contractual terms of not. See *L'Estrange v F Graucob Ltd* [1934] 2 KB 394), which has been adopted in Kenya in inter alia *Joel Phenehas Nyaga & Joseph Nyaga Nzau (Suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) v Aloysius Nyaga Kanyua & Julia Gicuku Nyaga* [2020] eKLR.

30. In this case, the Protestor did depose in his Affidavit of Protest that he signed the "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date and thus bound, notwithstanding the fact that by the time he signed, he had sought no legal counsel.

31. Consequently, this Court finds the Protest to the effect that the consent titled "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date does not accord with rule 40(8) of the *Probate and Administration Rules* regarding attestation, and that it does not accord with the stipulation of section 71(2) of the *Law of Succession Act* and rule 40 (4) of the P*robate and Administration Rules* requiring specification of the identities of all persons beneficially entitled and their respective shares in the estate, unfounded and without merit.

(iii) Whether nine properties to wit outstanding sale proceeds of Mavoko Town Block 3/57853; plot numbers 3/3376 Mavoko 20 acres; 3549 Lukenya 3 acres; Mavoko Town Block 3/81221 6.59 Ha; 3/2827 Mavoko 15 acres; Mitaboni plots 230,231, 1360; Kithima plots 2001, 229, 1528; Koma plot 3756; and Kenol plot 1950, were deliberately omitted from the list of properties of the estate

32. This Court finds that at Paragraph 5 of the Replying Affidavit, the Respondents admitted that some properties were omitted but proceeded to present what this Court deems a plausible explanation that ownership of the omitted properties have not been procured.

33. This Court thus finds this Protest with merit.

Part vi: Disposition

34. Accordingly, this Court finds:

    i. the Protest to the effect that the consent titled "Consent to Mode of Distribution" dated 6th June 2022 and filed together with the Summons for Confirmation of Grant of even date does not accord with rule 40(8) of the Probate and Administration Rules regarding attestation, and that it does not accord with the stipulation of section 71(2) of the *Law of Succession Act* and rule 40 (4) of the *Probate and Administration Rules* requiring specification of the identities of all persons beneficially entitled and their respective shares in the estate, unfounded and without merit. It is dismissed.

    ii. the Protest that nine properties to wit outstanding sale proceeds of Mavoko Town Block 3/57853; plot numbers 3/3376 Mavoko 20 acres; 3549 Lukenya 3 acres; Mavoko Town Block 3/81221 6.59 Ha; 3/2827 Mavoko 15 acres; Mitaboni plots 230,231, 1360; Kithima plots 2001, 229, 1528; Koma plot 3756; and Kenol plot 1950, were deliberately omitted from the list of properties of the estate, well-founded and with merit.

iii. On basis of the finding in (ii) above, this Court invokes section 71(1) (d) of the *Law of Succession Act*, to postpone confirmation of this grant until such a time when the Respondents will confirm to the Court that the issues listed in (ii) above have been addressed.

35. Orders accordingly.

VIRTUALLY DELIVERED, SIGNED AND DATED THIS 17TH DAY OF SEPTEMBER 2024

.....

C.N. Ondieki

Principal Magistrate

Advocate for the Beneficiary/Protestor:

Advocate for the Administrators/Respondents:

Court Assistant: Mr. Ndonye