



**Waita & another v Waita & another (Civil Appeal E030 & E032 of 2023
(Consolidated)) [2025] KECA 689 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KECA 689 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E030 & E032 OF 2023 (CONSOLIDATED)
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
APRIL 11, 2025**

BETWEEN

GERTRUDE CHAO WAITA 1ST APPELLANT

LINDA CHAO WAITA AKA LINDA WANJIKU MUTHANDI .. 2ND APPELLANT

AND

EDITH WANGARI WAITA 1ST RESPONDENT

AGNES WAMAITHA 2ND RESPONDENT

(Being an Appeal from the ruling of the High Court of Kenya at Mombasa (J. Onyiego, J.) delivered on 17th November, 2022 in Mombasa Succession Cause No. 76 of 2012)

JUDGMENT

1. The two appeals, Mombasa Civil Appeal No E030 of 2023 and Mombasa Civil Appeal No E032 of 2023 concern the Estate of George Francis Waita (Deceased), who died intestate on 4th February 2010 On 5th March 2012, Edith Wangari Waita (Edith) and Agnes Wamaitha (Agnes), the 1st and 2nd respondents, in their capacity as widows, petitioned the court for a grant of representation They claimed that the deceased was survived by the following beneficiaries:

- 1 Edith Wangari Waita (widow)
- 2 Kevin Francis Waita (son)
- 3 Allan Kenyeki Waita (son)
- 4 Maureen Chao Waita (daughter)
- 5 Agnes Wamaitha Waita (widow)
- 6 Lillian Chao Waita (daughter)



- 7 Brian Waita Waita (son)
- 8 Evan Kibuchi Waita (son)
2. They included the only asset constituting the estate at the time, namely plot number 6X7VIMN (plot no 6X7) The estate was gazetted on 15th May 2012 and subsequently a grant of letters of administration intestate made on 26th July 2012 and issued on 15th August 2012 The grant was thereafter confirmed on 30th August 2013 Later, the grant was rectified to include plot Number XA Sagana Town (plot no XA) together with the building thereon, which they claimed was erroneously left out due to lack of knowledge of its existence; that they had discovered that the deceased was a beneficiary of plot no 4A from his late father's estate in Succession Case Number 92 of 1XX7 in the estate of Francis Waita Mbaki in which Gertrude Chao (Gertrude), the 1st appellant in Mombasa Civil Appeal No E030 of 2023 and Stephen Mbaki, mother and brother respectively to the deceased were the petitioners The application was granted on 25th August 2014 A further rectification of the grant was sought on 9th October 2014.
3. Gertrude filed a summons for revocation and annulment of confirmation of the grant dated 4th March 2021 seeking to revoke the grant on grounds that: plot no 627 listed in the estate was registered in the name of the deceased as a trustee to hold for the benefit of the family of Francis Waita (deceased), her late husband; that the grant was obtained without informing her, which pointed to a clear scheme by the respondents to disinherit her together with the deceased's siblings She claimed that the grant was obtained fraudulently by the making of a false statement and or concealment from the court of something material to the case and that, therefore, the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
4. She also claimed that the respondents had intentionally left out her name as a dependant of the deceased, and that of Linda Wanjiku Waita, (Linda), the 2nd appellant, and Angeline Wakio Waita, who are daughters to the deceased.
5. She further claimed that plot no 4A is for the benefit of her children, namely George Francis (deceased herein), Mary Waruguru, Esther Mukumbo (deceased), Stephen Mbaki, Jane Wandia (deceased), Grace Njeri (deceased), Allan Gerishon (deceased) and Lucy Msigo and that, if the orders sought are not granted, she and her children who are by law entitled to a share of the plot no 4A will suffer prejudice
6. While Gertrude's summons for revocation was pending hearing, one Angeline Wakio Waita, alleging to be a daughter of the deceased, also filed summons for revocation of a grant dated 4th March 2021 seeking orders that: the grant issued to the respondents be revoked; and that, pending hearing of the revocation application, the subject grant be suspended; an injunction against the respondents restraining them from undertaking any dealings and or disposing of plot no 627 and plot no 4A pending hearing and determination of the application; that Forms P & A 5, 12, 38 and 80 of the P&A rules relied upon to obtain the grant be expunged from the court record; that, pending hearing and determination of the application, the respondents be restrained from withdrawing any funds from the bank accounts of the deceased; that registration of plot no 4A in the names of the respondents be cancelled; that the respondents be ordered to deposit in court annual rent of Kshs 640,000 collected from plot no 4A and Kshs 4,471,200 paid to them as compensation by the National Land Commission for the house without land on plot number 293VIMN, for distribution to all beneficiaries; an order to issue directing Directorate of Criminal Investigation (DCI) to investigate the respondents for money received from Barclays Bank held in the name of the deceased, but not accounted for; and a fresh grant to issue to Angeline Wakio Waita and Gertrude



