



**Massawa v Masawa & 2 others (Family Appeal E007 of 2025)
[2025] KEHC 16889 (KLR) (21 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E007 OF 2025
DK KEMEL, J
NOVEMBER 21, 2025**

BETWEEN

ANTONY SIWOLLO MASSAWA APPELLANT

AND

MONICA AWUOR MASAWA 1ST RESPONDENT

VALENTINE CHARLES MUOK MASSAWA 2ND RESPONDENT

JAMES AGOYO MASSAWA 3RD RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Siaya (Hon. Benjamin Byson Limo (PM) dated 14th February 2025 in Succession Cause No. E126 of 2021)

JUDGMENT

1. The appeal arises from the ruling and order of Hon. B. Limo (PM) dated 14th February 2025 wherein he allowed the Respondents' summons for revocation of grant dated 11th November 2024. In that application, the Respondents had sought that the grant issued on 15th September 2021 and reinstated on 31st October 2024 be revoked and that titles to land parcels in the name of Appellant and another be cancelled and to revert back in the name of the deceased.
2. Aggrieved by the said ruling, the Appellant filed his memorandum of appeal dated 17/2/2025 wherein he raised the following grounds of appeal:
 1. That the learned magistrate erred in law and fact in failing to appreciate, sufficiently or at all, the nature of the application which was before him for determination and the grounds upon which the Respondents based their prayer for revocation of grant.
 2. That the learned magistrate erred in law and fact in finding and holding that "... The Petitioner (Appellant herein) in his replying affidavit admits to have registered other properties in his



name by mistake” when no such admission was on record and no such allegation was made by the Respondents as a ground for seeking revocation of grant.

3. That the learned trial magistrate erred in law and fact by holding and ordering that ...all properties which were registered in the name of the Petitioner (Appellant) by mistake or otherwise to revert back to the name of the deceased to allow full participation of all the beneficiaries on the distribution of the deceased’s estate when there was no evidence before the court to support the finding that some properties of the deceased were registered in the name of the Appellant whether by mistake or otherwise.
4. That the learned magistrate erred in law and fact in finding and holding that “it appears the petitioner (Appellant) has failed to proceed diligently with the administration of the estate of the deceased ...” an issue which was not canvassed by the parties before him as he was still prosecuting the suit, Busia ELC Case No. E004/2024, on behalf of the estate of the deceased to recover a parcel of land measuring 1.04 Hectare which forms part of the net estate of the deceased.
5. That the learned magistrate erred in law and fact in failing to correctly interpret and apply Section 76 of the Law of Succession Act, and further erred when he failed to find and hold that the Respondents had not made out a case for revocation of the grant issued to Appellant On 15/9/2021.
6. That the learned magistrate erred in law and fact in ignoring his own order dated 31/10/2024 by which he had set aside an exparte order dated 18/7/2023 revoking the grant issued to the Appellant on 15/9/2021 and reinstated the same grant.
7. That the learned magistrate erred in law and fact in ignoring the High Court order given on 25/1/2021 in Siaya High Court Citation Cause NO. 1 of 2020 by which the Appellant as the Citor, was allowed and/or directed by the High Court by consent “.... To petition for grant of letters of administration intestate of the estate of the deceased Michael Massawa Ombayo...” By revoking the learned magistrate purported to countermand an order of a higher court which was in force at the time of his decision.
8. That the learned magistrate erred in law and fact in granting an order which was unjust in the circumstance, considering that the order left the estate of the deceased without an administrator for no good reason.

The Applicant therefore prays for the following orders that this appeal be allowed with costs; that the order dated 14/2/2025 revoking the grant made to the Appellant by the lower court on 15/9/2021 be set aside and in place of thereof be substituted with an order dismissing the Respondents’ summons for revocation of Grant dated 11/11/2024 with costs; and that such further or other order be granted as the court deems fit and just in the circumstance of this appeal.

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 as to 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 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. The record of the lower court indicates that the Appellant herein had earlier filed a citation at Siaya High Court vide Citation Cause No.1 of 2020 wherein a consent was reached between the Appellant and Citees and that the Appellant was allowed to proceed to take up letters of grant of letters of administration intestate. The Appellant therefore lodged succession cause No. E126/2021 wherein he obtained a grant dated 15/9/2021. The said grant was later revoked on 18/7/2023 after the Appellant failed to appear in court to show cause why he had not filed summons for confirmation of grant. The Appellant later filed an application dated 29/10/2024 seeking reinstatement of the dismissed cause which was allowed on 7/11/2024. The Respondents herein later filed summons for revocation of grant dated 11/10/2024 wherein they sought to have the grant issued on 15/9/2021 and reinstated on 31/10/2024. The said application was disposed of by way of written submissions in which both parties complied. The learned trial magistrate later ordered the revocation of the grant issued on 15/9/2021 and reinstated on 31/10/2024 and further ordered cancellation of titles in name of the Appellant and to revert in the name of the deceased. This thus precipitated to the present appeal.
5. The Respondents' gravamen in their application dated 11/11/2024 was inter alia; that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of false statement; that the grant was obtained by the concealment from court of something material to the case; that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; that the administrator has failed to apply for confirmation of grant within the time allowed despite the notice in the issued grant; that the Appellant/Administrator had cited the Respondents vide Siaya HC Citation Cause No. 1/2020 and that a consent was recorded on 2/2/2021 in which the Appellant was allowed to petition for full grant; that the Appellant together with a brother to the Respondents by name Raphael Oghona Massawa were intermeddlers of the estate of the deceased as they gained registration of Land parcel No. Bukayo/Ebusibwabo/3105 without a full grant; that the transmission of the said parcel No. Bukayo/Ebusibwabo/3105 to the Appellant and Raphael Oghona Massawa was irregular and that the property should now revert back in the name of the deceased; that the Appellant also registered other two parcels of land in his name namely North/Ugenya/Siranga/1042 and 607.
6. The Appellant filed a replying affidavit sworn on 27/11/2024 wherein he averred inter alia; that he had filed a citation No. 1/2020 in which he had cited the Respondents to take up letters of grant and in which a consent was entered whereby he was allowed to proceed and file for letters of grant and that he was issued with the same on 15/9/2021; that the allegation raised by the Respondent are false; that the Applicants are mischievous; that the Respondents were unhappy with him after he filed a civil suit in Busia reference ELC No. E004/2024 to have the land the Respondents occupy in Bukhayo title LR No. Bukhayo/Ebusibwabo/3105 declared as belonging to the deceased and to be shared by the beneficiaries; that he and Raphael hold the same parcel of land in trust for the estate of the deceased; that parcel number Ugenya/Siranga/1042 is registered in his name but has been included in the list of asset of the deceased's estate by mistake while parcel Number Ugenya/Siranga/609 belongs to the deceased.
7. Florence Akinyi swore a replying affidavit dated 29/11/2024 in support of the Appellant wherein she averred inter alia; that she is the 4th born daughter of the deceased; that their home was in Bukhayo ward which had four houses and that she lived with her mother among other siblings on parcel number Bukhayo/Ebusibwabo/3105; that her father died before he could transfer the land in Bukhayo to his name from the main block of the late Noah Okuku who had sold the land to her father; that the family had to go to court to stop Noah Okuku's family from attempting to deny the family of the deceased land and that the court in Kakamega ruled in their favour and that the land was registered in the name of Antony Massawa and Raphael Massawa to hold in trust; that the family later arranged for the meeting



