

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HCFCA NO. E012 OF 2024

**IN THE MATTER OF THE ESTATE OF ENDEREA OWOUR
AFWANDE.....DECEASED**

**ISAIAH OPONDO OKUWA.....1ST
APPELLANT**

SAMUEL AFWANDE OKUWA.....2ND APPELLANT

VERSUS

**CLEMENT FESTO OCHIENG.....
.....RESPONDENT**

***(Being an appeal from the ruling of Hon. E. Tsimonjero
(SRM) in Ukwala Succession Cause No. 134 of 2021 dated
11th September 2024)***

BETWEEN

ISAIAH OPONDO OKUWA.....1ST
OBJECTOR/APPLICANT

SAMUEL AFWANDE OKUWA.....2ND
OBJECTOR/APPLICANT

VERSUS

CLEMENT FESTO
OCHIENG.....PETITIONER/RESPONDENT

JUDGMENT

1. The appeal arises from the ruling of Hon. E. Tsimonjero(SRM) in Ukwala Succession Cause E134 of 2021 dated 11th September 2024 wherein he dismissed the Appellants' Summons for revocation of Certificate of Confirmation of Grant dated 17/11/2022.
2. The Appellants were aggrieved by the decision and proceeded to file their memorandum of appeal dated 27/9/2024 wherein they raised the following grounds of appeal:
 - i) That the Honourable magistrate erred in law and in fact by failing to find that the Appellants had proved their case on a balance of probabilities.

- ii) That the Honourable magistrate erred in law and fact in using a higher standard than on a balance of probabilities in arriving at the determination as to whether the Appellants had proved their case.
- iii) That the Honourable magistrate erred in law and fact in not appreciating sufficiently or at all the evidence adduced by the Appellants herein.
- iv) That the Honourable magistrate erred in law and in fact in not appreciating sufficiently or at all the submissions of the counsel for the Appellant herein on the issues for determination.
- v) That the Honourable magistrate erred in law in failing to appreciate the oral testimonies rendered in court by the Appellants.
- vi) That the Honourable magistrate erred in failing to address and make a proper finding on the issues raised by the Appellants in the pleadings and submissions.
- vii) That the Honourable magistrate erred in applying his conscience rather than the law in evaluating the evidence as presented before the court hence the findings are total unsupported in law.
- viii) That the trial magistrate erred in law and fact by delivering a ruling against the Appellants despite the weight of evidence against the Respondent.
- ix) That the Honourable magistrate erred in law and in fact in disregarding the Appellants' evidence and pleadings thus arriving at a wrong finding.

- x) That the Honourable magistrate failed to appreciate the submissions of the learned counsel for the Appellants subjecting them to injustice wherefrom.

The Appellants therefore prayed that the appeal be allowed and the impugned ruling be set aside.

3. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to 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 Appellant's summons for revocation of grant dated 17/11/2022 was disposed of by way of viva voce evidence which was as follows:

5. **Isaiah Opondo ID No. 29532834 (OW1)** testified that he is a businessman based in Nairobi. That he is in court

because he applied for a revocation of grant to the estate of Andrea Owuor Afwande which was given by the court to Clement Festo Ochieng. That the estate comprises of LR No. Rambula/Uholo/265. That Andrea Awour Afwande is his uncle and a brother to his father Bartholomew Okuwa. That Clement Festo is his grandfather's herd boy and that he knew him from childhood. That Clement Festo has no family connection though he took care of his grandfather's cattle for a long time while he was away. That his grandfather was a soldier and was away most of the time. That his grandfather built him a house and that Clement Festo Ochieng took advantage of his father's absence. That his father would stay away for long periods as he was one of the founders of Legio Maria Church. That when his grandfather died, Clement Festo Ochieng did not want his father to inherit the land and the matter was handled by the village elders. That his grandfather out of the long relationship with Clement bought for and meant to settle down on Rambula/Uholo/265 and that on 9/4/2003 Clement Festo Ochieng murdered his father in broad daylight. That he filed the proceedings from the High Court Case No. 77/2003 which he wishes to produce as exhibit 3(a) and (b). That he was not made aware of the succession proceedings and that he had put a caution on the land. That he was not called to participate. That he heard that Festo had sold his own parcel number 255. That he was aware that the chief wrote a letter indicating that he was kin to his father. That he frequently obtained documents from his grandmother ostensibly to process papers for parcel 255

but he was irregularly transferring 265 too. That when his father discovered upon returning home, he killed him in broad daylight. That at the time that Clement applied for grant, Uholo/Rambula/265 was in the name of Andrew who was step-brother to his father. That the chief's letter in which Festo claimed to be brother to his father is in court and that he wishes to produce it as exhibit. That in his replying affidavit, he indicated that he did the succession together with Andrew whom he claims to be his brother. That he is curious as to such proceedings and would apply to revoke any such grant. That he wanted the court to revoke the grant in this case.

On cross examination, he stated that Andrea is a shareholder in parcel Number 265 and the owner of the land. That Clement erroneously registered his name as a co-owner of that land. That at the time of succession, Andrea owned $\frac{1}{2}$ share of the land and Clement owned $\frac{1}{2}$ share of the land. That he has a problem regarding Clement's ownership of $\frac{1}{2}$ as that was fraudulent. That he also has an issue with Clement inheriting the other $\frac{1}{2}$ that belonged to Andrea. That he has not filed an ELC case and that his father was to file but Clement murdered him before he could do so and that by then he was 11 years old. That Clement is called Ochieng and whom he does not know his father and mother. That he did not know any relations and that all he knew is that Clement was a herdsboy. That he knows the family of Andrea Owuor Afwande but does not know Clement's family. That Andrea Owuor Afwande's mother was Monica Okoth who was the