7. It was her case that she was a daughter to the deceased and hence entitled to a share of her father's estate; that she is well known by her grand-mother Gertrude, uncles and aunties She claimed that, after instructing her lawyer to peruse the court file, she realized that her grandmother had engaged a private investigator and a document examiner who discovered that the respondents had not sought consent from all beneficiaries, and that the consents attached to secure the confirmed and later rectified grant were not signed by the purported beneficiaries, hence the forged and false statements filed in court
8. Yet another application seeking revocation of the grant dated 4th March 2022 was filed by, Linda, the appellant in Mombasa Civil Appeal No E032 of 2023 and the 2nd appellant herein, through one Charles Kuria Muthandi, who claimed to be acting on her behalf under her power of attorney She claimed that she was a daughter to the deceased and Kesia Njeri, who was her mother, and that her name had been excluded from the list of beneficiaries, and that her consent was not sought by the administrators
9. Similarly, Kesia Njeri, who also claimed to be a widow of the deceased, filed summons dated 4th March 2021 seeking revocation of the grant through Charles Muthandi under a power of attorney The grounds for revocation are similar to those of Angeline Wakio Waita and Linda It was averred that, after Agnes, the 1st respondent parted ways with the deceased, Kesia lived with him for a while in Kisumu It was during Kesia's cohabitation with the deceased that he disclosed to her of the house in plot number 2-27-1 Migosi and a plot at Mamboleo Kisumu She deponed that she fully participated in the burial of the deceased and was recognized by the family members
10. In her replying affidavit sworn on 29th April 2021, Agnes opposed the applications for revocation of the grant She denied the claim by Angeline that she was a daughter to the deceased and challenged her to produce a birth certificate indicating the deceased as her father; that the late Mariam Mwamburi mother to Angeline was buried in Taita and not in Sagana, which was sufficient evidence that her mother was not married to the deceased She dismissed the private investigator's report and urged the court to disregard it as it was initiated while the petition was pending in court so as to suit the objector's interests.
11. Regarding the identity of Allan Willie Kanyeki, she attached a birth certificate showing that he was a son to George Waita and Edith Wangari On the allegations that they had sold part of the estate, she dismissed them as unfounded In answer to the assertions that the beneficiaries' consents were not obtained, and that their signatures were forged, she attached a declaration from Kevin, Allan, Lilian, Brian and Evans, all children of the deceased confirming that they gave their consent for confirmation of the grant, and that Angeline, Keziah and Linda are strangers to them
12. In response to Linda's application, Agnes, with authority from Edith, filed a replying affidavit sworn on 29th April 2021 denying that Linda was a daughter to the deceased She further stated that Charles, who purported to represent Linda, was a resident of the USA who should be investigated on how, as a stranger, he managed to access their court documents She accused her mother in-law, Gertrude and brother in-law, Stephen, of colluding with strangers to take what rightfully belonged to the true beneficiaries of the deceased
13. By a replying affidavit sworn on 29th April 2021 in response to Kesia's application, Agnes dismissed the claim that Kesia had a relationship with the deceased, and denied having parted ways with him at any time As proof of her continued relationship with the deceased, she attached hospital and medical bills paid by her employer through her medical card as a wife to the deceased She stated that Kesia's name did not appear in the deceased's obituary, and that only herself and Edith were recognized as the



deceased's wives She also attached family meeting minutes chaired by the local chief where, once again, only herself and Edith were recognized as the deceased's wives

