

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HCFA NO. E001 OF 2024

JOHN OCHIENG OKELLO.....APPELLANT

VERSUS

**LUCAS ONYANGO
OCHIENG.....RESPONDENT**

(The appeal arises from the ruling of Hon. M. O. Wambani dated 9th November 2023 in Siaya CM's Succession Cause No. 172 of 2019)

BETWEEN

**LUCAS ONYANGO OCHIENG.....
.....OBJECTOR/APPLICANT**

VERSUS

JOHN OCHIENG

OKELLO.....PETITIONER/RESPONDENT

JUDGMENT

1. This appeal emanates from the ruling of Hon. M. O. Wambani (CM) dated 9/11/2023 wherein she allowed the Respondent's Summons for Revocation of Grant dated 22/9/2020 as prayed and proceeded to order that the grant of letters of administration issued to the Appellant on 19th December 2019 be revoked.

2. The Appellant was aggrieved by the aforesaid decision and duly filed his Memorandum of Appeal dated 11th December 2023 wherein he raised the following grounds of appeal namely:
 - 1) That the learned magistrate erred in entertaining the Objector's application before it contrary to the set down principles in determining summons for revocation of grants as premised in the leading case of the Estate of Henry Kithai Mwithari (deceased) [2021] eKLR.
 - 2) That the learned magistrate erred in both law and fact by relying on an inaccurate public record in the nature of a

Green card without calling the registrar to ascertain the entries therewith leading to an unjust decision.

- 3) That the learned magistrate erred in both law and fact by finding and holding that the Respondent's name had been included in the Green card as a co-owner of the subject property being Siaya/Karapul/Umala/523 while relying on an inaccurate public document.
- 4) That the learned magistrate erred in both law and facts in finding and holding that the Respondent had the right to participate in the succession cause of the estate of the deceased when he is and was not a beneficiary within the meaning of section 29 of the Law of Succession Act.
- 5) That the learned magistrate materially erred in law in entertaining the Application before her when the same was never accompanied by mandatory forms.

The Appellant therefore sought for orders inter alia; that the appeal be allowed; that the ruling of the learned magistrate be set aside and substituted with a declaration that the Respondent is not the co-owner of the suit property; that the objector's summons for revocation of grant is and was not meritorious; that an order be and is hereby made reinstating the grant for letters of administration confirmed on 23/7/2020 and that the costs of the appeal be granted to the Appellant.

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 Respondent herein had filed an application for revocation of grant dated 22/9/2020 which sought reliefs namely the grant of letters of administration intestate issued to the Petitioner on 19/12/2019 be revoked and that the cost of the application be borne by the Petitioner.
5. The application was supported by the grounds set out thereunder and by the affidavit of the Respondent sworn on even date. The Objector's gravamen is inter alia; that the Applicant is the joint owner of the property Siaya/Karapul/Umala/523 and that the said property does not form part of the estate of the deceased; that considering that the property is jointly owned and with regard to the principle of survivorship, the property naturally devolves to the survivor and hence the Applicant is the rightful owner of the property; that the Respondent with full knowledge of the above however somehow found a way to have the parcel registered in his name despite there being a caveat over the title and without filing of a succession as procedure dictates;

that the Respondent did not follow due procedure as they did not file an application for dismissal of his application for revocation on record for want of prosecution nor did they put in a response before proceeding to put in summons for confirmation of grant; that the Respondent's actions are not in good faith and amount to intermeddling as he proceeded to do this before a succession cause was even filed in court and did not have the courtesy to consult the Applicant who was a registered co-owner and did not consent to the transfer; that the grant was obtained by misrepresentation and concealment of true facts from the court; that further the Applicant made a similar application for revocation of grant on 21/1/2020 and which was set down for hearing on 23/4/2020; that the application failed to proceed to hearing because of the derailment caused by the Covid-19 pandemic; that the Respondent took advantage of the period and proceeded to have the grant confirmed without the knowledge of the Applicant; that he only became aware of the same after courts re-opened and that they went to peruse the file and set the same for hearing; that the Respondent/Administrator is up to some mischief as he intentionally left out the Applicant in this succession cause so as to deny him his inheritance. The supporting affidavit is a reiteration of the grounds in support.