wife of Samuel Afwande Obudho and who was a co-wife of Namada. That Monica bore Andrew Owuor Afwande and Helida also known as Okuwa and that Okuwa and all of them are now deceased. That he doesn't know Margaret Aluoch Afwande and that his father is Bartholomew Okuwa Wanyando. That he was the son to Samuel Afwande and Agnes Namada. That Agnes Nanzala was the inherited wife of Samuel Afwande and who was formally married to Lazaro Afwande Obudho an elder brother to Samuel. That on re-marriage, they got a child to Raphael Ohango who passed away. That Lazaro had two children before Agnes remarried upon the death of Lazaro. That he died before land adjudication. That Samuel Afwande Obudho became the first registered owner of 265. That when Samuel Afwande Obudho died only his family was allowed to inherit. That Clement should not have been part of that. That the letter exhibit P2 was in the files that Clement used. That Clement lied about the murder proceedings in the succession case. That the chief's letter cannot confirm sonship on Clement when he was not the son of Samuel Afwande Obudho. That he went to the chief to write to him a letter to pursue case on behalf of his father. That he knows from his family that Clement is not his son and he doesn't need the chief to clarify whom his relatives are. That his village elders will come to testify. That he knows his mother and grandmother and he doesn't require the chief to tell him his entire family because he knows. That there was a land in Bartholomeo's name. That it is a small piece of land and that they acquired via court. That they

could not succeed parcel 265 when Samuel inherited the wife of Lazaro Agnes Nanzala. That they bore Raphael Ochongo who passed on. That the land was for Andrea, Raphael and Bartholomeo. That these were Afwande Owuor's family. That he has letters of administration ad-litem for the estate of Andrea Afwande over parcel number 265. That he is not meddling and that he has his brothers in court.

On re-examination, he stated that he is aware of ELC No. 61/2022. That he filed the case after getting letters of administration Ad-Litem and that the case is ongoing.

6. **George Ouma Oketch (OW2)** testified that he comes from Ambira Sub Location Ugunja Sub-County near Rambula Secondary School. That he knows why he is in court and that it is because the case of Isaiah Opondo Okemwa and Samuel Afwande Okuwa with Clement Festo Ochieng over land. That Isaiah and Samuel are known to him as Afwande's grandchildren. That Andrew Owuor Afwande was his friend and work mate. That Clement Ochieng was Afwande's employee and that he recorded his statement which was filed and he wishes that the court adopts the same. That he wished to inform the court to revoke Clement as the administrator of the land and that the land be given to Afwande's grandchildren.

On cross examination, he stated that he is a close friend and that they spent a lot of time together. That he does not know Obudho Wanyando. That Samuel Afwande's father is his friend and a friend to Andrew Owuor Afwande. That

Andrew Awuor Afwande was the son of Afwande Obudho and that Samuel Afwande is Samuel Afwande Okuwa who is a brother to Isaiah Opondo (OW1). That he does not know the name of Andrew Afwande's mother. That Obudho Afwande had two wives and he could not differentiate between them. That he only knew two out of four of them. That Andrew Afwande and Bortholemeo are siblings. That he was a visitor in the home and he was not concerned with who comes from which house. That he only knows Andrea who had children and who died while young. That his wife was Jessica Owuor. That he knew Andrea as the husband to Jessica not the child. That he cannot know everyone in his friends' household. That Andrea was Bortholomeo's brother. That they were siblings. That he doesn't know their mother. That he knew Monicah Akoth and Agnes Nawanda. That he knows them both as the mothers of the home and the wives of Afwande's and those are their children. That Nerea was the wife of Obudho Afwande and that he did not know Lazaro. That he did not know that he is the father to Batholemeo and that all he knows is the family of Obudho Afwande. That he has not met the chief who is supposed to know better.

7. **Peter Ooko Baraza (OW3)** testified that he comes from Magoya Rambula and that he is a farmer and that he is in court because of Isaiah Opondo, the family of Afwande Obudho. That he is their grandfather. That he knew Anderea Owuor who is like his son. That he knows Clement Ochieng who was Afwande's herdsman. That he recorded a

statement filed on 27/4/2023 which he wishes to adopt in court.

On cross-examination, he stated that he is a friend and a clan member and that he knows the family very well. That the shamba is for Afwande Obudho. That he doesn't know if they had a title deed as he never asked him. That parcel number 265 was under Afwande Obudho. That Anderea Afwande is Afwande's son and that parcel number Ramula 265 belongs to Afwande Obudho's name and that Andrea is a son to Afwande Obudho. That he doesn't know whether Afwande Obudho has sick neighbours. That Clement Festo lived in parcel Number 255 and that he himself lived in 255 where Obudho wrote for him as his worker. That the murder of Obudho was in parcel number 265, that he never lived in 265. That he doesn't know many wives Obudho Afwande had. That he worked away from home and that he returned and found changes. That he left when he was young and that he could not really tell whether he had two or four wives. That he worked away from home and that he returned and found the changes. That he left when he was young and could not tell whether he had two of the four wives. That he knows Afwande Obudho not Lazaro. That Bathelomeo Okuwa is the father of Afwande Obudho not Lazaro. That Bathelemeo Afwande Obudho has two wives and that he cannot really know who gave birth to who. That Afwande Obudha and Lazaro are two different people and that the father was born along time ago. That he cannot really know that Clement Festo

Ochieng lived on parcel 255. That after Bartholomeo was killed in 265 and Ochieng had already bought 265 he saw that the grand children were alone and that they opted to switch 255 from them. That Afwande Obudho has two wives not four and that he only knows Akoth and Nanjala as he did not know much about the four.

On re-examination he stated that Clement Ochieng was given 255 but he later sold it. That after he killed Barthelomeo, he now wants to snatch from the dependents whom they knew.

That marked the close of the Objectors' case.

8. **Clement Festo (PET W 1)** testified that he was born in Magoya in 1950 and that he is a carpenter. That he filed a replying affidavit dated 15/2/2023 and that he also filed a statement on 19/10/2023 which he wishes to be adopted. That Anderea Afwande is his younger brother. That they are all children of Afwande. That Uholo/Rambula/265 belongs to Afwande Obudho who is his father as well of father to Afwande. That Afwande Obudho was is father. That he was called Samuel Afwande Obudho. That Andrea Ouma is the son of Samuel Afwande Obudho who is his father.