14. The trial Judge upon considering the objections, held that fraud was not established; that Gertrude had not established dependency on the deceased who had retired by the time he died and, in so concluding, dismissed her claim The court found that Kesia had not proved that she was married to the deceased and also dismissed her claim Linda and Angeline's applications were also dismissed as they failed to prove that they were daughters of the deceased In totality, the trial Judge dismissed all the applications for revocation of the grant
15. Aggrieved, Gertrude filed Mombasa Civil Appeal No E030 of 2023 setting out a liturgy of 42 grounds most of which were repetitive and which we have summerise as that the learned Judge was in error: in awarding the 1st and 2nd Respondents two plots namely, Plot No 2519 and Plot No 2393 arbitrarily and illegally by his pronouncement that 'Magongo Night Club' belonged to deceased when the issue of ownership of the plots was never pleaded in the Petition, or amended Petition, affidavits, the grant, confirmation of grant inter alia, thereby demonstrating open bias and acting beyond jurisdiction; in referring to the 2nd respondent as a wife of the deceased when throughout the Summons, cross-examination and submissions, the 1st appellant's position has been that the 2nd respondent did not qualify to be a wife in view of the subsisting marriage between the deceased and the 1st respondent; in finding that the documents were forgeries, and then exonerating the 2nd respondent from wrong doing and proceeded to award her plot no 4A which was already awarded to the 1st appellant's son, Stephen Mbaki Waita in Mombasa Environment and Land Court at Mombasa ELC No 50 of 2021 Stephen Mbaki vs (1) National Land Commission (2) Kenya National Highways Authority; in failing to appreciate that the Letters of administration intestate issued to the respondents on 15th August 2012 and confirmed on 30th August 2013 were obtained fraudulently by forging of signatures on Forms P & A 5, 12 and 80; in finding that the persons who signed Form 38 who are the children of 1st and 2nd respondents were in the USA, yet they are alleged to have travelled to Kisumu to sign Form 38, and thereafter finding that the children were not complainants, yet fraud had already been proved; in accepting the expert opinion report of document examiner, Emanuel Karisa Kenga dated 5th February 2021 which confirmed that the signatures were all forgeries, and failing to find that the entire process of obtaining the grant was a nullity; in failing to find that the 1st and 2nd respondents affixed their signatures at Kisumu and at Mombasa, yet they could not have affixed signatures in two different places at the same time; in failing to find inconsistencies in the name and differing signatures of Allan Willie Kanyari Waita, which rendered the confirmation defective and his personal appearance during confirmation necessary; in failing to find that the admission by the 2nd respondent, Agnes that the documents were signed and witnessed in Kisumu were fatal to the grant of the letters of administration which rendered it liable for revocation; in failing to find that the 1st respondent, Edith, did not rebut the evidence of fraud or provide written authority to the 2nd respondent, Agnes, filed the petition and Summons for rectification of Grant dated 28th July 2014 was sufficient basis upon which to revoke or annul the grant; in failing to appreciate that the beneficiaries who signed the written consents were not summoned to appear in court to confirm their consents to the proposed mode of distribution and confirmation of grant, and to satisfy the court as to their respective identities and shares, contrary to the proviso to section 71 of the *Law of Succession Act*, rendering the entire proceedings a nullity and liable for revocation ex debito justitiae; in failing to find that the Estate was not distributed amongst all the surviving children of the deceased; in failing to find that the 1st appellant was fraudulently excluded as a dependant, and Angeline Wakio Waita and Linda were excluded as beneficiaries of the deceased; in failing to find that the deceased was statutorily married to the 1st respondent, Edith which rendered Agnes' marriage invalid, which disqualified her from applying for the Grant of administration; in



