

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

FAMILY CIVIL APPEAL NO. E016 OF 2024

JOSEPHINE AGWINDI OBIERO1ST
APPELLANT

JAMES AKECH OGOLA.....2nd
APPELLANT

VERSUS

JECTONE ABAJA AWUONDA.....1ST RESPONDENT

(Being an appeal from the judgment of Hon. Benjamin Limo (PM) in Siaya Misc. Succession No. E296 of 2021 Josephine Ogwindi Obiero and James Akech Ogola Vs Jectone Abaja Awuonda dated 11th October 2024)

BETWEEN

JOSEPHINE AGWINDI

OBIERO.....1ST OBJECTOR/APPLICANT

JAMES AKECH

OGOLA.....2ND OBJECTOR/APPLICANT

VERSUS

JECTONE ABAJA AWUONDA.....
.....PETITIONER/RESPONDENT

JUDGMENT

1. The appeal herein arises from the ruling of Honourable B. Limo (PM) in Siaya Misc. Succession No. E296 of 2021 dated 11th October 2024 wherein he allowed the Respondents' summons for revocation of grant dated 7th September 2021 and issued orders inter alia; that the grant issued to the Appellant be revoked forthwith; that the certificate for confirmation of grant dated 17th May 2023 was defective as it indicated strangers as beneficiaries; that the Respondents and the Appellant were appointed as joint administrators of

the estate of Wilson Oware in Succession Cause No. 484 of 2021; that Succession Cause No. E296/2021 be consolidated with Succession No. 484/2021; that a fresh form P&A 41 to issue to the 1st Respondent and Appellant forthwith and that the two be at liberty to seek confirmation of grant which includes the name of the 1st Respondent which had earlier been omitted in the summons for confirmation of grant dated 17/5/2023; that an order be issued that the Appellant Jacktone Abaja Awuonda is a bonafide beneficiary of the estate of the late Wilson Oware; that the Appellant is entitled to 50% of the estate of Wilson Oware in South Gem/Dienya/620; that a certificate for confirmation of grant be issued afresh in compliance with the orders of the court; that the land registrar is ordered to revert back the name of Wilson Oware (deceased) to the land register in Land Parcel South Gem/Dienya/620 and that the earlier title be cancelled; that each party to bear their own costs.

2. Aggrieved by the aforesaid ruling, the Appellant filed his Memorandum of Appeal dated 25/10/2024 wherein he raised the following grounds of appeal:

- The learned Trial Magistrate rightly revoked a grant issued to the respondents but erred in distributing a share of the deceased instate estate to the respondent.
- The Learned Trial magistrate had no jurisdiction in holding that the grant issued to the 1st Appellant in

succession case No.484 of 2021 and Certificate of Confirmation thereof is defective

- The London Trial Magistrate held in law and in fact in failing to find the Succession cause number E296 of 2021 is *res judicata* and offends the mandatory provisions of section seven of the Civil Procedure Act
- The learned Trial Magistrates erred in law and in fact in consolidating succession cause no E296 of 2021 with succession cause No.484 of 2021
- They learned trial magistrate erred in law and in fact in appointing the 1st Appellant and the respondents as Co administrators of the estate of Wilson Oware Akech (deceased).
- The Learned Trail Magistrate erred in law and in fact in revoking the grant of letters of administration issued to the first appellant in succession Cause No.484 of 2021.
- The Learned Trial Magistrate erred in law and in fact in purporting to revoke succession cause number E296 of 2021 and 484 of 2021 and then consolidating revoked grants.
- The Learned Trial Magistrate erred in law and in fact in finding that the respondent (Jectone Abaja Awuonda)

is a bona fide in beneficiary of the estate of the late Wilson Oware Akech

- The Learned Trial Magistrate erred in law and in fact in finding that Jectone Awuonda (the respondent) is entitled to 50% of the estate of the late Wilson Oware Akech.
- The Learned Trial Magistrate erred in law and in fact in failing to find that Wilson Oware (deceased) was only entitled to a 1/3 of land parcel number SOUTH GEM/Dienya/620.
- The Learned Trial Magistrate Erred in law and in fact in holding and directing the Land Registrar to revert back land parcel number SOUTH GEM/DIANYA/620 to Wilson Oware (deceased) whilst the second Appellant and James Onanda Ogonda are also each entitled to 1/3 share of the property.
- The Learned Trial Magistrate Erred in law and in fact holding the earlier titles issued to the Appellants and James Onanda Oganda be canceled.
- The Learned Trial magistrate Acted without jurisdiction in overturning the decision of a court of concurrent jurisdiction and acting as an appeal court on a ruling issued by a court of concurrent jurisdiction Siaya Succession Cause No.484 of 2021