That Andrea Ouma Afwande did not have siblings and that his brothers were Batholemeo Okuwa who is the one of Lazaro Wanyonya and not son of Samuel Afwande. That the true siblings of Anderea Ouma Afwande and Clement Festo Ochieng are Helinda Okuwa and Margaret Aluoch Afwande. That he doesn't know George Ouma Oketch. That it is not

true he was born in that home of Samuel Afwande and George came to lie in court. That the land he claims was bought by himself from Obuyi. That he found the land having issues and that he sold it as a result to Peter Odera and that it is no longer his. That exhibit 3(Green card) shows that the land was registered in his name and that of Andrea. That he had to sell number 265 because in 2013 there were disagreement among them ie Betholemeo Okuwa and him. That Betholemeo made noises any time he went to the ask him why he was cutting trees that the surveyor had put on the building and that he was not aware. That the village elder came and told him that whenever he cuts he plants and that he was not supposed to do it alone. That Batholomeo then started a fight with the elder. That he had a rod and that he was disappointed that the village elder had supported that he should also cut the trees. That he went to separate them. That he hit him with the fimbo and drew a panga from the gumboots and that he tried to cut him though he missed and that he took the panga. That the fight resulted to death and that he was tried and jailed for life. That Isaiah and Samuel forged an application to enter the samba and start using it. That they were told to vacate the shamba. That he served the life sentence from 2003 for a period of 16 years and was put on probation for four (4) years. That it was a condition of the probation that he should not go home. That his villagers do not know his whereabouts as he has kept away. That Andrea and Bethlemeo were his neighbours and that

Bathelemeo had his father's land Uholo/Rambula/271 and that the land was bordering his. That Isaiah Opondo and Samuel Okuwa Afwande are sons to Bethelomeo Okuwa Manyando who died in the fight and that they have no right to the land. That his grandfather was Obudho who was a father to Samuel Afande Obudho and whose father was Wanyando. That they died long ago before issues of baptism. That the court held that he sells that land and that he settles elsewhere. That the murder case was No. 77/2003. That he was not a herdsman of Afwande Obudho but he was his son and that the chief knows the same. That whatever is presented are lies and that he knows Ooko Barasa. That there are five sons including Bathelemeo whose father is Lazaro Wanyando. That Helida Okuwa is his sister though deceased and that Raphael Okongo is a son to Samuel Afwande and who is a son to Lazaro Wayando and a brother to Bathelemeo. Patricia Oliech is a sister to Bathelemeo.

Andrew Ouma Afwande is a son to Afwande and a brother to Benjamin the deceased herein. That the shamba belonged to Ombanyi Ogolla and not Ramjius, Peter Ooko Barasa and George Ouma Oketch who are not close to them and are not even relatives. That he doesn't know whether Oketch Ooko is a father to Obwanda's clan and that he is from Kambalumbo clan. That Isaiah and Samuel are neighbours and that they have common lineage with great grandfathers but from far off.

On cross examination, he stated that Id Number 16038577 is his and that Id Number 819138 is the number he gave in his exhibit 3 while Id Number 160388577 is the oldest Id he took but it was changed and was given the new one. That he took a grant for the parcel Number 256 and that in the chief's letter indicated that he was the outcoming relative. That at the time it was Margaret Aluoch which he noted in the chief's letter. That Andrea Ouma Afwande was his brother and that their father was Samuel Afwande Obudho. That when the High Court released him, the court clearly indicated that he should sell the land. That the probation officer was sent to the court registrar and that they found that the land was his so he was to sell it and relocate. That the court gave him an order to sell the land. That his sister was unwell when he was pursuing succession. That he sold 265 to Benson Omondi Oduor. That it was his land and that 255 he sold to Peter Odero and that he sold after buying the farm from Obonyo Ogolla.

9. **Charles Ochieng Otieno (PET W2)** testified that he is a retired chief and that he is a farmer. That he comes from West Uholo location. That he did the letter dated 14/5/2021. That he was aware of the contents of the letter. That it is a family he knows. That he knows the land in question. That Andrew Awuor Afwande (deceased) and that he knows Clement Festo Ochieng the petitioner. That he was the brother to Andrea Owuor Afwande. That it is not true that Andrew Owuor Afwande was the brother to Batholomeo and

that the Petitioner is the brother to Andrew. That he knows Margaret Aluoch who is a sister to Clement Festo Ochieng and Andrew Owuor Afwande who is deceased. That he knows that the Objectors are children of Betholomeo and that their own land is next to estate property herein. That it is true that the deceased Anderea Owuor Afwande is their uncle and that they cannot inherit from Afwande if the children of Afwande are absent and that he still maintains the sentiments contained in his letter of introduction.

On cross examination, he stated that he did write a letter in respect of the late Andrew Owuor Afwande and that he knows the family very well. That he scheduled with some of the family members and that Margaret Aluoch is the sister to Clement Festo Ochieng. That Margaret had informed him that she had no problem with Clement being the administrator. That Margaret is before court and she would testify. That he saw the death certificate of Andrew Afwande.

10. **Charles Oketch Odongo (PET W3)** testified that he is a resident of Rang'ala and that he left work long time ago and that he does farming. That he is 75 years old and did record his statement dated 19/10/2023 which he wished to be adopted. That Clement Festo Ochieng is his nephew and that he is the son of Akoth who is his sister.

On cross examination, he stated that he knows the Applicant (Isaiah and Samuel) and that Clement Festo is a brother to Anderea Afwande and that they are brothers. That Clement

was not a herdsman and that he is the son of Afwande whom he knew well.

11. **Margaret Aluoch Obonyo (PET W4)** testified that she is a resident of Tingare and that she is a farmer. That she recorded her statement dated 19/10/2023 which she wished to adopt. That they were born four children and that Anderea Owuor Afwande was his brother who married but both his wife and children died. That their father was called Samuel Afwande Obudho and that it was not true that Clement Festo Afwande was a herdsman of Samuel Afwande Obudho. That he knew their neighbour by the name Bartholomeo.