- disregarding Gertrude's evidence that the 1st and 2nd respondents failed to disclose various properties and obtained money from the deceased properties, to the detriment of the beneficiaries of the estate; in failing to appreciate that the rectified grant had distributed plot no 4A and building which was not part of the deceased's estate but part of the Estate of Francis Waita Mbaki in High Court of Kenya at Mombasa Succession Cause No 92 of 1997 (In The Matter of The Estate of Francis Waita Mbaki (Deceased) and failing to revoke the grant so that the plot no 4A could revert to the Estate of Francis Waita for distribution to the rightful beneficiaries; in failing to appreciate that there was sufficient proof that Angeline Wakio Waita is the deceased's daughter; in failing to find that the 2nd respondent did not sign the consent to the mode of distribution or consent for confirmation of grant dated 28th July 2014, which omission rendered the distribution defective and the confirmation of the grant of representation a nullity ab initio; and in failing to find that the fraud and irregularities were sufficient to revoke the grant of letters of administration and expunge all documents filed, and require the DCI to carry out investigation on fraud to protect the dignity of the court and preserve the Estate
16. Also aggrieved by the decision of the trial Judge, the 2nd appellant, Linda, filed Mombasa Civil Appeal No E032 of 2023 setting out a raft of 44 grounds of appeal which, save for two grounds set out below, the rest were essentially a repetition of the grounds in Mombasa Civil Appeal No E030 of 2023, namely that the learned Judge was in error in failing to appreciate that the deceased was survived by eight children all of whom have equal right or entitlement to apply for letters of administration, yet the 2nd appellant was excluded; and in failing to find that the deceased was also survived by the 2nd appellant born on 7th January 1992 to Kesia Njeri as a dependant, which was a concealment from the court of something material and a ground to revoke the grant
 17. When Civil Appeal No E030 of 2023 and Civil Appeal No E032 of 2023 came up for hearing on the Court's virtual platform, learned counsel Mr D Wachira appeared for the 1st appellant while learned counsel Mr Anyona appeared for the 2nd appellant Learned counsel Mr Otuya holding brief for Mr Adoch appeared for the 1st and 2nd respondents At the commencement of the hearing an order for consolidation of the two appeals was made given that they arose from the same decision of the High Court
 18. The parties filed written submissions On behalf of the 1st appellant, counsel submitted that the trial Judge based his ruling on a Summons for revocation and annulment of a grant dated 20th September 2014, which was not canvassed by the 1st appellant and disregarded the 1st appellant's Summons for revocation of grant dated 4th March 2021 and the affidavit in support sworn on the same day, thereby denying the 1st appellant a right to fair hearing
 19. Counsel further submitted that the grounds in the 1st appellant's application were based on allegations of fraud as the document examiner, PW3, found that the documents lodged in support of the Petition were forgeries; that the 2nd respondent admitted that the beneficiaries signatures differed on the different P & A forms and on the consents for confirmation; that further, even though the beneficiaries resided in the USA, the forms indicated that they were signed in Kisumu; and that, the anomalies notwithstanding, the learned Judge found that forgery was not established since the beneficiaries accepted that the signatures belonged to them Counsel submitted that, since all the documents were forgeries, and the court relied on them to issue the grant and confirmation, the forged documents rendered the grant and confirmation liable to be revoked and all pleadings and orders set aside
 20. Regarding the properties, counsel submitted that the grant was wrongly rectified to include plot no 4A and building thereon which belonged to the Estate of Francis Waita Mbaki in High Court Succession Cause No 92 of 1997 (HCP&A 646 of 2015 of Machakos), the deceased's father, and which is yet to be distributed, and yet the court went on to distribute plot no 4A to the respondents;



and that, in addition, and despite there having been no application by the respondents for inclusion of Plot nos 2519 and 2393 that belonged to Stephen Mbaki Waita who was compensated by the National Land Commission, in the list of assets of the deceased's estate, the learned Judge wrongly and arbitrarily awarded the properties to the respondents by his pronouncement that 'Magongo Night Club' belonged to the deceased; that this was notwithstanding that the court lacked jurisdiction to determine land ownership disputes