- The Learned Trial Magistrate erred in law and in fact in ignoring the ruling in High Court his number eighty five of 1995
- The Learned Trial Magistrate Erred in law and in fact in failing to find that the 2nd Appellant is entitled to 1/3 of SOUTH GEM/Dienya/620
- The Learned Trial Magistrate Erred in law and in fact in failing to find that the respondent is a stranger to the estate of the deceased
- The Learned Trial Magistrate Erred in law and in fact in failing to find that the children of the deceased rank and priority over nephews under section 29 of the Law of Succession Act.
- The Learned Trial Magistrate Erred in law and in fact in holding that the Respondent was taken in by the deceased as his child without any evidence to support the assertion.
- The fact that the 1st Objector was nowhere in June 2021 did not grant the respondent any right to claim as beneficiary of the estate of the deceased
- The Learned Trial Magistrate Erred in law and in fact in fail find that the then the first appellant the deceased is also survived by grandchildren and another child who ranks in priority over the respondent.
- The Learned Trial Magistrate Erred in law and in fact in failing to find that the Respondent made a false

representation that the 2nd Appellant was deceived and attempted to acquire the whole of land parcel number SOUTH GEM/Dienya/ 620.

- The learned Trial Magistrate erred in law and in fact in disregarding the pleadings, evidence, and submissions tendered for and on behalf of the appellants.

The Appellants therefore pray that the appeal be allowed with costs and that the judgment of the Learned Trial Magistrate be set aside and the Succession Cause be revoked

3. This being the first appellate court, its duty is to analyze and evaluate the entire evidence by subjecting it to a fresh exhaustive scrutiny and to arrive at its own independent conclusion so as to establish whether or not to uphold the decision of the trial court. This court must bear in mind that it did not have the opportunity to hear or see the witnesses as they testified and must give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).**

4. It is noted that the Respondents **(1st and 2nd Objector/Applicants)** had filed summons for revocation/annulment of grant dated 2/3/2022 wherein they

sought for an order that the grant of letters issued to the Appellant (**Petitioner/Respondent**) on 7/9/2021 be revoked. The Objectors' gravamen was inter alia; that the grant was obtained fraudulent by making of false statement and concealment of material facts; that the grant was obtained by means of an untrue allegation of facts essential in point of law; that the Petitioner/Respondent made false representation; that the allegation that the 2nd Objector herein was deceased while he in fact was alive; that the Petitioner/Respondent made a false misrepresentation of facts by claiming that Wilson Oware (deceased) was not survived by any child yet the truth is that he was survived by one child who is the 1st Objector herein; that the Petitioner/Respondent is not a relative or a dependant of the deceased; that the petition was filed without the consent of the beneficiaries; that the 1st Objector being the only child of the deceased ranks in priority in taking out letters of grant and also entitled to the entire estate of her late father.

5. The Petitioner/Respondent filed a replying affidavit dated 19/5/2022 wherein he averred inter alia; that the estate comprises of a 1/3 share in land parcel No. South Gem/Dienya/620 which measures 4.8 hectare which was originally registered in names of three persons - Akech Ogala(deceased), Wilson Oware (deceased) and Fanuel Ogonda (deceased); that he filed succession cause No. 296/2021 and sought to administer the 1/3 share of the land reference South Gem/Dienya/620 forming part of the estate of

Wilson Oware; that he is a grandson of the late Akech Ogala who had two children Charles Awuonda Akech (**Petitioner's father**) and Wilson Oware; that the late Wilson Oware married three wives - Grace Awiti who had no child, Mito who was blessed with one child and Lucia Awuor who was blessed with 6 children who are still alive, Anyango who had one daughter but who is deceased; that he is a nephew of the deceased Wilson Oware; that the 2nd Objector is a different person from Akech Ogala and that he is a stranger on the land and who has entered the land through fraud; that the 1st Objector is also a stranger in the estate of Wilson Oware since the record from the Registrar of persons reveals her as somebody whose father is one Obiero Paulo and mother Leonida Masawa domiciled in Uranga, West Alego, Siaya County; that the Objectors have come to court with unclean hands with the intention to acquire the estate unlawfully; that the 2nd Objector had filed Misc. Application No. 84 of 1995 Kisumu High Court which was revoked; that he seeks the court to compel the area chief to provide the true identity of the Objectors who are definitely strangers and fraudsters to the estate.