On cross-examination, she stated inter alia; that Anderea and Clement are brothers; that parcel 255 was bought by Samuel Afwande and it was far from where they were staying; that it is true that Clement did the succession for Andrea Owuor Afwande; that she agreed not to be included in the succession proceedings and that she did not know that her suggestion was improper; that her name is Margaret Aluoch Obonyo and that she took her ID card using her husband's name; that she did not change her name to suit the circumstances of the case.

12. The Petitioner closed his case at that juncture.

13. The parties filed and exchanged submissions and thereafter the trial court came up with the ruling, which is now the subject of this appeal.

14. The appeal was canvassed by way of written submissions. Both parties complied.

15. The Appellants' submissions are dated 6/10/2025.
16. Learned counsel for the Appellants started off by submitting that representation was sought in the estate of **Anderea Owuor Afwande (Deceased)** by the Respondent in **MCC Ukwala Succession Cause E134 of 2021** in his capacity as alleged brother of the deceased, in a petition that was lodged on 27th May 2021. That the Respondent listed himself as the sole surviving sibling of the estate. The only asset available for distribution in the cause was Uholo/Rambula/265 measuring 1.8 Ha which was distributed fully to the Respondent and that letters of administration intestate were confirmed by the Honourable Court on 6th October 2021. That the appeal arises from this decision and the Appellants' claim as representatives of their late father Bartholomew Okuwa, who had a real and lawful interest in the Estate of Anderea Owour Afwande (deceased). The Appellants contend that they are the biological grandchildren of Lazaro Wanyando, a brother of Afwande Obudho, who, upon the death of Lazaro Wanyando, inherited his late brother's wife, Agnes Nanzala, together with her two children, and another born to this union, who is also deceased.
17. It was also submitted that the Appellants testified that their claim as lawful beneficiaries of the Estate of Anderea is founded on the fact that they are the biological grandchildren of **Lazaro Wanyando**, a brother to **Afwande Obudho**, and that upon the death of Lazaro Wanyando,

Afwande Obudho, in accordance with Luo customary law, inherited Lazaro's widow, **Agnes Nanzala**. That the Appellants' interest in the estate arises from their relationship with the children adopted by Agnes Nanzala under Afwande Obudho, one of whom is **Bartholomew Okuwa**, the father of the Appellants. As stated, Bartholomew Okuwa, together with his mother and other siblings who are deceased, were inherited and adopted into the household of Afwande Obudho, where they resided alongside Afwande Obudho's biological children, including **Andrew**, and were treated as members of the household in accordance with Luo customary law.

18. It was further submitted that the estate that is subject of this appeal belongs to **Andrew**, a biological son of **Afwande Obudho**, who was a step-brother to Bartholomew Okuwa a brother to the Appellants' father. The Appellants' interest arises through their biological father, Bartholomew Okuwa, as a brother of the deceased Andrew by virtue of their shared household and family structure, and Luo beliefs. That the Appellants testified before the trial court that, under Luo customary law, **Bartholomew Okuwa**, having been adopted into the household of Afwande Obudho and raised therein, were customarily regarded as children of Afwande Obudho. The Appellants contend that this recognition established Bartholomew Okuwa's standing within the family unit and raises their claim to protect their father's beneficial interest

in the estate of his late brother, who held concurrent capacity as the Respondent.

18. It is on the basis of the foregoing and long-standing residence at Uholo/Rambula/ 265 that the Appellants seek the intervention of this Honourable Court on appeal. That the Appellant's father was recognised as a member of that family and stood as a brother to the deceased whose estate is the subject of these proceedings. Consequently, Bartholomew Okuwa ranked in equal degree of priority with the Respondent in respect of the estate.

The Appellants further contended that their father's death, Bartholomew Okuwa, at the hands of the Respondent, resulted in an unfair advantage being gained by the Respondent in the administration and distribution of their uncle's estate. As the biological children of Bartholomew Okuwa, a brother of the deceased, the Appellants have a direct and lawful interest in safeguarding their late father's rightful share of the estate, which the Respondent's actions sought to usurp, and are entitled in law to protect their late father's interest in the estate.

It was also contended that the Appellants continue to reside within the family compound of Uholo/Rambula/265 notwithstanding the demise of both their father, Bartholomew Okuwa, and the deceased Andrew, and remain in occupation of the said premises to date. That on

the other hand, the Respondent, who is the current administrator of the estate of Anderea Owour Afwande, testified that he is the child of the late Afwande Obudho and Monica Akoth and had another three siblings, two of whom are now deceased leaving him and his sister Margaret Oluch Afwande who is now married and resides in Ugenya. That the Respondent goes further to testify that prior to the death of his alleged brother Anderea Owour Afwande, succession was done and suit parcel Uholo/Rambula/265 was registered under both their names but however in 2003, the Respondent had a fatal altercation with Bartholomew Okuwa, the father of the Appellants, resulting in Bartholomew Okuwa's death. The Respondent was subsequently arrested, taken into custody in Siaya, and convicted, serving 16 years of a life sentence before being released on probation in 2019. That upon his release, the Respondent filed a Petition for Letters of Grant of Administration dated 6th October 2021 intestate for his alleged late brother, Anderea Owour Afwande, alias Andrew Owour Afwande. That he represented to the Honourable trial court that he jointly owned property **Uholo/Rambula/265** with his deceased brother and further claimed to be the only surviving heir.

That the Chief corroborated the Respondent's claims, accepting him as the sole heir, despite the existence of other lawful claimants, including the Appellants, whose father had been unlawfully killed to create this unfair advantage.

19. It was submitted that the learned magistrate erred in law in finding that father of the Appellants is not an adopted child under Section 3(2) of the Law of Succession Act, which provides reference as to who the Act considers to be a child thereby confirming Appellant's father's position as brother of deceased capable of benefitting from their late brother's estate in equal capacity as Respondent.
20. It was also submitted that the trial court erred in law and fact by finding that the Appellants had not proved their case on a balance of probabilities and erred in law and in fact in using a higher standard than on a balance of probabilities in arriving at the determination as to whether the Appellants had proved their case.

The Learned Judge in giving his Ruling raised four issues being:

- a) Whether the Appellant's late father was the deceased's brother.