to distribute the property but her step mother Mary and her children who are the Respondents herein refused to attend the meeting; that the family later mandated the Appellant as the eldest son to apply for letters of administration; that the deceased had two parcels of land Bukhayo/Ebusibwabo/3105 and North/Ugenya/Siranga/607 that the Appellant has listed all the beneficiaries and left nobody out; that the objection raised by the Respondents is in bad faith since they had refused to attend the family meeting called on 21/11/2020; that the Respondents are enjoying the occupation of thirty acres in parcel number Bukhayo/Ebusibwabo/3105 while the other family members have nowhere to build their homes.

8. The appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.
9. The Appellant's submissions are dated 14th July 2025 whereas those of Respondent are dated 21st August 2025.
10. The counsel for Appellant submitted inter alia; that Siaya Magistrate's Succession Cause No. E126/2021 was filed by the Appellant pursuant to an order which was given by the High Court (Aburili, J) on 2nd February 2021, in Siaya High Court Cause No. 1 of 2020 as annexed in the record of appeal; that by the said citation cause, the Appellant had cited all the representatives of the deceased's three (3) houses; the parties who were represented by the advocate then recorded a consent before Hon. Lady Justice Aburili, J that "by consent of both parties herein, the Citor herein, Antony Siwollo Massawa is hereby directed to petition for grant of letters of administration intestate of the estate of the deceased Michael Massawa Ombayo within the next 30 days of today, that the citation is closed and this file be marked as closed"; that pursuant to the aforementioned order, the Appellant moved and filed Siaya CM's Succession Cause No. E126/2021 in the matter of the estate of Michael Massawa Ombayo (deceased) in compliance with the consent order and that the consent order has never been set aside or reviewed and it remains on record; that the Appellant needed to obtain the subject grant to enable him, as the eldest son of the deceased and one of the beneficiaries of the estate, to among other things collect and preserve the estate of the deceased pending confirmation of the grant and that one of the assets which the Appellant wanted to protect is a parcel of land known as Title No. Bukhayo/Ebusibwabo/3105 which is registered in the name of the Appellant jointly with Raphael Oghona Massawa, another son of the deceased from a different house, but is held by them in trust for the estate of the deceased; that unknown to the Appellant, the trial court had moved suo moto without any notice to any of the parties, and made an order on 18th July 2023 revoking the Grant and closing the file and that the Appellant only became aware of the order revoking the grant from the pleading filed by Raphael Oghona Massawa in Busia ELC Case No. E004/2024 which the Appellant had filed in respect of Title No. Bukhayo/Ebusibwabo/3105; that immediately the Appellant became aware of the order dated 18/7/2023 revoking the grant, the Appellant filed an application dated 29/10/2024 praying for reinstatement of the revoked grant and re-opening of the file for the succession cause; that the Appellant's application seeking reinstatement of the revoked grant was allowed by the lower court(Hon. B. Limo) on 7/11/2024 and that the grant was thereby reinstated; that upon becoming aware of the reinstatement of the grant dated 15/9/2021 and re-opening of the file for the cause, the Respondents filed the summons for revocation of grant dated 11/11/2024 alleging that "(1) the proceedings to obtain the grant were defective in substance, (2)the grant was obtained fraudulently by the making of false statement,(3) the grant was obtained by concealment from court of something material to the case, (4) the grant was obtained by means of untrue allegation of a fact essential on point of law to justify the grant, and (5) the administrator has failed to apply for confirmation of grant; that the application for revocation of the grant was strongly opposed by the Appellant who filed replying affidavits sworn by himself and Florence Akinyi Owiti, a daughter of the deceased where both parties also filed written submissions; that by the ruling delivered on 14/2/2025, the trial magistrate allowed the Respondent's application and revoked the grant dated 15/9/2021 after finding and holding that



the consent of all beneficiaries was not obtained, that the Petitioner in his replying affidavit admits to have registered other properties in his name by mistake and that the Petitioner has failed to proceed diligently with the administration of the estate.

11. Learned counsel further added that apart from revoking the grant, the trial magistrate proceeded to make an order that “.....it is the finding of the court that all properties which were registered in the name of the Petitioner by mistake or otherwise to revert back to the name of the deceased to allow full participation of beneficiaries on the distribution of the deceased’s estate” and yet such an order was never prayed for and neither did the Respondents allege that the Appellant had registered any property belonging to the deceased in his name by mistake.