6. The Objector/Applicants filed further affidavits. The 1st Objector averred inter alia; that her late father Wilson Oware had five wives and that her mother was one Leonida Masawa who had three children two of whom are deceased while she is the only one surviving; that her late mother and her later father separated in the year 1969 and that her mother

returned to her parents' home in Alego taking her along; that her later mother remarried in 1970 to one Obiero Paulo from Alego and left her at her maternal grandmother; that she moved to her mother's new place in 1972 but later went back to her maternal uncle; that the said Paulo Obiero neither adopted her nor assumed parental responsibility over her as she was not his child; that as the only surviving child, she is entitled to her late father's estate; that she filed Succession Cause No. Siaya 484/2021 only to learn that the Petitioner herein had lodged another succession in the estate of her late father; that the claim by the Petitioner that he is a nephew to the deceased is false and misleading since he is neither a relative nor a dependant; that the Petitioner herein had lodged a succession cause in Kisumu No. 320/1999 but which was revoked and estate reverted to the three owners of the property James Onanda Ogonda, Wilson Oware and James Akech Ogala. The 2nd Objector supported the averments of the 1st Objector and maintained that the Petitioner is out to fraudulently acquire the estate of the deceased going by the fact that he had colluded with the chief West Gem Location who gave him a letter in which it was indicated that he (2nd Respondent) had died while the truth is that he is still alive.

7. The summons for revocation aforesaid was canvassed by way of viva voce evidence.

8. **Josephine Ogwindi Obiero (OW1)** adopted her supporting affidavit as well as further affidavit and listed documents

dated 13/5/2023 as her evidence in chief in support of her claim. She also adopted her statement dated 10/6/2022. She stated that she filed succession cause 484/2021 wherein she has been issued with a certificate of confirmation of grant. That the land in issue is South Gem/Dienya-Kathome/620. That the land is to be divided into three parts. That her father is Wilson Oware who is entitled to 1/3 share. That the Petitioner is a neighbour. That she was born on the suit land and that her mother Leonida Masawa left the homestead and left her at her maternal home. That the name Obiero belongs to her uncle who was her guardian with whom she lived but later on moved to her father's land South Gem/Dienya-Kathome/620.

On cross examination she stated inter alia; that her father is called Wilson Oware Akech; that he had three wives namely Milo, Grace Asoka and Leonida Masawa. That Leonida Masawa had a child called Awuor while Grace Asoka had no child; that her father died in 1983 and that she came for the burial with her relatives; that she came to her father's land in December 1984; that there were no structures on the land at the time; that she came to know her father's land in 2022 and went to stay in that land; that she took the area chief to the land on 31/4/2021; that her grandfather is called Aketch Wilson Ogola.

On re-examination, she stated that she came home while at the age of ten years.

9. The witness **James Aketch Ogala (OW2)** relied on his statement dated 10/4/2022. On cross examination, he stated

that he is the one who was sued by Charles Awuonda Aketch in Misc Application No. 84 of 1995; that the Appellant had his parcel of land No. 1978; that he took his Id Card in 1985; that the name is correct; that he is the son of Ogala; that Wilson Oware had three children one of them being Josephine and two others who are deceased; that he is aware of the Misc. Application 84 of 1995; that the Petitioner claimed that the land of Wilson Oware is the same land belonging to Charles Awuonda; that Charles Awuonda and Wilson Oware are brothers.

On re-examination, he stated that Wilson Oware had four children; that Leonida was the mother of the Objector.

10. **James Ogala (OW3)** adopted his statement dated 13/5/2023. He stated that he knows James Aketch from Gem who is his son. That James Aketch Ogala and Aketch Ogala is one and the same person and who is still alive.

on cross examination he stated inter alia; that he knows the first objector and her family; that they are related by association; that they live together as the children of Aketch and that Aketch is a child of Ogola; that Wilson Oware is the son of James Aketch; that they are nephews to Wilson Oware; that the first Objector is the daughter of Wilson Oware; that Wilson Oware had four wives namely; Milo, Grace, Leonida and Anyango who are all deceased and buried on the parcel of land. That all the children have died except the first objector. That Riat is a child of deceased Wilson Oware but the said child is deceased.