6. The record does not show that the Appellant filed a response.
7. The application was canvassed by way of viva voce evidence.

8. **Lucas Onyango Ochieng (OW1)** was the Objector and who testified and adopted his witness statement dated 22/9/2020 as his evidence in chief. That he produced the Green card as PEX -1. That Bonface Okinda was an uncle to John Ochieng (the Appellant) and that he had assisted the deceased until he got well in hospital. That the deceased allowed him to cultivate the parcel of land and that in 2003 he called him and appreciated him and that he referred to him as his son and thus he added his name to ownership of the land. That Morris and his wife were witnesses. That the deceased died in 2011 and that he did make arrangements to lay him to rest and that he had the title deed. That he lost the original copy during shifting. That he has been using the land until sometimes in 2018 when the Appellant came to the land and chased him from the said land. That in 2019, he was issued with orders to restrict operations on the parcel and that he prays to court that the parcel be reverted in his name and that of the deceased as joint owners thereof. Further, that he reported to the police of an incident where the Appellant had cut trees on the land and that he had the OB number.

On cross examination, he stated that Bonface was like a family and that he knew him as Bonface Okinda Olal. That he was his friend and that he had his wife without children. That he was the only one in his mother's house and that he included his name in 2003 as co-owner and that he collected the title deed in 2012.

9. **Morris Otieno Obama (OW2)** adopted his statement dated 22/9/2020 as his evidence in chief. That Bonface was a village

elder and a relative of the Respondent and that in 2003, the Respondent called him and requested that he accompanies him to Siaya Land office as he wanted to have his name included in the register of the suit land. That they proceeded to Siaya with Bonface and his wife. That the deceased informed the land's office to register the Respondent's name in the register. That they were given forms and that the four of them signed. That he witnessed all the proceedings.

On cross examination, he confirmed that he was Morris Otieno Obama and that in June 2003, he was at Ng'iya when Lucas called him to go to Siaya. That he knew Bonface as the Respondent's village elder and that he came from Olien while Bonface came from Umala. That he was Respondent's witness not because they were related but because Bonface told him of how the Respondent cared for him. That he saw the deceased with a broken arm and who informed them that it was the Appellant's wife who had injured him.

At this juncture, the Respondent closed his case. The Petitioner did not tender any evidence.

10. The appeal was canvassed by way of written submissions.
11. The Appellant's submissions are dated 21/8/2025 while those of the Respondent are dated 8/9/2025.
12. Counsel for Appellant gave a brief history of the matter as follows. That these proceedings relate to the estate of one Bonfas Okinda Olal who died intestate on **9th November 2011**. That the deceased had only one property known as SIAYA/KARAPUL UMALA/523 (herein after "suit property")

available for distribution as exhibited in the Appellant`s affidavit in support of Petition for letters of grant produced at page 16 of the record of appeal. The Appellant followed all due process in petitioning for the said grant which grant was made on **19th December 2019** and confirmed on **23rd July 2020**.

13. That the Respondent thereafter lodged summons of revocation produced at pages 19 to 25 of the record of appeal seeking that the above grant be revoked claiming interests in the suit property. That the trial court entertained the said summons in total contravention of principles established in re **Estate of Henry Kithia Mwitari (Deceased) [2021] KEHC 13569 (KLR)**.

14. The Appellant petitioned for grant of letters of administration intestate for the estate of the late Bonifas Okinda Olal following his death and obtained the consent of all other persons entitled while declaring the only asset available for distribution in the estate. That the legal process culminated into the grant that was confirmed by Court on 23rd July 2020 and it is thereafter that the Respondent lodged his summons for revocation under Section 76 of the Law of Succession Act.