The counsel for Appellant has put forth eight grounds of appeal and in clusters; that ground 1,2, and 3 is that the trial magistrate committed a grave error by finding and holding that the Appellant had admitted to have registered other properties of the deceased in his name by mistake yet there was no such admission and that the alleged admission was invented by the trial magistrate. That not even the Respondents had made such an allegation and it was not one of the grounds upon which the Respondents had based their application for revocation of grant. The Appellant further submitted that he had informed the court in his replying affidavit sworn on 27/11/2024, and at paragraph 7,8, and 9 thereof, that the Applicants are being mischievous, and that he was aware that the Applicants and their other siblings, are not happy with him for filing a suit (Busia ELC No. E004 of 2024) to have the land they occupy in Bukhayo/Ebusibwabo/3105) declared to be belonging to the deceased’s estate and shared among all beneficiaries of the deceased’s estate; that although the said title No. Bukhayo/Ebusibwabo/3105 is registered in his name jointly with Raphael Oghona Massawa, they hold the land in trust for the estate of the deceased and that all the deceased’s heir/dependants are entitled to a share of the land and that the title No. North/Ugenya/Siranga/1042 is however registered in his name and the same was included in the list of assets of the estate by mistake, that title No. North Ugenya/Siranga/609 belongs to the deceased who was also known by an alias of Michael Ochieng; that from the above sentiments, the Appellant did not admit that he registered some of the deceased’s land in his name by mistake.

12. It was further submitted that the Appellant was actually informing the court that he needed the grant, and he had used it, to file a case in Busia Environment and Land Court to recover on behalf of the estate of the deceased land which was registered in his name jointly with Raphael Oghona Massawa but which land the Appellant was aware belonged to the deceased’s estate and was being held by him and the said Raphael Oghona Massawa in trust for the estate and all the heirs of the deceased. That the Appellant also revealed to the court that he had actually filed a case in court to recover the land on behalf of the estate using the grant; that the Appellant had further informed the court that his own property had been listed as part of the deceased’s estates by mistake and that it did not mean that the Appellant had admitted to have registered land belonging to the deceased in his name by mistake; that according to the holding by the trial magistrate that the Appellant had admitted that he had registered some properties belonging to the deceased in his name by mistake was wholly erroneous and was not supported by the evidence which was on record and consequently, the order directing that all properties which were registered in the name of the Petitioner by mistake or otherwise to revert back to the name of the deceased was given in error and in vain and that the orders should be set aside.
13. Further, it was submitted that the trial magistrate erred by holding that the Appellant had failed to proceed diligently with the administration of the estate of the deceased and that the trial magistrate ignored his own order dated 31/10/2024 by which he had set aside his earlier order dated 18/7/2023 revoking the grant.



Further, on ground 4,5, and 6 of the appeal, it was submitted that the trial magistrate also erred by ignoring the fact that his earlier order of reinstatement of grant was not challenged by the Respondents and no appeal or application to set aside the order had been filed by the Respondents. That by making an application to revoke the grant which had been reinstated by an order dated 31/10/2024 and which was not being challenged, the Respondents' application was incompetent and ought not to have been entertained or allowed; that the trial magistrate also erred in allowing an application which did not meet the threshold prescribed by Section 76 of the *Law of succession Act* because none of the grounds which the Respondents relied on was proved. That no fraud, concealment of material facts or procedural error or failure to administer the estate was demonstrated or proved by the Respondents. That on contrary, the Appellant had demonstrated that he had applied for and obtained the grant quite procedurally and lawfully and that the delay in making an application for confirmation of the grant was because the Appellant still needed to pursue Title No. Bukhayo/Ebusibwabu/1305 on behalf of the estate of the deceased for the benefit of all beneficiaries including the Respondents.

14. On Ground 7 and 8, counsel submitted that the Appellant had petitioned the court for the grant in compliance with a court order which had been given by a Judge in Citation Cause No. 1 of 2020. That the High Court (Aburili J) had made an order on 2/2/2020 directing the Appellant...to petition for grant of letters of administration intestate of the deceased Michael Massawa Ombayo within 30 days..” and that the order was never set aside or reviewed and is still intact to date. That the Appellant submitted that the lower court had no powers or jurisdiction to delve into the circumstances under which the Grant was obtained or to hold that “the consent of all the beneficiaries was not obtained to enable proper succession proceedings take place.” This is more so considering that the Respondents who had applied for revocation of the grant were all included in the list of beneficiaries and they stood to lose nothing.
15. It was further submitted that in view of the fact that the Respondents were all included in the petition as beneficiaries, and which petition was filed pursuant to a commanding High Court order dated 2/2/2021, there was absolutely no basis for the complaints that were raised by the Respondents and that the trial magistrate was wrong in revoking the Grant dated 15/9/2023 and that by revoking the Grant and making no order for any other grant to be issued to anybody, the trial magistrate occasioned a serious miscarriage of justice because the revocation left the deceased's estate without an administrator, for no good reason and that the revocation order left the Appellant without power or capacity to prosecute Busia ELC Case No. E004 of 2024 on the strength of the same grant.
16. Counsel placed reliance in the case of *In re Estate of William Mbogo Njunu (deceased) [2022] eKLR*, where Njuguna, J held as follows

“ 35 However, revoking a grant means that the estate will be left without an administrator and which is against the objective of the *Law of Succession Act* and the duties of the Probate Court. Section 66 of the *Law of Succession Act* bestows this court with the discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made.....”
17. Further, reliance was placed in *Re Estate of late Simon Ndungu Njoroge (deceased) [2024] eKLR* where H.M.Nyaga, J held as follows:

“ 43. In view of the above, I find that there are sufficient grounds to revoke the grant. However, in the interest of expediting this matter, I will not revoke the grant as prayed. This will leave the estate without an administrator and thus at risk of wastage. Under Section 56(1) (b) of the Succession Act, a court can appoint



up to a maximum of 4 administrators of the estate of the deceased. Thus, the grant herein is to be rectified and a fresh one to issue in the name of the three existing administrators and the Applicant herein.

That in the instant case, the trial magistrate revoked the grant and failed to protect the estate in any way. That this was highly imprudent and against the law.