11. **Jectone Abaja Owuonda (PW1)** testified that he resides in parcel No. South Gem/Dienya/620 which measures 4.8 ha. He relied on a replying affidavit dated 19/3/2022 and the annexures as his evidence in chief.

On cross examination, he stated inter alia; that he has seen the certificate of confirmed grant in the case No. E484/2021 where the court issued the land to Josephine, James Aketch and James Awuonda; that he has seen the green card and that No. 19 shows the title closed for parcel No. 2191, 2193; that they have a title deed for Josephine Abiero as South Gem/Dienya/2092; that he has seen the area chief's letter; that he had stated that Aketch Ogala is dead; that the deceased had no child and that he is the only dependent; that he had stated that the deceased was blessed with one child who was deceased but also stated that the deceased had six children who are alive and reside in Alego area; that Riat is a daughter of Wilson Oware and who is deceased but that she had a son who is alive but who cannot be traced; that he has listed all names of the six children; that he does not know the son of Riat; that they had correction of names by James Aketch in 1985; that his father died in 1988 and was called Charles Awuonda; that James Aketch Ogala is not Aketch Ogala; that he does not have ID card of the deceased but that he has the chief's letter dated 30/4/2021; that they had lived with the deceased from birth in the same homestead; that his father sued James Aketch Ogala.

12. **Mary Awuonda (PW2)** relied on her statement dated 12/5/2023. On cross examination, she stated inter alia; that Wilson Oware had three wives namely Grace Awiti, Milo and Anyango; that she does not know Leonida; that Wilson Oware had no other wives.

13. The appeal was canvassed by way of written submissions. It is only the Respondents who complied.

14. Respondent's submissions are dated 15th July 2025. The learned counsel revisited the grounds raised by the Appellant namely: that the learned magistrate erred in law and in fact by declaring the 1st Objector/Respondent herein a beneficiary to the deceased's estate while she is not a beneficiary to the deceased's estate; that the trial court erred in fact and by law by disregarding the Appellant's evidence to the effect that the 1st objector/Respondent is not the daughter of the late Wilson Oware.

The counsel raised two issues for determination namely: whether the 1st Objector/Respondent is the child of the late Wilson Oware and whether the Appellant is the beneficiary of the estate of the deceased.

15. As regards the first issue, it was submitted that the 1st Objector/Respondent filed Siaya Succession Cause No. 484 of 2021 in respect to the Estate of Wilson Oware (deceased) and that Grant of Letters of Administration in Siaya Succession Cause No. 484 of 2021 was issued to the 1st

Objector/Respondent on 8/6/2022. That the grant of administration of Estate of Wilson Oware in Siaya Succession Cause No. 484 of 2021 was confirmed on 17/5/2023. That one of the cardinal issue that the trial court in Siaya Succession cause No. 484 of 2021, had to determine is whether the 1st Objector/Respondent was a beneficiary to the estate of the deceased. That on the basis of the determination, the grant of letters of administration was issued to the Objector/Respondent in Siaya Succession Cause No. 484 of 2021. It is also on the basis of the said determination that the Grant of Letters of Administration was confirmed. That the Grant of Letters of Administration issued to the 1st Objector/Respondent in Siaya Succession Cause No. 484 of 2021 and certificate of confirmation thereof has not been revoked, nullified, varied or set aside and that it is still in force. It was further submitted that the trial court in Succession Cause No. 484 of 2021 having made a determination that the 1st Objector/Respondent is a child and beneficiary of the estate of Wilson Oware (deceased) renders the issue as to whether the 1st Objector/Respondent is the daughter and/or beneficiary to the estate of Wilson Oware (deceased) res judicata. That the chief's letter dated 30/4/2021 introduces the 1st Objector/Respondent as the only child of the deceased. That it is on the basis of the said letter that the subordinate court in Siaya Succession Cause No. 484 of 2021 issued grant as well as a certificate of confirmation of grant to the 1st Objector/Respondent. That the Appellant did not summon the chief and thus the credibility of this letter is

not challenged. Reliance was placed in the case of *Re Estate of Mukhobi Namonya (deceased) (2020) eKLR* where Musyoka J held:

“Before I get into the substance of the matter before me, it is critical that I deal with the importance of the letter from the chief. It is not a requirement of the law, for it is not provided for in the Law of Succession Act, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.”