15. That the Respondent contended that the suit property was jointly owned between him and the deceased and based on the principle of survivorship and that the same did not form part of the estate. That the Respondent`s claim of ownership of the suit property at the succession Court invited the said

Court to entertain matters outside its jurisdiction. That this still withstanding, the trial court failed to appreciate the evidential materials placed before it and in particular;

- i. The official search certificate dated 2nd December 2009 produced at page 63 of the record of appeal shows inconsistency with the testimony of the Respondent (PW-1) as captured in the certified proceedings produced at page 41 of the record of appeal. It was the testimony of PW-1 that his name was added as joint owner on the suit property in 2003, however, the official search certificate as at 2009 did not prove this position.
 - ii. The Green card produced by the Respondent in his supporting affidavit in support of the application for revocation on page 24 of the record of appeal confirms that there is absolutely no entry that was done in 2003 as claimed by the Respondent. Further, the entry where the Respondent`s name was added is recanted.
 - iii. Additionally, from the green card, restrictions were lodged on suit property in 2019 eight years after the sad demise of the deceased which begs the question “who signed the application for restriction on behalf of the deceased?”
16. The Appellant contends that the trial Court erred in holding that the suit property was co-owned by the deceased and the Respondent since no such proof of ownership was adduced in Court by the Respondent as guided by Section 26 of the Land Registration Act. Further, the land records had glaring consistencies but the trial Court failed to judiciously address

the same thereby arriving at an unjust decision hence the appeal before Court.

17. The Appellant contends that the trial Court erred in entertaining the summons of revocation dated 22nd September 2020 filed by the Respondent since objection to a claim of property should not be litigated in a succession cause since the question of who is the rightful owner of the suit land cannot be determined by the Probate Court in a succession cause.

18. Further, the Respondent claims that the suit property was registered in joint names between him and the deceased sometime in 2003 and that the same should not form part of the estate for the reasons that he assisted the deceased financially and as a way of repaying the debts, the deceased agreed to register him as a joint owner. It was contended that the Respondent should have sought stay of the succession proceedings in good time to allow him ventilate his claims over the suit property at the correct forum and with the decision from such forum affirm his interests in the suit property by moving the succession Court under Section 76 of the Law of -Succession Act.

19. On the issue of whether the public record in the nature of green card produced by the Respondent in support of his summons for revocation were accurate, it is necessary to

refer to the ruling of the trial court where the learned magistrate stated:

“After due evaluation of the parties aforestated premises, each in its entirety this court has found that the objector/ applicant has offered sufficient reasons in support of his application.

Secondly, the court is satisfied that the objector`s application is meritorious on the ground that the objector applicant was a co-owner of the subject land herein....”

It would appear that the learned magistrate relied on the green card to form the view that the Respondent was a “co-owner” of the subject property. However, a perusal of the documents presented by the Respondent appear to raise some inaccuracies inter alia; that there is no entry record in 2003 proving the Respondent`s theory that his name was added to the suit property as joint owner in 2003; that the Respondent`s name was added to the green card records in 2012 - one year after the death of the deceased who died on 9th November 2011. Due to the glaring inconsistencies with the said public record in the nature of green card produced at page 24 in the record of appeal, it was necessary for the Land Registrar to have been called to testify so as to shed light on the said copy of Green card in view of the discrepancy in the documents such as the search conducted which indicated the deceased as sole proprietor as at 2/12/2009 yet the Respondent`s name was acclaimed to have been added in 2003. The copies of official searches presented by the parties were pursuant to the provisions of Section 34 of the Land

Registration Act which provides that a person who applies for an official search is entitled to particulars of subsisting entries. An official search therefore serves as a crucial proof of subsisting entries in the land records and evident from the search dated 2nd December 2009 is that the Respondent`s was never added to the register in 2003. The subject green card records that the Respondent`s name was added in the records in 2012 which is extremely strange because this was exactly one year after the death of the deceased and that it however gets stranger when the Appellant undertook a second search in 2018 and from the official search certificate dated 19th June 2018 produced at page 64 in the record of appeal, the Respondent`s name appears alongside the deceased. This document indicates that the Respondent`s name was added to the records on 13/6/2006 as the third entry in the records, however, from the green card, the third entry done thereto was recanted and was done in 2012 not as it is indicated in the second official search; that there are glaring inconsistencies with the public record in the nature of green card produced by the Respondent in support of his summons for revocation dated 21st January 2020 and thus inaccurate for legal evidential purpose