21. Counsel further submitted that the learned Judge was in error in law and fact in failing to find that, after rectification of the grant pursuant to the court orders issued on 25th August 2014, the grant was irregularly rectified and dated 9th October 2014 without presentation of the application in court; that although the 1st and 2nd respondents did not respond to this issue as raised, the court failed to revoke the illegal and fraudulent grant. It was also argued that the beneficiaries who signed the consents were not summoned to appear in court to confirm their agreement with the proposed mode of distribution and confirmation of grant.
22. As concerns the submissions for the 2nd appellant, Mr Anyona submitted that the 2nd appellant is the daughter to the deceased, but that the respondents did not list her as one of the beneficiaries of the estate of the deceased; that they neither involved her in the succession process, nor did she consent to the schedule of distribution; and that the Judge's reason finding that she was not a child of the deceased because she was not mentioned in the funeral announcement was inadequate, and yet she had produced a baptism card which indicated the deceased's name. It was also argued that, since all the consents of the children of the deceased were forgeries, the petition for grant and the schedule of distribution signed by the beneficiaries had culminated in a confirmed grant that was defective since mandatory succession procedures were not followed.
23. On behalf of the respondents, counsel relied on their written submissions where it was submitted that the appellants did not adduce any evidence in support of their application for revocation; that they did not prove that the beneficiaries' signatures were forged thereby rendering the entire process a nullity; that the respondents produced sworn and unchallenged affidavits by the dependents, namely Kelvin Francis Waita, Allan Willie Kanyeki Waita, Lilian Chao Waita, Brian Waita, Evans Kibuchi and Maureen Chao, which firmly confirmed that the signatures in the documents lodged in court were theirs.
24. It was further submitted that no evidence was adduced showing that the deceased supported or maintained both the 1st and 2nd appellants prior to his death, and neither did evidence exist of a union between the deceased and Kesia Njeri; and that there was also no indication that the deceased acknowledged the 2nd appellant. As regards Angelina Wakio Waita, it was submitted that there was no evidence proving her paternity.
25. This being a first appeal, the duty of this court is as re-stated in the case of *Abok James Odera ta AJ Odera & Associates vs John Patrick Machira ta Machira & Co Advocates* [2013] eKLR, where it was held in part that:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
26. This Court is mindful of its role as a first appellate court which is to re-evaluate and re-assess the evidence on record and the conclusions reached by the High Court and determine whether those conclusions are to stand or not and give reasons either way with the only caveat placed on the exercise



- of that duty being that this Court should be slow to interfere with the learned trial Judge's findings of facts and the demeanor of witnesses as unlike that court, it did not have the benefit of seeing and hearing them See also the case of Kamau vs Mungai and another [2008] 1KLR 1103
27. Given that the grounds in Mombasa Civil Appeal No E030 of 2023 and Mombasa Civil Appeal No E032 of 2023 are similar and repetitive, in our view, the issues that arise from the consolidated appeals that fall for consideration are:
- i whether the trial judge considered the summons for revocation grant of 20th September 2014 or the 1st appellant's summons for revocation of grant of 4th March 2021;
 - ii whether the grant was obtained fraudulently by making a false statement for the reasons that the signatures of the beneficiaries were forgeries, and that the documents indicated to have been sworn in Mombasa instead of in Kisumu were fraudulent;
 - iii whether the 2nd respondent was a wife of the deceased;
 - iv whether the 1st appellant was a dependant of the deceased;
 - v whether Allan Willie Kanyeki Waita was a stranger to the estate;
 - vi whether Linda was a daughter of the deceased;
 - vii whether plot no 4A and plot no 627 belonged to the deceased; and
 - viii whether the trial judge was wrong in declining to revoke the grant confirmed on 30th August 2013 and rectified on 25th August 2014
28. Beginning with Gertrude's complaint that her summons for revocation dated 4th March 2021 was not considered and that, instead, the learned Judge determined a summons dated 20th September 2014, a consideration of the Judgment shows that it is true that reference is made by the Judge to a summons dated 20th September 2014 However, when the issues for determination in the summons of 4th March 2021 are interrogated, it becomes evident that the Judge determined the very issues arising out of the summons dated 4th March 2021 and no other It would appear that the learned Judge referred to the wrong date in error, which is a matter that either party ought to have brought to the attention of the Judge so that it could be corrected under the Civil Procedure rules Given that the date of the summons was indicated in error, and that the learned Judge was at all-time cognisant of, and in fact determined the various issues arising from the summons for rectification dated 4th March 2021, we are satisfied that nothing turns on this issue, and it is accordingly dismissed
29. We next turn to consider the various allegations in Gertrude's summons for revocation based on the document examiner, Mr Kenga's report, that the documents in support of the Petition were forgeries because, firstly, the signatures of the beneficiaries/dependants on the P& A forms differed; secondly, that all the beneficiaries signatures on the consent Form 38 were forgeries; thirdly, that the jurats of the affidavits indicated that they were attested by the children in Kisumu while they were in the USA; and, fourthly, that the 2nd respondent's admitted swearing the jurat of Form P & A 5 on 5th March 2012 in Kisumu and on same date P& A 12 indicated the place of swearing as Mombasa when, in fact, she was in Kisumu
30. In support of the claims of forgery, Emanuel Karisa Kenga, PW3, a private document examiner testified that he examined various questionable documents, among them Form 38 against known signatures of Edith Wangari, Maurine Chao, Lilian and Brian, persons who purportedly signed the consent and, after comparing those signatures affixed thereto with their known signatures obtained from their