It was further submitted that on being cross examined, the Appellant stated that he is related to the deceased, as a nephew and lived together with him as his child. The Appellant’s witness (PW3) stated that the deceased had four wives namely Milo, Grace, Leonida and Anyango and that the children among them the 1st Objector as per PW3’s statement (see record of appeal).

Further, that **PW2 (2nd Respondent)** also confirmed that the 1st Objector/Respondent is the daughter of the deceased wherein reference was made to the statement of OW3 as found on the record of appeal. It was urged that the court takes judicial notice that the 2nd Objector/Respondent and OW3 James Awuonda Ogola and Wilson Oware, the deceased herein were co-registered proprietors of land parcel No. South Gem/Dienya/620 and thus he knew the deceased and his family.

It was submitted that the 1st Respondent vide a further affidavit dated 10/11/2022 explained how her mother separated with the deceased when she was still a minor and got remarried to Abiero Paul. That she has explained that her biological father is Wilson Oware and not Obiero Paul as annexed in the Court of Appeal records.

It was also submitted that the document exhibited by the Appellant as emanating from the Registrar of Persons is not credible as it was admitted by the Appellant during cross examination and that it is not dated and it does not indicate the author thereof.

16. As regards the second issue, it was submitted that the chief's letter dated 30/4/2021 on page 65 of the record of appeal unequivocally indicates that **Josephine Ogwindi Obiero Id Number 4059291 who is the daughter (only child) to Wilson Oware the late.** That this was corroborated by the evidence of OW2 and OW3. Reliance was

placed on Section 38 of the Law of Succession Act which provides as follows:

Where an intestate has left a surviving child or children but no spouse, the next intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

It was thus submitted that the first Respondent is the only surviving child of the deceased and therefore entitled to inherit the estate of the deceased by dint of Section 38 of the Act. Further, it was submitted that the Appellant could only benefit from the estate under Section 39 of the Act if there is evidence to the effect that the deceased died without children. However, it was submitted that this does not arise in view of the fact that the deceased had a surviving child who is the 1st Respondent herein and who should be allowed to inherit the estate of her father. It was further submitted that the Appellant while applying for the chief's letter made a false allegation to the effect that the 2nd Objector herein was deceased yet he is still alive and therefore the Appellant lied in his evidence especially when he claimed that he is a nephew of the deceased. Learned counsel finally urged the court to dismiss the appeal with costs to the Respondents.

17. I have considered the record of the lower court and the submissions filed. It is not in dispute that the Appellant herein

lodged succession cause No. 296 of 2021 and had the grant confirmed in his favour and was to be entitled to the 1/3 share due to the deceased in parcel South Gem/Dienya/620. It is also not in dispute that the 1st Respondent herein also lodged succession number 484 of 2021 wherein she was issued with a grant and which was confirmed and which entitled to a 1/3 share due to the deceased in parcel number South Gem/Dienya/620. It is also not in dispute that both the Appellant and 1st Respondent are each laying claim to the deceased's 1/3 portion in parcel number South Gem/Dienya/620. The issue for determination is whether the appeal has merit.

18. It is noted from the record of the lower court that the Respondents herein had filed summons for revocation of grant dated 2/3/2022 seeking for revocation of grant issued to the Appellant herein on 2/11/2021 in Succession Cause 296/2021. The said summons was canvassed by way of viva voce evidence as captured hereinabove. It transpired from the evidence aforesaid that land South Gem/Dienya/620 as per search dated 8/6/1977 was registered in favour of three persons namely Akech Ogala, Wilson Oware and Fanwel Ogonda and that each of these proprietors owned 1/3 share thereof. It is also not in dispute that one of the proprietors Fanwel Ogonda later died and that his estate was taken up by James Onanda Ogonda and which led to the new changes in the search dated 29/5/1984 which indicated the proprietors as James Onanda Ogonda, Akech Ogala and Wilson Oware. The