18. It was finally submitted that the trial magistrate granted an order which the Respondents were not entitled to, with the result that a serious miscarriage of justice was occasioned not only to the Appellant but also to the estate of the deceased and all the heirs/dependants who are entitled to have the estate administered, preserved, collected and thereafter distributed in accordance with the law.
19. Therefore, the Appellant prays that this appeal be allowed with costs, that the lower court order dated 14/2/2025 be set aside and in place thereof be substituted with an order dismissing the Respondents' summons for revocation of grant dated 11/11/2024 with costs and such further or other order be granted as the court will deem just and expedient.
20. The 1st and 2nd Respondent filed submissions dated 21st August 2025.
21. The Respondents' counsel gave a brief history of the matter and submitted that the appeal emanates from the ruling and order of the Chief Magistrate's Court at Siaya (Hon. Benjamin Byson Limo (PM) dated 14th February, 2025 in Succession Cause No. E126 of 2021). That by the Respondent's application dated 11th November, 2024, the trial court allowed the said application as prayed and being dissatisfied with said ruling and order, the Appellant preferred this appeal by a memorandum of appeal dated 17th February, 2025 where he raised eight (8) grounds of appeal. A brief historical background of the litigation is inter alia; that Siaya Chief's Magistrate's succession cause No. E126 of 2021 was filed by the Appellant pursuant to an order which was given by the High Court (Hon. Aburili, Judge) on 2nd February, 2021 in Siaya High Court Citation Cause No. 1 of 2020 (page 12 of the record); that by the said Citation Cause, the Appellant cited only five persons who are beneficiaries, Mary Anyango Massawa, Rathatphael Oghona Massawa, Henry Massawa, Jude Thaddeus Massawa, Paul Agoyo Massawa (page 38 of the record) of the deceased's estate and that the purported five had authority/consent from their houses to represent them in the succession cause that had been filed; that pursuant to the order dated 2nd February, 2021 the Appellant filed Siaya Chief Magistrate's Court Succession Cause. No. E126 of 2021 – In the estate of Michael Massawa Ombayo (deceased) in compliance with the consent order between the parties therein. (page 23 of the record); that the Succession Cause was gazetted and Grant of Letters of Administration Intestate was issued to the Appellant on the 15th September, 2021 (page 11 of the record); that the Appellant then used the grant to file a case in Busia Law Courts, that is Busia ELC Case No. E004 of 2024 in respect of Title No. Bukhayo/Ebusibwabo/3105 registered in the names of the Appellant and Raphael Oghona Massawa as joint proprietors. (page 101 to 104 of the record); that the Defendant in Busia ELC Case No. E004 of 2024, one Raphael Oghona Massawa then filed a Preliminary Objection to the suit dated 24th October, 2024. (page 105 to 106 of the record) to the effect that the grant which clothed the Appellant therein as plaintiff with authority to file the Busia ELC suit had been revoked; that on realizing the grant had been revoked, the Appellant filed ex-parte summons for reinstatement of the revoked grant dated 29th October, 2024 (See page 96 to 108 of the record); that the court on the 7th November, 2024 reinstated the grant by allowing the summons and granted prayer 2 and 3 of the same; that on the 11th November, 2024, the 1st Respondent herein filed summons for revocation of grant issued on the 15th September, 2021 claiming lack of consent, concealment of material facts by the Appellant herein (See page 4 to 26 of the record); that on the 14th February, 2025, the Siaya Chief Magistrate's Court revoked



the grant that had been reinstated on the 7th November,2024 hence the filing of this appeal dated the 17th February,2025 (See page 81 to 82 of the record).

24. Learned counsel submitted that Section 76 of the *Law of Succession Act* provides for the instances in which the Magistrate’s Court can revoke a grant of representation of a deceased person’s estate. That section provides in part as follows:

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

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently” [Emphasis supplied].

Reliance was placed In *Matheka & Another v Matheka* [2005] 2KLR 455 the Court of Appeal construed Section 76 of the *Law of Succession Act* and laid down the following guiding principles: -

- “i. A grant may be revoked either by the application by an interested party, or by the court on its own motion.
- ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.” [Emphasis supplied].

In the instant appeal, the Appellants’ claim is that that the Learned Magistrate erred in law and fact in failing to correctly interpret and apply section 76 of the *Law of Succession Act* in its ruling.

The Respondent had the duty to prove any of the grounds set out in Section 76 of the *Law of Succession Act* before the grant issued on the 15th February,2025 was revoked. In the persuasive decision of the High Court, Mwita, J. in *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No. 158 of 2000 stated as follows: -

- “(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”



Further, Rule 26 of Probate and Administration Rules states that letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicant. In *Re Estate of Wahome Mwenje Ngonoro* (2016) eKLR it was held: -

“It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.”

The evidently deliberate failure by the Respondent to involve the Applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the Deceased's estate, the court would have hesitated to issue the grant.”

25. It was also submitted that statute law is clear that concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR, in revoking a grant the High Court (Achode, J.) reiterated the grounds upon which a grant can be revoked and stated as follows:

“The circumstances that can lead to the revocation of grant have been set out in Section 76 *Law of Succession Act*. For a grant to be revoked either on the application of an interested party or on the Court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

26. It was submitted that in this appeal, it is not in dispute that the Appellant, Anthony Siwollo Massawa petitioned for letters of administration intestate on 27th February 2021. It is also not disputed that he filed a Citation No.1 of 2020 against Mary Anyango Massawa, Raphael Oghona Massawa, Henry Massawa, Jude Thaddeus Massawa and Paul Agoyo Massawa and an order was issued by Hon.Lady Justice R.E.Aburili on the 2nd February 2021 to quote “That by consent of both parties herein ,the Citor herein Anthony Siwollo Massawa is hereby directed to petition for grant of Letters of administration intestate of the estate of the deceased Michael Ombayo within the next 30 days of today.”

The Appellant then filed a Petition dated the 27th February 2021 and therein he attached form P& A 5 dated the 27th February 2021 listing all the beneficiaries of the estate and assets. He also attached to the Petition a Chief's Letter dated 22nd December,2020 and listed the beneficiaries of the estate of Michael Massawa Ombayo.

In addition to the attachments above, he included Form 38 dated the 15th January 2021 whereby the Respondents herein did not consent to the making of the grant by not appending their signatures therein.

The Appellant in his replying affidavit dated the 27th November 2024 at paragraph 5, contended that he applied for and obtained the grant issued on the 15th September 2021 with the full knowledge of



the beneficiaries of the deceased's estate, including the Respondents herein. In his application under certificate of urgency dated the 29th October 2024 for re-instatement of the revoked grant, he also contended at paragraph 2 to quote "The revoked grant had been issued to the petitioner with the full knowledge and consent of all the concerned beneficiaries of the deceased's estate."

27. Florence Akinyi Owiti in her replying affidavit dated the 29th November 2024 posited at paragraph 11 and 17 (See pages 45 to 53 of the record) that the Respondents herein did not attend the meeting dated 21st November 2020 called for the way forward on the Petition for grant.