17. On whether the learned magistrate erred by failing to fully evaluate the evidential materials and testamentary evidence of parties thereby arriving to erroneous decision that the Respondent has the right to participate in the succession cause, it is clear that the trial magistrate went off tangent by

affirming the Respondent's ownership of the suit property on the basis of doubtful documents. The trial court held that;

“Secondly, the court is satisfied that the objector's application is meritorious on the ground that the objector applicant was a co-owner of the subject land herein, so he has a right to participate in the relevant succession cause”

Indeed, the learned magistrate lacked the jurisdiction to entertain the evidence and arguments on ownership of the suit property and fatally erred by failing to judiciously evaluate evidential materials and testamentary evidence before her. The Respondent testified that he collected the title deed in 2012, lost the original but retained a copy of the same. He however failed to produce a copy of the same and what is on record is the title deed produced at page 59 of the record of appeal which was issued on 27th August 2020 to one Mr. Samuel Otieno Musumba having been transferred from the Appellant who had the grants confirmed on 23rd July 2020. It is quite clear that the Respondent might after all not have been issued with a title deed as alleged and that the Land Registrar could have shed light on the same but who was not called to testify.

18. It was also contended that the Respondent should have approached the Environment and Land Court on the issue of ownership of the land instead of the succession court. Reliance was placed in the case of *re Estate of Prisca*

Ong'ayo Nande (Deceased) [2020] eKLR, where the court held:

“The applicant herein lays claim to Butso/Indangalasia/337, not as an inheritor from the estate of the deceased herein, but by alleging that portions of that property was sold to him by the estate. The sales are contested by the administrator. That would mean the court has to decide a question of ownership of the said property as between the estate and the applicant. ... That is a matter which revolves around title to land. Under articles 162(2) and 165(5) of the Constitution, I have no jurisdiction over that question.”

19. Further it was contended that the Respondent claimed that he is a joint owner and by virtue of the principle of survivorship, the suit property devolves to him. However, the trial Court despite assuming jurisdiction that it did not have failed to judiciously evaluate evidentiary materials and testamentary evidence of parties thereby arriving at an unjust decision and that the revocation sets a dangerous precedent in allowing unverified claims to disrupt succession processes, contrary to the objectives of the Law of Succession Act, which seeks to ensure certainty and fairness in estate administration.

20. Counsel finally submitted that this Honourable Court sets aside the trial court's ruling, restores the grant, and affirm the Appellant's status as administrator to avoid exposing the Appellant to unnecessary suits from other third parties.

21. The Respondents' submissions are dated 8th September 2025. The same are as follows.

22. The Respondents submission are dated 8/9/2025.

23. It was submitted that the Respondent had approached the trial court vide summons for revocation of grant dated 22/9/2020 which was allowed by the trial court. Section 76 of the Law of Succession Act provides that;

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

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

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

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

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

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. To proceed diligently with the administration of the estate; or

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

24. A reliance was placed in the case of **Jamleck Maina Njoroge -VS- Mary Wanjiru Mwangi (2015) eKLR** in revoking a grant reiterated the grounds for revocation by holding as follows: -

“ 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.”

25. Further, under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was

attended by problems. This could be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons.

26. It was submitted that the Appellant herein has alluded to what they term as inconsistencies in documents that were produced before court namely, search certificates and Green cards. Reliance was placed on the case of **Jayesh Autospares Ltd v Kapterit Rapid Co. Ltd & 2 Others [2020] eKLR**, and that the Respondent contended that the Appellant failed to discharge his duty under Section 107 of the Evidence Act since he did not any demonstrate fraud, concealment, or misrepresentation by the Respondent. He who alleges must prove and simply put, when given the opportunity to prove his claims, the Appellant failed to do so.

27. It was further submitted that having alleged fraud, the responsibility lay with the Appellant herein to prove such allegations to a standard above a balance of probabilities but not beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v**

Simon Parkoyiet Mokare & 4 others [2017] eKLR. Quite certainly, the Appellant has not met the requisite standard of proof as regards fraud and as such has failed to discharge the burden of proof under Section 107 of the Evidence Act.