identity cards, he found them to be at variance, and therefore not made by the same hand The 1st appellant also claimed that there were inconsistencies in the name and differing signatures of Allan Willie Kanyari Waita

31. The respondents, for their part, denied the claims of forgery and averred that the signatures were obtained from the persons listed and the document commissioned by an Advocate They attached declarations signed by the signatories confirming the signatures to be theirs, and that they had not raised any complaints in this regard

32. The trial Judge held:

“PW3, a forensic examiner Mr Kenga examined signatures contained in the ID cards of those children and compared them with their purported signatures in form 38 and found them to be at variance hence concluded that they were forged Agnes attached declarations from those children confirming that they indeed signed the consent It would appear like people whose signatures are said to have been forged are not complaining but instead claiming those signatures to be theirs It is trite that forensic examination is not conclusive and where the person whose signature is said to have been forged is claiming to be the author, the court cannot force him or her to admit liability on forgery of the same...

75 The only wrong I can find is the attestation aspect of those signatures in Kisumu while the deponents were in America Although an irregularity, it is not on its own capable of revoking a grant whose execution is almost at its final stage and not challenged by those entitled to the estate”

33. Section 109 of the *Evidence Act* places the burden of proof on the person advancing the allegation The section provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person”

34. In the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* [2014] eKLR, the Supreme Court held:

The person who makes such allegation must lead evidence to prove the fact She or he bears the initial legal burden of proof which she or he must discharge The legal burden in this regard is not just a notion behind which any party can hide It is a vital requirement of the law On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”

35. In the case *Urmila wo Mahendra Shah vs Barclays Bank International Ltd and the Standard Bank Ltd* [1979] KECA 15 (KLR), this Court held that,

To constitute a forgery, it must be shown that the signature on it was forged, or was placed on it without the authority of the person whose signature it purports to be, or, of course, that it has been fraudulently altered in a material particular after it was drawn”



36. With regard to reliance on expert opinion in the case of *Shah and Another vs Shah and Others* [2003] 1 EA 290, it was held that:
- “One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony... The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...
- ...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion” (emphasis ours)
37. In the case of *Kagina vs Kagina & 2 others* [2021] KECA 242 (KLR), this Court held:
- “A Court is entitled to reject expert opinion if upon consideration of such an opinion in conjunction with all other available evidence on the record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion based on the entire evidence before it and such evidence must not be rejected except on firm grounds”
38. In the instant case, the trial Judge found that, since the signatories as beneficiaries had confirmed the different signatures to be theirs, then the question of forgery could not be said to arise. In other words, the signatories having accepted that the signatures were theirs, the handwriting expert could not superimpose his findings over and above the signatories who were the makers. Given that the beneficiaries as listed in the schedule, including Allan Willie Kanyari Waita who the appellant claimed was a stranger, were available, and quite capable of ascertaining the veracity of their own signatures, we find that the trial Judge was right in disregarding the opinion of PW3 in the face of the declarations made by the signatories regarding their signatures.
39. With respect to the claims that the affidavit in support and other documents were a forgery because Agnes attested Form P & A 5 on 5th March 2012 in Kisumu, and on the same day attested Form P & A 12 whilst in Mombasa, which was an impossibility, and further, that the forms showed that the beneficiaries attested them in Kisumu, yet they were in the USA, our consideration of the issue would lead us to conclude that nothing really turned on the allegations.
40. This Court in the case of *Toshike Construction Company Limited vs Harambee Co-operative Savings & another* [2019] KECA 598 (KLR) adopted the position of the Court of Appeal of Uganda in the case of *Saggu vs Roadmaster Cycle (U) Ltd* (2002) 1 EA 258, which held that:
- “...the defect in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (8), of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. I should



perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn It would follow that the learned judge had the power to order that the undated affidavit be dated in court or that the affidavit be re- sworn before putting it on record He was also correct to penalize the offending party in costs”