That it is now clear that the Respondents herein were not cited in the Citation No.1 of 2020 of Siaya High Court by the Appellant nor served with the petition for the Letters of Administration Intestate of the estate of Michael Massawa Ombayo. The Respondents were not represented by the firm of M/s Onsongo & Co. Advocates for the citees (5). Therefore, the Appellant's claims of having received consent from the Respondents is baseless and not true since the Respondents did not give consent to the making of the grant herein. They were not served with the said petition nor consented to the making of the same. No affidavit or authority letter was filed by the Appellant in the Citation No.1 of 2020 Siaya High Court to confirm whether the remaining beneficiaries of the estate not mention therein had given authority for representation to one Raphael Oghona Massawa and the other four cited beneficiaries.

The minutes attached to the affidavit of Florence Owiti dated the 29th November, 2024 (pages 44 to 53 of the record) for the purported meeting on way forward of the deceased's estate which are unsigned, undated do not contain any signatures or consent of the Respondents to have consented to the making of the grant and authorized one Anthony Siwollo Massawa to petition for the estate of Michael Massawa Omabyo. It is also confirmed from the replying affidavit of Florence Akinyi Owiti dated 29th November 2024 that the Respondents did not attend the meeting at all.

28. It was submitted that the framework for applications for grants of representation is set out in Section 51 of the *Law of Succession Act*. The most relevant portions, for the purpose of this appeal are in subsection (2)(g), which state as follows:

"Application for Grant

51.

- (1) ...
- (2) Every application shall include information as to—
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) ...
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;



(h)

...”

That the counsel’s understanding of Section 51(2) (g) is that the Appellant was required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The Appellant fully disclosed the beneficiaries of the estate and even attached a Chief’s Letter dated 22nd December 2020 to support the same. However, he failed to serve and did not seek consent of the Respondents herein before petitioning for the grant as an administrator. See Form 38 attached to the petition dated 27th February 2021, pages

29. In this appeal, the Respondents still maintain that they were not served with the petition for letters of administration intestate for the estate of Michael Massawa Ombayo nor consented to the making of the same as averred by the Appellant. It therefore means that they were not consulted before administration was sought, or, put differently, that their consent was not obtained before representation was sought by the Appellant/administrator one Anthony Siwollo Massawa.
30. It was further submitted that the law on who qualifies to apply for representation in intestacy is section 66 of the *Law of Succession Act*, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is usually given to surviving spouses, followed by the children of the deceased.

Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

For avoidance of doubt, these provisions state as follows:

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

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

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors ...”and

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



satisfy the court that every person having a prior preference to a grant by virtue of that section has –

- (a) renounced his right generally to apply for grant; or
- (b) consented in writing to the making of the grant to the applicant; or
- (c) been issued with a citation calling upon him to renounce such right or to apply for a grant. “

There is also Rule 26 of the Probate and Administration Rules, which states as follows:

- “26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In this case, the Appellant was expected to notify the Respondents who have equal entitlement with notice as per the law. The Respondents who had entitlement to apply for representation of the deceased estate were required to signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consent in Forms 38 depending on whether the deceased died testate or intestate.

31. That in this appeal there was no consent or renunciation that was done by the Respondents herein and that the Appellant was therefore required to file an affidavit which indicated that notice was given to all the other persons equally entitled, and demonstrate in that affidavit that such persons had failed or refused to renounce their rights or to sign consent to allow him to go ahead with the petition. He did not do that as required by the law.

A reading of Section 66 and Rules 7(7) and 26 of the Probate and Administration Rules means that the Appellant/Administrator Anthony Siwollo Massawa was to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they have an equal or lesser right to administration.

The Appellant had no absolute entitlement to the administration of the estate of the deceased as a son. He was not superior to Mama Rosa who is alive and the Sisters whom he completely failed/refused to cite in Citation No.1 of 2020 Siaya High Court. His entitlement was way inferior to Mama Rosa and equal to the other sons and daughters of the estate of Michael Massawa Ombayo. Therefore, the Appellant was required to comply fully with Rules 7(7) and 26 of the Probate & administration Rules. In that regard, the Appellant was required to obtain the consent of the Respondents, Mama Rosa and others before applying for representation to the estate of the deceased herein. He did not do so however he went forward and petitioned for the grant without consent of the all the beneficiaries listed nor filed an affidavit for renunciation of rights to the court.



32. That the Appellant misled the lower court that the Citees in Citation No.1 of 2020 Siaya High Court gave him consent from all the beneficiaries to apply for the grant of the estate of Michael Massawa Ombayo. In the replying affidavits dated the 29th October 2024 and 27th November 2024 respectively, it is claimed that the Appellant received full consent from all the beneficiaries which is not true.
33. The contention of having obtained consent from the Respondents is all false since the parties in the Citation No.1 of 2020 were only five and had no express authority to represent the Respondents in the citation.

“It was submitted that the magistrate correctly found that the Appellant did not obtain the mandatory consent of the Respondents herein before applying for representation of the estate of his late father, Michael Massawa Ombayo, the proceedings to obtain the grant were defective, the grant was obtained fraudulently by making of a false statement to the court and that the court had no choice but to revoke the grant issued to the Appellant as per section 76 of the *Law of Succession Act*. Therefore, the learned Magistrate interpreted and applied section 76 of the *law of succession act* correctly to the issues before him and this court should uphold the same.”

34. Statute Law is clear that concealment of material facts from the court is a ground for revocation of a grant which had been issued to a party in a succession matter. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR at paragraph 11 of its ruling, in revoking a grant, the court reiterated the grounds upon which a grant can be revoked. It stated as follows: -

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (Emphasis added.)

35. Also, in *Re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR where Gikonyo J held:

“(13) Applying the test of law in section 76 of the *Law of Succession Act*, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters



into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

36. It was also submitted that in the instance appeal, the so-called consent Form 38 attached by the Appellant in the Petition dated 15th January 2021 was not signed by all the beneficiaries including the Respondents herein listed therein as No.16 and 19 in form 38.