28. Reliance was placed in the case of **Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No. 158 of 2000, Mwita J.** made remarks on the guiding principles for the revocation of grant wherein he stated that:

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound ground. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing 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”

29. It was further submitted that this is not a dispute over ownership of land as alleged by the Appellant. The Respondent simply pointed out that the grant obtained by the Appellant was obtained through the material concealment of the fact that the Respondent was a joint owner of the property and that the Appellant ought to have included as part of the estate of the deceased. Further, the claims by the Appellant that the documents presented were inconsistent were not

proved on a balance of probabilities and that the same ought to be dismissed in entirety.

30. On the issue of the cost of the suit, it was submitted that costs of the suit are awarded at the discretion of the Court and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. Reliance was placed in the case of **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR** where the Supreme Court further held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. Further, counsel submits that other principles to be considered in the awarding of costs are as stated by Justice Odunga in **Republic v Communication Authority of Kenya and another ex - parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR** in which he held as follows:

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“In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 and Mulla (12th Edn) P. 150.”

31. I have considered the record of appeal and the submissions as well as authorities cited. I find the issue for determination is whether the appeal has merit.

32. It is noted that the Respondent had approached the lower court vide a summon for revocation of grant dated 22/9/2020 in which he accused the Appellant for having secretly taken out letters of grant of administration in the estate of the deceased without informing him yet he knew that the Respondent was a co-owner in the property namely Siaya/Karapul-Umala/523. Hence, the suit revolved around whether the Respondent presented sufficient grounds before the trial court to warrant revocation of the said grant. Revocation is provided for in Section 76 of the Law of Succession Act as follows:

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

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

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

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

- (d) *That the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
- i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
 - iv. To proceed diligently with the administration of the estate; or*
 - v. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or(e)that the grant has become useless and inoperative through subsequent circumstances.”*

33. In the case of **Jamleck Maina Njoroge -VS- Mary Wanjiru Mwangi (2015) eKLR** the court while revoking a grant reiterated the grounds for revocation by holding as follows: -

“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.”

34. In the case of ***Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No. 158 of 2000, Mwita J.*** made remarks on the guiding principles for the revocation of grant wherein he stated that:

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound ground. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing 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”

35. Further, under said Section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. This could be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead

of a grant of probate, or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons.

36. It is noted that the Respondent has contended the suit property was jointly owned between him and the deceased and that he relies his claim on the basis of the principle of survivorship and contends that the same did not form part of the estate. The Appellant on the other hand maintains that the trial court upon establishing that the Respondent was staking a claim of ownership of the suit property, should have advised him to proceed to the Environment and Land Court which is the right forum to adjudicate his said claim. However, the succession Court proceeded to entertain the matter outside its jurisdiction. Further, the trial court failed to appreciate the evidential materials placed before it inter alia; the official search certificate dated 2nd December 2009 produced at page 63 of the record of appeal shows inconsistency with the testimony of the Respondent (PW-1) as captured in the certified proceedings produced at page 41 of the record of appeal. It was the testimony of PW-1 that his name was added as joint owner on the suit property in 2003, however, the official search certificate as at 2009 did not prove this position; the Green card produced by the Respondent in his supporting affidavit in support of the application for revocation on page 24 of the record of appeal confirms that there is absolutely no entry that was done in 2003 as claimed by the

Respondent. Further, the entry where the Respondent`s name was added is recanted; additionally, from the green card, restrictions were lodged on suit property in 2019 eight years after the sad demise of the deceased which begs the question “who signed the application for restriction on behalf of the deceased?”