learned trial magistrate upon analyzing the entire evidence found that the objectors' application had merit and further held that the 1st Respondent herein Josephine Ogwindi Obiero having been found to be a surviving child of the deceased Wilson Oware was found to be a dependant and was allowed to own a third share of the property due to her late father Wilson Oware. It is also not in dispute that the said 1st Respondent herein had successfully lodged Succession Cause No. 484 of 2021 at Siaya in the Estate of Wilson Oware and was issued with a grant dated 8/6/2022 and confirmed on 17/5/2023 and that she was to inherit 1/3 of the deceased's share in parcel No. South Gem/Dienya/620 just like the other two proprietors James Onanda Ogonda and James Aketch Ogala and was shocked to discover that the Appellant herein had already lodged Succession Cause No. 296/2021 and obtained a confirmed grant entitling him to the whole property. The 1st Respondent also discovered that the Appellant had fraudulently filed Succession Cause in Kisumu High Court 320/1999 where he sought to acquire the whole property but that the said grant was revoked and the property restored to the rightful proprietors James Onanda Ogonda, James Aketch Ogala and Wilson Oware. Further, the Respondents came to the realization that the Appellant, while lodging the Succession Cause No. 296/2021, had made false statements, for instance claiming that the 2nd Respondent herein was deceased and that the 1st Respondent was not a child of the deceased yet the truth was all there for everyone to see.

19. Revocation of grants is provided for under Section 76 of the Law of Succession Act which sets out the provisions under which a grant can be revoked. The same provides as follows:

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

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

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

i) to apply for the confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

- ii) to proceed diligently with the administration of the estate; or**
 - iii) to produce to the court, within the time prescribed, any such inventory or account of administration as required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or**
- (e) that the grant has become useless and inoperative through subsequent circumstances.”**

20. It is noted that the Respondents in their application had made a raft of accusations against the Appellant in their affidavits and went ahead during the viva voce evidence to show that there was lack of good faith on the part of the Appellant when he lodged the succession cause No. 296 of 2021 inter alia; that he was the only surviving beneficiary; that the 2nd Respondent was already deceased yet it came out clearly from the evidence of the Respondents and their witnesses that the 1st Respondent was the only surviving child of the deceased while the 2nd Respondent was alive and kicking. Further, it transpired that the property namely South Gem/Dienya/620 was initially registered in names of three proprietors namely James Onanda Ogonda, James Aketch

Ogala and Wilson Oware. It is not in dispute that all the parties herein are in agreement that parcel No. South Gem/Dienya/620 was registered in the name of the aforesaid three persons. The petitioner in succession cause No. 296 of 2021 claims that his father Charles Awonda was a brother to Wilson Oware and therefore he is her nephew of the deceased Wilson Oware while the petitioner in succession course 484, Of 2021 claims to be a biological daughter of the late Wilson Oware and therefore she is the legitimate beneficiary to inherit the estate of her father Wilson Oware. The learned trial magistrate having received the rival evidence, from the parties was at great pains to determine who between the first objector and the petitioner was the legitimate beneficiary and legally authorized to take out letters of grant of administration. The trial court went ahead to cite provisions of the Section 29, 66 of the Law of Succession Act and Rule 26 (1) of the Probate and Administration Rules. I need to revisit the foregoing provisions.

Section 29 describes the category of dependence as follows;

- a. Wife or wives or former wife or wives, children of the deceased whether or not maintained by the deceased immediately prior to his death.
- b. Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, half-brothers and half-

sisters as were being maintained by the deceased immediately prior to his death.

- c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Section 66 provides that when a deceased has died intestate the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. Surviving spouse or spouses, with or without association of other beneficiaries.
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V.
- c. Public Trustee.
- d. Creditors.

Provided that where there is partial intestacy, letters to administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Rule 26 (1) of the Probate and Administration Rules provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

21. The 1st objector and the petitioner sought to rely on the above provisions to justify their rival claims that they are the rightful beneficiaries of the estate and entitled to take out letters of grant of administration. Under section 38 of the Law of Succession Act, surviving children of a deceased are entitled to equally share such estate or wholly if the child is only one. On the other hand, if there is no surviving child, then the estate will be distributed under section 39 of the Law of Succession Act. Each of these parties presented introductory letters from the area chief. The letter presented by the 1st objector describes her as a daughter and only child to the late Wilson Oware while the letter in regard to the petitioner indicated him as a nephew of Wilson Oware. That being the position, the estate of the deceased ought to have been distributed under section 38 of the Act. From the proceedings, it became clear that the 1st objector, Josephine Agwindi Obiero came out as a legitimate beneficiary of the estate of Wilson Oware as she is the only surviving child while the petitioner (Jectone Abaja Awuonda) came out as a nephew of the deceased since his father, Charles Awuonda Akech was the brother to the deceased Wilson Oware. Hence, the 1st Objector, Josephine Agwindi Obiero ranked high in priority as compared to the Petitioner. The trial magistrate appears to have faulted her for not being in the picture around the time the petitioner was filing Succession Course No. 296 of 2021. It was therefore erroneous for the trial court to dismiss the claim by the said 1st objector yet the evidence was available. The petitioner herein, other than claiming to be