21. It was submitted that the trial court had raised two issues for determination inter alia: whether the Appellant's late father was the deceased's brother and whether the Respondent is a sibling of Anderea Afwande Okuwa.
22. Learned counsel contended that the Respondent's evidence is rife with inconsistencies which undermine the credibility of their evidence on balance of probabilities. First, the Respondent testified that Monica Akoth, born in 1942, is his mother, while he himself testified to have been born in 1950 which would suggest that Monica Akoth had given birth at the age of eight. That the Respondent further testified that

he purchased the suit land from the deceased and simultaneously participated in succession proceedings over the same property. That the Respondent produced no documents to support his claim to have purchased Uholo/Rambula/265 from the deceased and thus his testimony is contradictory, as one cannot purport to purchase property from a deceased person and still purport to be a beneficiary of the same through succession.

23. It was also submitted that the Respondent testified to having a surviving sibling, the said surviving sibling is unknown to the chief, who omitted her in his introduction letter, and further, the Respondent failed to produce form 38 under Law of Succession Act, which is a consent to the making of a grant of administration intestate to a person of equal or lesser priority. Learned counsel contended that the Appellants proved their case on a balance of probability and placed reliance in the case of **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526** where Kimaru J (as he then was) held that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is

probable than not that the allegations that he made occurred.”

24. It was submitted that from a study of the lower court record, it is not in dispute that the Appellants called evidence to controvert the Respondent’s claims, however, be that as it may, the legal principle stands that at the end of the day, the onus lied on the Respondent to prove his claim to the required standard, whether or not the evidence is uncontroverted.

25. The Appellants submit that the duty of proving the averments contained in the Petition for letters of administration intestate lay squarely with the Respondent which he failed to do by reason of the glaring inconsistencies in evidence and oral testimonies of his witnesses. Reliance was placed in the case of **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** where the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a

balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

It was submitted that **on** a balance of probabilities, the Respondent's oral testimony and evidence is improbable and cannot be relied upon by this Honourable Court. That the chronological sequence of events together with the multiple factual discrepancies cast doubt on the weight of the Respondent's evidence and the court is entitled to question the credibility of the said evidence and its subsequent admissibility.

26. The Appellants also submit that the degree of balance of probability applied for the Respondent was of much lower threshold, while that of the Appellants was much higher. That the trial court readily accepted the Respondent's evidence without subjecting the same to similar analysis to that of the Appellants, instead requiring a higher standard by Appellants resulting in a miscarriage of Justice. That the learned magistrate erred in law and fact by misinterpreting the

Appellants evidence adduced and failing to enforce the Appellant's entitlement to equal protection of the law, being that their father, who is a brother of the deceased by virtue of customary law, was entitled to a share of the estate of Anderea Owour Afwande, and consequently, the Appellants, as his children, are entitled to step up and protect their late father's beneficial interest in the said estate.

27. It was contended that the Respondent produced a letter of introduction authored by the chief Charles Otieno (DW2), purporting to confirm himself as the sole surviving heir of the estate. That the letter omits any mention of Margaret Olouch (DW-4), a surviving sibling who testified at the trial court that she is indeed a sibling of the Respondent.

28. The Respondent also testified that the property had been transferred to him by Afwande Obudho and that he and Anderea Owour Afwande alias Andrew Owour Afwande had succeeded their father; yet, the Respondent produced no transfer documents, no succession records, and no letters of consent from other beneficiaries of equal consanguinity. That these acts together with that the Respondent had, in 2003, fatally killed Bartholomew Okuwa, the Appellants' father, removing a key beneficiary to the estate, casts doubt on the integrity on procedure at the trial court.

29. It was further submitted that the testimony of Margaret Olouch carries significant probative value, it directly contradicts the Respondent's evidence and other oral

testimonies at the trial court, where the Respondent is named as the sole surviving heir, whereas her evidence concurrently establishes the existence of other lawful heirs entitled to inheritance.

30. Through this deliberate conduct, the Respondent sought to portray himself as the sole lawful heir, exclude other rightful beneficiaries, and establish sole control over the estate. His actions directly undermined the Appellants' lawful interest, arising through their father, and deprived them of the opportunity to protect their father's rightful share, creating an unfair advantage and resulting in the unlawful administration of the estate.

The said Chief's letter, produced at page 10 of the Record of Appeal, is the very document upon which the learned trial magistrate relied upon notwithstanding its glaring inconsistency with the oral evidence on record. That the learned magistrate erred both in fact and in law by relying only on the introductory letter produced by the Respondent, while disregarding the probative testimony of DW-4, Margaret Olouch, as well as the internal contradictions in the evidence of DW-1 and DW-2. That the Appellants submit that the Chief's letter produced is inaccurate, incomplete, and premised on material non-disclosure and that by upholding the grant on the strength of this document alone, the trial court failed to interrogate whether the grant had been obtained through false statements and the concealment of material facts. That this error contradicts Section 76 of the

Law of Succession Act, which empowers the Court to revoke or annul a grant where the same was obtained fraudulently by the making of false statements or by the concealment from the Court of material facts, or where the grant was founded on untrue allegations essential in law to justify its issuance, whether made knowingly or inadvertently as provided for in the said Act as follows:

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.

37. It was also submitted that the learned magistrate erred in law by dismissing the Appellants Application by relying on the by letter of introduction which deliberately excluded lawful beneficiaries, one of whom is allegedly DW-4, Magaret Alouch, occasioning a material non-disclosure. This omission is in direct contravention of the express provisions of Sections 71 and 76 of the Law of Succession Act, which mandate full disclosure of all beneficiaries and equitable

provision for them prior to the confirmation of a grant. That the learned Magistrate erred in law and fact by relying on the testimony of a self-serving party, which was not supported by any evidence. That the Petitioner adduced no evidence to support his testimony that Margaret Aloch is his sister, making her testimony or evidence extraneous in nature. That the learned trial court Magistrate accorded probative weight to a witness who was not named as a rightful beneficiary, and further, not putting to account that uncorroborated oral evidence cannot contradict documentary proof identifying beneficiaries.