37. Since the Respondent in his summons for revocation of grant clearly indicated that his claim is one of co-ownership of the suit property namely Siaya/Karapul-Umala/523, then the trial court ought to have considered that this was purely a claim over land. In any case, if indeed the Respondent presented evidence which showed that he was a co-owner of the property, then upon the demise of the deceased who was the other co-owner, the ownership of the property devolves automatically to the surviving co-owner. According to the Respondent, he claimed that the deceased escorted him to the Land`s offices Siaya and endorsed him as a joint owner of the property and that he later obtained a title deed which contained the two names. However, he did not present the said title deed but a copy of a Green card showing that the register entries was made in the year 2003. It would appear then that the Respondent is alluding to the concept of a joint tenancy. In a joint tenancy, there is the right of survivorship in that the deceased co-owner`s interest automatically passes to the surviving co-owner by the principle of Survivorship (Jus accrescendi). This process occurs outside of the deceased`s will or the Laws of Inheritance (Succession). The Respondent upon the demise of the deceased was required to present a

certified copy of the death certificate to the Land Registrar and that the Land Registrar proceeds to remove the deceased's name from the title and the survivor becomes a sole legal owner and that a new title is then issued with the changes effected. In those circumstances, the deceased's share is not part of the estate and cannot be claimed by the beneficiaries. On the other hand, if the ownership was one of a tenancy in common, each co-owner holds a separate and distinct share of the property which can be equal or unequal and that the share of the deceased co-owner goes to part of his estate and distributed according to his will or by the laws of Intestacy (Succession) if there is no will.

38. Going by the foregoing observation, it seems that the trial Court erred in holding that the suit property was co-owned by the deceased and the Respondent since no such proof of ownership was adduced in Court by the Respondent as guided by Section 26 of the Land Registration Act. Further, the land records had glaring inconsistencies but the trial Court failed to judiciously address the same thereby arriving at an unjust decision hence the appeal before Court. Again, an objection to a claim of property should not be litigated in a succession cause since the question of who is the rightful owner of the suit land cannot be determined by the Probate Court in a succession cause. Further, the Respondent's claim that the suit property was registered in joint names between him and the deceased sometime in 2003 and that the same should not form part of the estate for the reasons that he assisted the deceased financially and as a way of repaying the debts, the

deceased agreed to register him as a joint owner, it is not convincing and that if he wanted to pursue his interest in the property then he should have sought stay of the succession proceedings in good time to enable him ventilate his claims over the suit property in the relevant forum (ELC) and with the decision from such forum then he could properly move the succession Court under Section 76 of the Law of Succession Act.

39. On the issue of whether the public record in the nature of green card produced by the Respondent in support of his summons for revocation were accurate, it is necessary to refer to the ruling of the trial court where the learned magistrate stated:

“After due evaluation of the parties aforestated premises, each in its entirety this court has found that the objector/ applicant has offered sufficient reasons in support of his application.

Secondly, the court is satisfied that the objector`s application is meritorious on the ground that the objector applicant was a co-owner of the subject land herein....”

It would appear that the learned magistrate relied on the green card to form the view that the Respondent was a “co-owner” of the subject property. However, a perusal of the documents presented by the Respondent appear to raise some inaccuracies inter alia; that there is no entry record in 2003 proving the Respondent`s theory that his name was added to the suit property as joint owner in 2003; that the

Respondent`s name was added to the green card records in 2012 - one year after the death of the deceased who died on 9th November 2011. Due to the glaring inconsistencies with the said public record in the nature of green card produced at page 24 in the record of appeal, it was necessary for the Land Registrar to have been called to testify so as to shed light on the said copy of Green card in view of the discrepancy in the documents such as the search conducted which indicated the deceased as sole proprietor as at 2/12/2009 yet the Respondent`s name was acclaimed to have been added in 2003. The copies of official searches presented by the parties were pursuant to the provisions of Section 34 of the Land Registration Act which provides that a person who applies for an official search is entitled to particulars of subsisting entries. An official search therefore serves as a crucial proof of subsisting entries in the land records and evident from the search dated 2nd December 2009 is that the Respondent`s was never added to the register in 2003. The subject green card records that the Respondent`s name was added in the records in 2012 which is extremely strange because this was exactly one year after the death of the deceased and that it however gets stranger when the Appellant undertook a second search in 2018 and from the official search certificate dated 19th June 2018 produced at page 64 in the record of appeal, the Respondent`s name appears alongside the deceased. This document indicates that the Respondent`s name was added to the records on 13/6/2006 as the third entry in the records, however, from the green card, the third entry done thereto was recanted and was done in 2012 not as

it is indicated in the second official search; that there are glaring inconsistencies with the public record in the nature of green card produced by the Respondent in support of his summons for revocation dated 22nd September 2020 and thus inaccurate for legal evidential purpose