a nephew of the deceased, did not avail evidence to the effect that the deceased had taken him in as his child or that he provided for him during his lifetime. Further, it came out from the evidence that the petitioner was entitled to claim from his father's estate but he has been driven by a desire for extra land and wants to inherit the property of his deceased's uncle yet there was a surviving child in the picture. Indeed, the petitioner went out of his way and gave false information to the effect that there are no surviving children of the deceased and further made a grave mistake to the effect that the 2nd objector was deceased yet he was still alive. Further, the documents relied by the petitioner appeared suspicious and which betrayed his claim to the estate of the deceased. It is instructive that he had earlier filed several suits before Kisumu law courts which did not succeed. The Petitioner's request to have the estate distributed under section 39 of the Act, therefore ought to have been rejected by the trial court as the 1st Objector presented convincing evidence showing that she is a surviving child of the deceased. The 1st Objector vividly gave an explanation as to how she acquired the name Obiero and stated that she accompanied her mother to where she was re-married and hence the name Obiero but she maintained that her real father is Wilson Oware and in which she has lodged a Succession Cause No. 484 of 2021 wherein she was issued with a confirmed grant and entitled to 1/3 share of her late father comprised in LR South Gem/ Dienya/ 620. She further averred that she has already carried out the task of distribution of the estate and thus acquired 1/3 of the

share due to the deceased comprised in land parcel South Gem/Dienya/620 and that she should be left to handle the said property.

22. It is noted that both parties herein appear to be aggrieved by the decision of the learned trial magistrate and hence the filing of separate appeals and that the parties failed to reach an agreement regarding whether one of the appeals should be treated as a cross appeal to the other. Indeed, the lower court record relates to Siaya CM Succession Cause No. 296 of 2021 and that the same is to be relied upon in these two appeals.

23. It is noted that the trial court ordered both succession causes 484 of 2021 and 296 of 2021 consolidated and appointed both the 1st Objector and Petitioner as administrators and directed them to file fresh summons for confirmation of grant. It is instructive that none of the parties had sought for such consolidation and further that the trial court did not issue directions to the parties prior to the canvassing of the Objectors' application and thus it is clear that the trial court had brought in new issues at the tail end of the proceedings to the prejudice of the parties since succession cause 484/2021 had been filed separately and concluded separately by a court of concurrent jurisdiction. I find that it was erroneous for the trial court to seek to make orders of revocation of grant and cancellation of titles in a concluded matter. As noted above, the 1st Objector having

established that she is a surviving child of the deceased and a beneficiary, the Petitioner's conduct in filing succession course No.296/2021 was fraudulent and meant to deny the rightful beneficiaries of the deceased. As the Petitioner has been found to have obtained the grant unprocedurally, the grant should be revoked and the 1st Objector allowed to proceed to administer the estate as directed in succession cause No.484/2021 and that the Petitioner herein shall be at liberty to move the court appropriately in Succession Cause No. 484/2021 or in any other relevant forum if need be.

24. In view of the foregoing observations, it is my finding that the trial court's orders were made in error and which requires this court to intervene. The objector's application dated 7th September 2021 ought to have been allowed as prayed by the trial court.
25. In the result, I find the appeal has merit. The same is allowed. The orders of the trial court dated 11th October 2024 are hereby set aside and substituted with an order allowing the Objectors' application dated 7th September 2021 with each party bearing their own costs. Each party to bear their own cost of this appeal.

Dated and delivered at Siaya this 24th day October 2025.

D.K. KEMEI

JUDGE

In the presence of:

Ochuka.....for Appellants

Jacktone Abaja.....for Respondent

Kimaiyo/Maureen.....Court Assistant