38. Learned counsel urged the court to look at the stark contradiction between the Respondent's evidence at the trial, one alleging that he jointly owned land with his late brother, another position stating that the deceased and Respondent had succeeded their late father despite producing no document, the other position that he succeeded his late brother as the sole survivor, the other account producing siblings not listed as beneficiaries, reveals an undeniable inconsistency that cannot be overlooked. This disparity is not incidental but rather a deliberate attempt for the Respondent to benefit from wrong doing.

39. The Appellants submit that the degree of balance of probability applied for the Respondent was of much lower threshold, while that of the Appellants was much higher. That the trial court readily accepted the Respondent's evidence without subjecting the same to similar analysis to

that of the Appellants, instead requiring a higher standard by Appellants resulting in a miscarriage of Justice. That the trial court ought to have examined the documentary evidence produced, and by not properly scrutinizing the same, the trial court misdirected itself and reached an erroneous conclusion.

41. It was also submitted that the learned Magistrate failed to consider the weight of the Appellants submissions and pleadings in **Ukwala Magistrate's Court Succession Cause No. E134 of 2021** and thereby made a wrong decision.

41. It was also submitted that the Appellants, at page 25 of the Record of Appeal, produced the Charge Sheet, Proceedings, and Judgment in **Kisumu High Court Murder Case No. 77 of 2003**, where **Clement Festo Ochieng**, the Respondent herein, had been tried and handed a life sentence following a verbal altercation in 2003 that tragically led to the death of his brother which happened at their home in **Uholo/Rambula/265**. That pursuant to the Respondent serving 16 years of imprisonment, and pursuant to recommendation of a Probation report, the Honourable High court at Kisumu then issued among other orders in respect to sentencing, the Honourable Fred A. Ochieng J (as he then was) ordered among other orders that;

- i. **‘With the help of his immediate family, Petitioner to settle in any place other than the land which was the place where the offence was committed’, and;**
- ii. **‘Finally, it is ordered that the Public Administration i.e the chief and the assistant chief should ensure that the Respondent (the Petitioner in that suit) complies with the Order requiring him to keep away from the place where the crime was committed.’**

44. It was contended that the trial magistrate disregarded the above High Court Orders dated 27th May 2019 issued in **Kisumu High Court Petition No. 43 of 2018 Clement Festo Ochieng, and** allowed the grant in respect to Uholo/Rambula/265 in favor of the Respondent herein.

45. It was submitted that it is a fundamental principle of the rule of law that court orders must be obeyed. The importance of this principle has been stated in many decisions in our courts and in particular the Court of Appeal. That to demonstrate the importance and seriousness with which the courts will deal with any conduct that may be deemed or found to be in contempt of court or judicial process, it may be necessary to look at some decisions on the subject.

47. In **Gulabchand Popatlal Shah & Another Civil**

Application No. 39 of 1990, (unreported), th Court of Appeal said: -

“..... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors”

In HADKINSON -V- HADKINSON (1952) 2 All ER. 567, it was held that: “It is a plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

48. The Appellants Counsel submitted that when this Petition and consequently Summons for revocation were filed at the Ukwala Magistrate Court in 2021 and 2022, the Orders of the High Court had not been appealed, varied or set aside, thus were binding on any subordinate court. However, the magistrate took it upon himself to hear and determine the Petition for letters of grant in respect to the suit premises,

which confirmed a grant in favour of the Respondent notwithstanding that it had been ordered that, he was to be assisted to settle elsewhere, other than the place the offence was committed, which is Uholo/Rambula/265. This was in clear contravention and overstepping of the learned magistrate's mandate as the Respondent having been barred from settling at **Uholo/Rambula/265** where the crime had been committed and further, he was to be assisted to settle elsewhere.

48. It was also submitted that the learned magistrate erred in law by disregarding the express orders of a superior court contrary to the principle that, orders of a superior court are binding on courts of inferior jurisdiction.

49. Further, it was submitted that given these reasons and factors, the trial Court erred in law and fact and misapprehended precedent and consequently made a wrong decision that should be reversed. That, unless this Honourable Court intervenes, the Appellants will be greatly prejudiced in the circumstances as their right to benefit from their father's interest in the Estate of his late brother remains violated with no redress.

50. Counsel further submitted that the court should find that the Appellants' appeal has merit in all the grounds and

allow the appeal in terms of the orders proposed in the Memorandum of Appeal.

51. The Respondent's submission are dated 20/1/2026.

52. Learned counsel for the Respondent raised two issues for determination being whether the learned trial magistrate erred in dismissing the summons for revocation of grant as sought; and who bears the costs of the application.

53. Counsel for Respondent gave a brief highlight that the Appellants filed an application dated 17/11/2022 seeking the grant of letters of administration intestate made to Clement Festo Ochieng on 6/10/2021 be revoked and/or annulled and that the certificate of confirmation of Grant issued to Clement Festo Ochieng dated 23/12/2021 be revoked and/or annulled and which application was supported by grounds and affidavit of Isaiah Opondo Okuwa. That the Respondent herein filed his replying affidavit sworn on 15/2/2023 wherein he denied all the averments put forth by the Respondent in the said application.

54. It was submitted that Samuel Afwande Obudho (deceased) father to the Respondent herein and Lazaro Wanyando Obudho (deceased), grandfather to the Appellants were brothers. That the Respondent's father traditionally inherited Agnes Nanzala the wife of Lazaro Wanyando Obudho but they never bore any children together. That the Appellant's father the late Bartholemew Okuwa was the son of Lazaro Wanyando Obudho

and Agnes Nanzala. It should be noted that the late Bartholomew Okuwa inherited his rightful parcels of land from his father. That the late Samuel Afwande Obudho was the father to the Respondent and the deceased herein as stated in his response sworn on 15/2/2023 in paragraph 3. That when their father died, they inherited the suit property being claimed now by the Appellants. Further, it was stated that he did succession to the estate of the deceased who was his brother since his said deceased brother did not have children and they subsequently held the suit parcel of land jointly.