“The Appellant herein posited in his replying affidavit dated the 27th November,2024(pages 35 to 43 of the record) that the Respondents consented to his petition for letters of administration intestate for the estate of Michael Massawa Ombayo which is contrary to the facts. The Appellant did not serve the Respondents with the petition as required by the Probate & Administration Rules. Neither did he obtain consent of the Respondents nor the Respondents renounced their rights of representation of the estate. He instead went ahead and filed a consent form 38 without the signatures of the Respondents to the court. He did not file any affidavit to demonstrate whether the Respondents refused to consent or failed to renounce their rights to representation to the court. However, in his affidavit dated the 27th November,2024(pages 35 to 43 of the record) he lied to the court that he obtained consent from all the beneficiaries of the estate from their representatives which was not the case as demonstrated above by the Respondents. He further misled himself that the order dated the 25th January 2021 issued in Siaya High Court Citation No.1 of 2020(page 92 of the record) had appointed him to petition for the letters of Administration Intestate of the deceased estate without all beneficiaries being represented by the five citees therein. The Appellant cited only five (5) citees and the Respondents were neither represented by the five citees nor were party to the cause. The Respondents were not represented by the five cite and did not give any authority to the five citees to represent them in the cause and the order issued from the Citation No.1 Of 2020 was not binding on the Respondents herein and other beneficiaries not cited at all.”

37. In this appeal and for the reasons advanced above by the Respondents’ the Appellant had the duty as in any judicial proceeding, to make full disclosures to the lower court of all material facts in the cause. He did not make full disclosures of material facts to the court. The principle of utmost good faith (*uberimae fidei*) mandates parties who are subject of any court proceedings as in this succession matter to make full disclosures to the court of all material facts in the cause. This responsibility is part of justice itself. Non-disclosure of material facts undermine justice and introduces festering waters into the pure streams of justice and such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.
38. Section 76 of the Act gives this court very wide powers on revocation or annulment of grants, “whether or not confirmed” and “may at any time” revoke or annul them “on application by any interested party or of its own motion”. The court will do so if it decides in part:

“

- “(a) That the proceedings to obtain the grant were defective in substance.
- (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.



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

This provision has been construed by the Court of Appeal in the Matheka case (supra) which laid out the guiding principles as follows: -

- “ 1. A grant may be revoked either by application by an interested party or on the court’s own motion.
2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.
3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be acquired.
4. 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.
 1. Surviving spouse or spouses, without association of other beneficiaries.
 2. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V of the *law of succession Act*.
 3. The public Trustee; and
 4. Creditors”.

It was submitted that the combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis. The discretion exercisable is in terms unfettered but, of course, it must be guided by the law and reason but not whim or caprice.



39. It was further submitted that the trial court had on its own motion, as it was entitled by the Act to examine the record and be satisfied that it was right to revoke the grant reinstated by the order dated 31st October 2024 since the same did not comply with Section 76 of the Succession Act and revoked the grant issued to the Appellant herein. That the lower court did not act against the law but upheld the rule of law, since who comes to equity must do equity. The Appellant did not comply with the *Law of Succession Act* and the rules therein and that the court had no choice but to revoke the grant.
40. Counsel therefore invited this court to find that the learned magistrate directed himself correctly by revoking the grant issued to the Appellant by concealment of material facts, obtained through defective proceedings, making of a false statement and failure to diligently proceed with the confirmation of the grant as required by law after three years' delay.
41. It was further submitted that the learned magistrate complied fully with Section 76 of the *Law of Succession Act* in revoking the grant issued to the Appellant and that this court should not interfere with that decision. That the provisions of Section 76 (b) empowers this court to revoke a grant with respect to the estate of the deceased if the grant was obtained by fraudulent means or by concealment of material facts essential to the case. As the Appellant had concealed material facts, the trial court was thus inclined to revoke the grant issued to him.
42. Learned counsel submitted that in response to Grounds 2, 3, of the Memorandum of Appeal that the trial magistrate erred in law and in fact by finding that the Appellant had admitted to have registered other properties of the deceased in his name by mistake or otherwise, the Appellant in his replying affidavit confirmed that he had registered parcel Bukhayo/Ebusibwabo/3105 in his name and that of his brother Raphael Oghona Massawa. However, the Green card showed that the transfer took place on 16/5/2005. Hence, the transmission of Title Number/Bukayo/Ebusibwabo/3105 to the Respondent (Petitioner) and Raphael Oghona Massawa by the sons of Noah Okuku was illegal on the part of the Appellant and his brother and that the same should be reversed by the court to make the property a free property for the estate of Michael Massawa Ombayo. It was also contended that it was not possible for the Appellant and his brother to have transferred the property in the year 2005 without a grant of letters of administration since the deceased died in the year 1994. That the two titles of numbers, Title Number/North Ugenya/Siranga 1042 and Title Number/North Ugenya/Siranga 607 are not in the name of the late Michael Massawa Ombayo but in the Appellant's name as proprietor and that he has declined to seek declaration of trust on the said titles for the estate of the late Michael Massawa Ombayo together with Title Number/Bukayo/Ebusibwabo/3105 and who
43. Learned counsel went on to submit on the question "What constitutes estate or free property of the deceased?" and went ahead to submit that according to the *Law of Succession Act* the same provides as follows:

"Estate "means the free property of a deceased person

And:

"Free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;



44. Case law would shed more light on these provisions and I am content to cite a passage from the Indian case of *Balgangadhar Tilak v Ganesh Srikrishna* 26 Ilr Bombay 792, that:

“The grant of probate only perfects the representative title of the executor to the property which belonged to the testator and over which he had disposing power...”

Being guided by the above provision, there are properties which the deceased cannot freely dispose of during his lifetime, and in respect of which his interest has been terminated by his death; such property does not form part of the free property of the deceased. Literary works provide useful information. For instance in *William Musyoka*, *Law of Succession* at pages 235 and 236 discusses some types of assets that do not vest in the deceased’s personal representatives; such property includes: -

- (a) Property held by the deceased as a joint tenant;
- (b) Sums payable under a discretionary pension scheme;
- (c) Property subject matter of a *donatio mortis causa*; and
- (d) Property of the deceased which is the subject of a statutory nomination made by the deceased.

Up to this point, it is clear that some type of assets which relate to the deceased person may not necessarily form part of the estate of the deceased for purposes of *Law of Succession Act*.