40. On whether the learned magistrate erred by failing to fully evaluate the evidential materials and testamentary evidence of parties thereby arriving to erroneous decision that the Respondent has the right to participate in the succession cause, it is clear that the trial magistrate went off tangent by affirming the Respondent's ownership of the suit property on the basis of doubtful documents. The trial court held that;

“Secondly, the court is satisfied that the objector`s application is meritorious on the ground that the objector applicant was a co-owner of the subject land herein, so he has a right to participate in the relevant succession cause”

Indeed, the learned magistrate lacked the jurisdiction to entertain the evidence and arguments on ownership of the suit property and fatally erred by failing to judiciously evaluate evidential materials and testamentary evidence before her. The Respondent testified that he collected the title deed in 2012, lost the original but retained a copy of the same. He however failed to produce a copy of the same and what is on record is the title deed produced at page 59 of the record of appeal which was issued on 27th August 2020 to one Mr. Samuel Otieno Musumba having been transferred from the

Appellant who had the grants confirmed on 23rd July 2020. It is quite clear that the Respondent might after all not have been issued with a title deed as alleged and that the Land Registrar could have shed light on the same but who was not called to testify.

41. It was also contended that the Respondent should have approached the Environment and Land Court on the issue of ownership of the land instead of the succession court. In the case of *re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, the court held:

“The applicant herein lays claim to Butsotso/Indangalasia/337, not as an inheritor from the estate of the deceased herein, but by alleging that portions of that property was sold to him by the estate. The sales are contested by the administrator. That would mean the court has to decide a question of ownership of the said property as between the estate and the applicant. ... That is a matter which revolves around title to land. Under articles 162(2) and 165(5) of the Constitution, I have no jurisdiction over that question.”

42. From the foregoing observations, it is not in dispute that the Respondent's claim of ownership of the suit property Siaya/Karapul-Umala/523 on the basis of survivorship ought to have been lodged before the Environment and Land Court if the Respondent opted not to engage the Land Registrar directly. The Respondent therefore upon obtaining the

requisite orders from the ELC then he was to present the order to the Land Registrar to effect changes on the register of ownership of the land. However, if the Respondent discovered that the Appellant had filed Succession Cause over the estate of the deceased, then he was to present to the Succession Court the order from the ELC and that the Succession Court would automatically stay any such proceedings and advise the Petitioner to pursue the matter in the ELC. Hence, the trial court which had no jurisdiction to entertain the Respondent's claim, should not have allowed the Respondent's summons for revocation of grant. It is also noted that the Respondent who had filed summons for revocation of grant bore the duty to prove his case on a balance of probability in accordance with the provisions of Section 107 and 109 of the Evidence Act. In my considered view, the Respondent's claim did not pass muster in that whereas he presented a copy of Green card showing his name and that of the deceased as well as a copy of official search, he did not find it necessary to call the Land Registrar to shed light on the process of how he was made a co-owner of the suit property. Hence, his evidence appeared shaky and therefore the same did not meet the threshold of proof. Even though the record of the lower court indicates that the Appellant did not present evidence, the same did not relieve the Respondent from his obligation to prove his case on the required standard of proof. In any event, his claim having been meant for the ELC for determination, the choice of the Succession Court was erroneous. Consequently, the finding

by the learned trial magistrate was in error and must be interfered with.

43. In the result, it is my finding that the Appellant's appeal has merit. the same is allowed. The ruling of the trial court dated 9th November 2023 is hereby set aside and substituted with an order dismissing the Respondent's summons for revocation of grant dated 22nd September 2020 with no orders as to costs. Each party to bear their own costs of this appeal.

Dated and delivered at Siaya this 21st day of November 2025.

D. KEMEI

JUDGE

In the presence of:

Opiyo.....for Appellant.

M/s Kiprop for Odeda.....for Respondent.

Maureen/Kimaiyo.....Court Assistant.