55. On the first issue of whether the learned trial magistrate erred by allowing the summons for revocation of grant as sought, it was submitted that the trial court's jurisdiction to revoke a grant if the condition under Section 76 are satisfied. That it is in furtherance of the Probate court's duty to distribute free property of the deceased to the rightful beneficiaries. That where property has been distributed to a wrong beneficiary, the court can revoke the grant and have the property revert back to the deceased for purposes of distribution. That the grounds in support of the application for revocation before the trial court were based on the fact that the Appellants were the sons of one Bartholomew Okuwa and who was a son of Agnes Nanzala and that Agnes Nanzala was the wife of Lazaro Wanyando Obudho and who was later inherited by Afwande Obudho.

56. Counsel further placed reliance on Section 76 of the Law of Succession Act which provides:

Revocations of grants is provided for under 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 an 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 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 grant within one year from the date thereof, or such longer period as the court has ordered or allowed;

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 paragraph (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particulars; or

e) That the grant has become useless and inoperative through subsequent circumstances.

57. That Section 76 vividly states that an aggrieved party must have an interest in the estate of the deceased. That under this section, it is a requirement that a party to a probate claim must have an “interest” in the estate. That the Appellants claim that their late father one Barthelomew Okuwa was beneficiary of the estate of the deceased herein and that they have not established how and simply stated the fact that the deceased herein had four siblings and that Barthelomew Okuwa (deceased) being one of them. Further, the Respondent stated in his replying affidavit that the Appellant’s late father was their cousin. That his late father Samuel Afwande Obudho had inherited Agnes Nanzala and they never bore a child together. That the Appellants are nephews to both the deceased herein and the Respondent.

58. Further, counsel submitted that the law is that whoever desires any court to give judgment as to any legal right or

liability, dependent on the existence of facts which he asserts, must prove that those facts exist. That the burden placed upon the Appellants ought to have showed how they were directly depended upon the deceased prior to his death. That the Appellant failed to show any documentation to show that they are directly depended on the estate of the deceased. The Appellants failed to produce a chief's letter to either ascertain their claim as beneficiaries since the chief is always the authority that knows the history of its subjects and it normally helps in succession matters or to contradict the one produced by the Respondent. That they did not go a further step to conduct a DNA process so that a report to that effect be produced to tie loose ends. That they only claim to be directly associated to the deceased which could mean that these are mere allegations. That there is no direct relation between the Appellants and the deceased. That they did not live in the homestead anywhere near the deceased on the land being claimed now. That it is their request that claiming interest after the deceased death should be frowned upon. That the trial magistrate was correct in his findings that the Appellants' relationship to Afwande Obudho (father to the deceased herein and the Respondent) is only by dint of their grandmother Agnes Nanzala being inherited by the Respondent's father.

59. It was submitted that it is not in dispute that the Respondent and the Appellants' father had an altercation which led to the death of the Appellant's father. That the Respondent served his sentence and released under the orders that he was to relocate

to some parcel of land. That the Respondent's assertions that he was the brother to the deceased herein was corroborated by the evidence of his blood sister (DW4) and his uncle (DW3). That the area under oath and confirmed the relationship between the Respondent and the deceased as being brothers and that nothing raised in cross examination poked holes in the witness's testimonies. It was further submitted that there was no just cause to warrant the overturning of the decision of the trial magistrate dismissing the summons for that revocation of the grant as alleged by the Appellants. That proceedings leading to the issuance of the grant were not defective in substance. That the bulk of the evidence on record clearly indicates that indeed the Respondent is the true beneficiary to the estate of the deceased. That this was reiterated in the oral testimony and the exhibits adduced by the Respondent. That the Appellants' mere allegations on fraud were never substantiated by any material evidence. That having established that the Respondent had interest in the deceased's estate, and if anything, his alleged interest had been proved to be recognized by the law. That the general rule is that the onus of establishing that issue of having an interest in the estate of the deceased rested upon the Appellants, they failed to prove that they directly depended on the deceased herein prior to his death. That they also failed to prove how the said property was supposed to be inherited by them and therefore they are not beneficiaries.

60. On the second issue of who bears the cost, counsel for the Respondent submitted that the general rule as to costs is provided for in Section 27 of the Civil Procedure Act which provides as follows:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of the incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what properly and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

Further, the Respondent counsel submitted that the Appellant to bear costs of the appeal.

61. Further, reliance was placed on Section 76 of the Law of Succession Act “to give recourse of beneficiaries” who have been disinherited by the unlawful conduct of the Petitioner. That the general rule is that the onus of establishing that the grant was obtained fraudulently through concealment of material facts

rests upon the Appellants. That the Appellants never depended directly on the deceased herein prior to his death and therefore they were not beneficiaries. Further, the general rule is that the onus of establishing that issue rests upon the Appellants.

62. Further, the right to claim property of a deceased person, is not an absolute right irrespective of other considerations arising from the proved facts of a case. That having established above that there is nothing to show that the Applicants had interest in the deceased's estate, if anything, their alleged interest has not been approved, or its too remote to be recognized by the law. That the right of beneficiaries to inherit is no longer absolute or an assured one.

63. Further, counsel for Respondent relied on the case of **In re Estate of Amos Kiteria Madeda - Deceased (Probate & Administration E004 of 2021) [2022] KEHC 12950 (KLR)** where the court stated that;

***“From my analysis of the issues discussed earlier, I find and hold that there is nothing before me to suggest that the Respondent withheld crucial material from the court or obtained the grant by misrepresentation of facts. The upshot is that the Applicants have failed to establish any of the grounds stipulated under Section 76 of the Act.*”**

Accordingly, I dismiss the Summons for Revocation of Grant dated June 2021 with costs to the Respondent.”

Finally, it was submitted that the Appellants have failed to achieve the threshold of proof and that the appeal should be dismissed with costs to the Respondent.

64. I have considered the record of appeal and the rival submissions tendered. The issue for determination is whether the appeal has merit.

65. It is noted that the Appellants had presented a summons for revocation of grant dated **17/11/2022**, wherein they sought that the Grant issued to the Respondent on 6/10/2021 be revoked and further that the certificate of confirmation of grant dated 23/12/2021 be revoked and/or cancelled on the grounds that the same was issued unprocedurally, as the Respondent withheld crucial information from the court and further did not present material facts to the court.