45. It was further submitted that considering the above omissions, the Appellant did not attach any searches or copies of green cards extract in the lower court for it to make an informed decision as to whether the property form the estate assets. It was a deliberate move to hide the assets since he had intermeddled with some of the assets himself. Therefore, the court was right to find that some of the estate assets were registered by the Appellant by mistake or otherwise as explained above. This court should not fault the learned magistrate in his finding on the same but should uphold the finding that the Appellant registered some of the property by mistake or otherwise.

As demonstrated above there is no free estate property to be administered by the Appellant in this cause and the claim that the learned magistrate did not appoint another administrator to continue administration does not hold any waters. Even if the magistrate appointed another administrator, it begs the question, what was he or she going to administer? There is no estate property to be administered by any appointed administrator. The estate has no assets to be distributed to the beneficiaries. The Appellant intermeddled in all the assets he listed in the P& A5 and no free property was available to be administered by any one appointed by the court. The court in its own view ordered the estate property registered otherwise in the Appellant name be reverted back to the estate to allow full participation and distribution to all the beneficiaries of the estate. In its own opinion it found that no estate property existed and ruled as above. Hence, the Appellant cannot fault the court on the finding, since he is the one who caused the illegal registration of the estate property in his name in order to disposes all the beneficiaries of their share of the estate assets. The lower court was right in its holding and this appeal court should not interfere with the learned magistrate decision at all but uphold the same in the interest of justice to the beneficiaries.

46. In conclusion, it was submitted that the learned magistrate was right in his finding and holding that the grant issued to the Appellant be revoked. The counsel urged that this court dismisses this appeal for lack of merit.

47. I have considered the record of appeal as well as the submissions of learned counsels herein as well as the authorities cited. It is not in dispute that the Appellant herein had filed a Citation Cause No. 1 of 2020 at Siaya High Court wherein he had cited five beneficiaries and subsequently a consent was entered



into wherein he was allowed to proceed and file for letters of grant which he duly did vide Siaya CM's Court Succession Cause No. E126/2021. It is not in dispute that the Appellant was later issued with a grant dated 15/9/2021 which was dismissed/revoked on 18/7/2023 as the Appellant failed to appear in court to show cause why he had not filed summons for confirmation of grant after a very long time. It is also not in dispute that the Appellant later approached the trial court vide an application dated 29/10/2024 seeking for reinstatement of the cause which was subsequently allowed on 7/11/2024. It is also not in dispute that the Respondents herein later filed a summons for revocation of grant dated 11/11/2024 which was allowed by the trial court and which precipitated this appeal. I find the issue for determination is whether the appeal has merit.

48. Revocation of grants is provided by Section 76 of the *Law of Succession Act* which provides in part as follows:

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

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court 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 is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become obsolete and inoperative through subsequent circumstances.

In *Matheka & Another v Matheka* [2005] 2KLR 455 the Court of Appeal construed Section 76 of the *Law of Succession Act* and laid down the following guiding principles: -

- i. A grant may be revoked either on the application by an interested party, or by the court on its own motion.
- ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or



that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

It is noted that the Appellant’s main grouse is that the trial court erred in law and fact in failing to correctly interpret and apply section 76 of the *Law of Succession Act* in its ruling. The Respondents made their raft of allegations against the Appellant vide the grounds and the affidavit in support of their summons for revocation which the trial court took into consideration. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No. 158 of 2000 Mwita J held as follows: -

“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

The Respondents had claimed that the Appellant had misled the court while filing the succession cause as he did not obtain the consent of all the beneficiaries as required by law. Rule 26 of Probate and Administration Rules provides that letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree or in priority to the applicant. In *Re Estate of Wahome Mwenje Ngonoro* (2016) eKLR it was held: -

“It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.”

The evidently deliberate failure by the Respondent to involve the Applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the Deceased’s estate, the court would have hesitated to issue the grant.”

49. Indeed, the issue of concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR, while revoking a grant, Achode J reiterated the grounds upon which a grant can be revoked and stated as follows:

“The circumstances that can lead to the revocation of a grant have been set out in section 76 *Law of Succession Act*. For a grant to be revoked either on the application of an interested party or on the Court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making



of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

50. It transpired from the rival affidavits that the Appellant had earlier filed a Citation No. 1 of 2020 at Siaya High Court and cited five beneficiaries and that a consent was later reached whereby he was allowed to proceed to file a succession cause which he did on 27/2/2021 as per form P & A 5 wherein he attached the chief’s introductory letter dated 22/12/2020 and listed the names of all beneficiaries and assets of the deceased and further filled Form 38. A perusal of the said Form 38 shows that several beneficiaries including the Respondents herein did not sign the document despite the Appellant claiming vide his replying affidavit to the summons for revocation of grant that he applied for and obtained the grant issued to him on the 15th September 2021 with the full knowledge of the beneficiaries of the deceased’s estate, including the Respondents herein. He also made similar assertions vide his application dated the 29th October 2024 seeking for re-instatement of the revoked grant where he averred thus “The revoked grant had been issued to the petitioner with the full knowledge and consent of all the concerned beneficiaries of the deceased’s estate.” The Appellant sought the help of one his sisters namely Florence Akinyi Owiti who filed a replying affidavit dated the 29th November 2024 wherein she claimed that the Respondents herein did not attend the family meeting which took place on 21st November 2020 that had been called to discuss the way forward on the issue of petitioning for grant of letters administration intestate. I have perused the minutes attached to the affidavit of Florence Owiti dated the 29th November, 2024 regarding the purported meeting on the way forward over the deceased’s estate and note that the same are unsigned and not dated and do not contain any signatures or consent of the Respondents so as to support the making of the grant and authorize the Appellant to petition for letters of grant for the estate of Michael Massawa Ombayo. The said Florence Akinyi also confirmed that the Respondents did not attend the said meeting. It is noted that the Appellant has claimed that there was a consent in the Citation which gave him permission to take up the letters of grant of administration. I find the said consent was the gateway for the Appellant to proceed and file the succession cause and that he was expected to comply with the essential requirements such as chief’s letter, list of all beneficiaries and consent of the beneficiaries as well as the assets of the deceased. Further, the consent aforesaid ended with the closure of the citation and did not absolve the Appellant from complying with the legal provisions under the Law of Succession Act namely sections 38 and 51 as he went about lodging the succession cause. It is also instructive that the Respondents herein were not parties to the Citation Cause No. 1 of 2020 and thus the Appellant’s attempt to rope them in the said consent must be rejected. The Appellant was under obligation to secure the consent of the Respondents and other beneficiaries and that if he faced challenges, then he ought to have availed evidence showing that the beneficiaries were indeed notified but deliberately refused to append their signatures.
53. In this appeal, the Respondents still maintain that they were not served with the petition for letters of administration intestate for the estate of Michael Massawa Ombayo nor consented to the making of the same as averred by the Appellant. It therefore means that they were not consulted before administration was sought, or, put differently, that their consent was not obtained before representation was sought by the Appellant/administrator.
54. The Respondents being beneficiaries could in their own right have the capacity to apply for letters of grant in intestacy under section 66 of the Law of Succession Act, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is usually given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons



to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. The said provision state as follows:

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

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

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors ...”and

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

- (a) renounced his right generally to apply for grant; or
- (b) consented in writing to the making of the grant to the applicant; or
- (c) been issued with a citation calling upon him to renounce such right or to apply for a grant. “

There is also Rule 26 of the Probate and Administration Rules, which states as follows:

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

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



Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In this case, the Appellant was expected to notify the Respondents who have equal entitlement with notice as per the law. The Respondents who had entitlement to apply for representation of the deceased estate were required to signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consent in Forms 38 depending on whether the deceased died testate or intestate.

55. A reading of Section 66 and Rules 7(7) and 26 of the Probate and Administration Rules means that the Appellant/Administrator was to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they have an equal or lesser right to administration.

56. It is clear that the Appellant did not comply with the requisite provisions of the *Law of Succession Act* and that the trial court correctly found that the Appellant did not obtain the mandatory consent of the Respondents herein before applying for representation of the estate of the deceased and thus the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by making of a false statement to the court and that the court had no choice but to revoke the grant issued to the Appellant as per section 76 of the *Law of Succession Act*. I find that the learned trial Magistrate interpreted and applied section 76 of the said Act correctly to the issues before him and thus I see no reason to fault him.

58. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR* the court reiterated the grounds upon which a grant can be revoked. It stated as follows: -

“ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (Emphasis added.)

59. Also, in *Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR* where Gikonyo J held:

“(13) Applying the test of law in section 76 of the *Law of Succession Act*, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision



on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimaefidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

60. It is noted that the Appellant’s counsel has taken great issue with the trial court’s order regarding cancellation of titles. Learned counsel contended that the trial magistrate erred in law and in fact by finding that the Appellant had admitted to have registered other properties of the deceased in his name by mistake or otherwise while the Appellant in his replying affidavit confirmed that he had registered parcel Bukhayo/Ebusibwabo/3105 in his name and that of his brother Raphael Oghona Massawa. The Appellant in his reply to the summons for revocation of grant stated that one of the properties was listed as part of the estate of the deceased by mistake and that according to the Appellant’s counsel, this admission appears to have been taken negatively by the trial magistrate who ruled against his client. I have perused the Green card which showed that the transfer took place on 16/5/2005 yet the deceased died in the year 1994. If that is the position, then the transfer of the title was done before a grant had been issued and confirmed. Hence, the transmission of Title Number/Bukayo/Ebusibwabo/3105 to the Respondent (Petitioner) and Raphael Oghona Massawa by the sons of Noah Okuku was illegal on the part of the Appellant and his brother and that the same should be reversed by the court to make the property a free property for the estate of Michael Massawa Ombayo. Indeed, that was intermeddling of the estate of the deceased which is forbidden by section 45 of the *Law of Succession Act*. Obviously, it was not possible for the Appellant and his brother to have transferred the property in the year 2005 without a grant of letters of administration since the deceased died in the year 1994. As regards the two titles of numbers, Title Number/North Ugenya/Siranga 1042 and Title Number/North Ugenya/Siranga 607, it is noted that the same are not in the name of the deceased but in the Appellant’s name as proprietor and who did not give a plausible explanation to the trial court as to how he was able to acquire one of them while the other one was claimed to be in the name of one Michael Ochieng whom the Appellant attempted to impute that it was the deceased’s other name. Clearly, the Appellant was concealing something material to the trial court. Under those circumstances it was proper that the titles be cancelled so that the same could revert back in the name of the deceased for distribution among the beneficiaries.
61. It is noted that the Appellant vide ground number 8 of the Memorandum of Appeal has taken issue with the trial court for revoking the grant and failing to appoint an administrator to handle the estate and to prevent it from wastage. Upon considering this issue, I am inclined to agree with the Appellant that the estate should not be left unattended. The trial court should have seen that the estate requires to have an administrator. Upon revoking the grant, the trial court was at liberty to appoint administrators of the estate from among the beneficiaries. I find the trial court therefore erred and thus the Appellant’s appeal on that ground succeeds.
63. Having considered all the areas in this matter, it is my view that whereas the trial court was right in revoking the grant as the Respondents had presented credible evidence, the trial court being the succession court was under duty to ensure that the estate does not remain without an administrator and thus the trial court ought to have issued a fresh grant. In that regard, I proceed to appoint Antony Siwollo Massawa, Valentine Charles Muok Massawa and Florence Akinyi Massawa as administrators



for the estate and who will proceed to file the appropriate summons for confirmation of grant upon issuance of a fresh grant.

64. In view of the foregoing observations, it is my finding that the Appellant's appeal partially succeeds to the extent that a new set of administrators for the estate are appointed. The rest of the Appellant's grounds of appeal lack merit and are dismissed. The following orders are issued:
- a) A fresh grant of administration intestate is hereby issued in the names of Antony Siwollo Massawa, Valentine Charles Muok Massawa and Florence Akinyi Massawa.
 - b) The new administrators are directed to file summons for confirmation of grant within thirty (30) days upon issuance of the fresh grant.
 - c) Each party to bear their own costs.
 - d) Matter fixed for mention on 27/11/2025 before Hon. M. O. Wambani (CM) for directions and further orders.

DATED AND DELIVERED AT SIAYA THIS 21ST DAY OF NOVEMBER 2025.

D. KEMEI

JUDGE

In the presence of:

Ahoma for Omuga.....for the Appellant.

Otieno Obwanda.....for the Respondents.

Maureen/Kimaiyo.....Court Assistant.