66. Revocations of grants is provided for under 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 an interested party or of its own motion -

- f) That the proceedings to obtain the grant were defective in substance;**
- g) That the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case;**
- h) 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;**
- i) That the person to whom the grant was made has failed after due notice and without reasonable cause either -**
- iv) To apply for confirmation of grant within one year from the date thereof, or such longer period as the court has ordered or allowed;**
 - v) To proceed diligently with the administration of the estate; or**
 - vi) To produce to the court, within the time prescribed; any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particulars; or**

j) That the grant has become useless and inoperative through subsequent circumstances.

67. The Appellants having moved the trial court vide their summons for revocation of grant, were under obligation to prove their claims pursuant to the provisions of section 107 of the Law of Succession Act which provide that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The key factor the Appellants were to prove is that they were dependent upon the deceased prior to his death and that the area chief authenticated the said claim and further go ahead to show that the Respondent deliberately left them out when he took out letters of grant of administration.

68. It transpired from the evidence presented by the Appellants and the Respondent together with their witnesses that Samuel Afwande Obudho (deceased) was father to the Respondent herein and Lazaro Wanyando Obudho (deceased) and that the said Lazaro Wanyando Obudho was the father to the Appellants father Bartholomew. That the Respondent's father traditionally inherited Agnes Nanzala, the wife of Lazaro Wanyando Obudho, but they never bore any children together. That the Appellant's father, the late Bartholemew Okuwa, was the son of Lazaro Wanyando Obudho with another wife before inheriting Agnes Nanzala. It should be noted that the late Bartholomew Okuwa inherited his rightful parcels of land from his father. That the late Samuel Afwande Obudho was the father to the Respondent and the deceased herein as stated in his response, sworn on

15/2/2023 in paragraph 3 thereof. That when their father died, they inherited the suit property being claimed now by the Appellants. That he filed the succession to the estate of the deceased who was his brother since his said deceased brother did not have children. That the burden placed upon the Appellants ought to have showed how they were directly depended upon the deceased prior to his death. That the Appellant failed to show any documentation to show that they are directly depended on the estate of the deceased. The Appellants failed to produce a chief's letter to either ascertain their claim as beneficiaries since the chief is always the authority that knows the history of its subjects and it normally helps in succession matters or to contradict the one produced by the Respondent. It came out quite clearly that the Appellants failed to establish the crucial issue whether the deceased maintained them prior to his death. They also did not go a further step to conduct a DNA process so that a report to that effect be produced to tie loose ends. That they only claim to be directly associated to the deceased which could mean that these are mere allegations. That there is no direct relation between the Appellants and the deceased. That they did not live in the homestead anywhere near the deceased on the land being claimed now. The evidence clearly established that the Appellants' relationship to Afwande Obudho (father to the deceased herein and the Respondent) is only by dint of their grandmother Agnes Nanzala being inherited by the Respondent's father.

69. It transpired from the evidence that the Respondent herein had earlier been involved in an altercation with the father of the Appellants Bartholomew who later died leading to the Respondent being charged with murder before Kisumu High Court. That the Respondent served his sentence and was released under the orders that he was to relocate to some other parcel of land other than the one he occupied for purposes of compliance with probationary orders. It is noted that the Respondent's assertions that he was the brother to the deceased herein was corroborated by the evidence of his blood sister (DW4) and his uncle (DW3). That the area chief also testified under oath and confirmed the relationship between the Respondent and the deceased as being brothers and that nothing raised in cross examination poked holes in the witness's testimonies. Hence, the Respondent was the closest kin of the deceased to inherit his property unlike the Appellants herein. I find that there was no just cause to warrant disturbing the decision of the trial magistrate which the summons for revocation of the grant as presented by the Appellants. I find that the proceedings leading to the issuance of the grant were not defective in substance since the bulk of the evidence on record clearly indicates that indeed the Respondent is the true beneficiary to the estate of the deceased as the same was reiterated in the oral testimony and the exhibits adduced by the Respondent. The Appellants' allegations on fraud were never substantiated by any material evidence. It is instructive that the Appellants father had been killed by the Respondent and hence one cannot rule out sour graves and bitterness on the part of the

Appellants towards the Respondent. Indeed, the court in Kisumu while releasing the Respondent on parole directed that he should relocate elsewhere. The Respondent complied with the order and lodged the succession cause and later sold his portion of land and went away. The Appellants should not use the excuse of the orders of the high court vide the parole directions to force the Respondent to abandon his interest in the land. The fact of the Respondent's conviction for murder did not take away his right to the land in question. The trial court having established that the Respondent had interest in the deceased's estate and which interest had been proved to be recognized by the law, then the finding must be upheld by this court. In any event, the general rule is that the onus of establishing that issue of having an interest in the estate of the deceased rested upon the Appellants to discharge. It is noted that the Appellants counsel in his submissions has sought to shift the burden of proof upon the Respondent yet it was the Appellants to discharge the burden of proof by dint of the provisions of section 107 of the Evidence Act. I find that they failed to prove that they directly depended on the deceased herein prior to his death and further failed to prove how the said property was supposed to be inherited by them and therefore they are not beneficiaries. In any event, at the time of the inheritance of the Appellant's grandmother Nanzala, the Appellants were adults in their own right and had been provided for by their father. Their claim that their father should also stake a claim in the estate and further their claim that the Respondent was a herds boy was properly rejected by the trial court.

70. An analysis of the entire evidence and the submissions presented leads me to come to the conclusion that the Appellants did not manage to prove their summons for revocation of grant and that the learned trial magistrate's finding was quite proper and must be upheld.

71. In the result, it is my finding that the Appellants appeal lacks merit. The same is dismissed. Each party to bear their own costs.

Dated and delivered virtually at Naivasha this 24th day

Of March 2026

D.KEMEI

JUDGE

In the presence of :

M/s Ochieng.....for Appellants

Akoko for Odero.....for Respondent

Maureen.....Court Assistant

SIAYA HCFA NO. E012 OF 2024 - JUDGMENT