The Court further held:

“ the statutory provision which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom The errors and omissions regarding the date, place and the commissioner cannot vitiate an application.”

41. Essentially, what this means is that, where errors or mistakes exist in the jurat of an affidavit or document, provided a place of swearing is indicated, and the commissioner has dated, and signed it, then, the application to which the document relates will not be vitiated In this case, the jurat fully satisfied the requirements of the law Even though the place of swearing was indicated as Mombasa or the USA instead of Kisumu, the errors or omissions indicated therein did not render the Petition a nullity The record shows that it was not doubted that the respondents and children listed in the Petition were the lawful beneficiaries of the deceased This is more so because it was not the 1st appellant’s case that they were masquerading as beneficiaries The complaint was merely that the beneficiaries’ signatures differed And, as seen above, the beneficiaries owned up to the signatures as being theirs For all intents and purposes, the errors in the jurat of the documents notwithstanding, the Petition remained valid In view of the conclusions reached, we are satisfied that the learned Judge rightly dismissed the appellants’ claims of forgery.
42. Regarding the question of whether the trial court was right in presuming that Agnes, the 2nd respondent, was a wife of the deceased, the trial Judge found:

“ Concerning whether Agnes was a wife to the deceased, she stated that; when she met the deceased, he did not have a wife and that the deceased did not disclose that he had divorced Edith a fact she came to know later when the deceased took Edith’s children to her to look after them She produced an affidavit of marriage between her and the deceased and her medical cover from her employer reflecting the deceased as her husband hence paid all medical bills as her husband Indeed they sired three children who are all grown up.The obituary and death announcement recognized her and Edith as the deceased wife She also produced family meeting minutes attended by the local chief where her and Edith were recognized as wives to the deceased Besides, in the revocation application of Gertrude, she referred to Edith and Agnes as wives to the deceased From this conduct and presentation before right thinking men and women in society, the deceased and Agnes behaved as husband and wife hence a presumption of marriage was properly inferred”
44. Accordingly, the trial Judge concluded that Agnes was, for all purposes and intents, a wife to the deceased, and who stood by his bedside until he died and buried him.
45. According to Halsbury’s Laws of England, Matrimonial and Civil Partnership Law (Volume 72) 5th Edition 2015 states that:

“ Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken



place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary”

46. The doctrine of presumption of marriage has its genesis in section 119 of the *Evidence Act*, which states that:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

47. This Court in the case of *Joseph Gitau Githongo vs Victoria Mwihaki* [2014] eKLR stated:

“The rationale behind the presumption of marriage was succinctly explained by the court as follows:

It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the 'husband', or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of 'wife' upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased 'husband'.”

48. In the same vein, in the case of *Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another* [2009] eKLR, this Court observed:

“Before presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”

49. It was also held by the Supreme Court in the case of *MNK vs POM*;

Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) that:

“Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises presumption that the parties have contracted marriage

...We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

1. The parties must have lived together for a long period of time
2. The parties must have the legal right or capacity to marry
3. The parties must have intended to marry
4. There must be consent by both parties
5. The parties must have held themselves out to the outside world as being a married couple



6. The onus of proving the presumption is on the party who alleges it
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive
8. The standard of proof is on a balance of probabilities”

50. For her part, Agnes testified that she met the deceased when he had separated from his wife; that the deceased did not disclose to her that he had divorced Edith, a fact she came to know later when the deceased brought Edith’s children to her to look after them Agnes proved that her marriage to the deceased was customary She produced an affidavit of marriage between her and the deceased There was also evidence that the deceased, as her husband, was included as a beneficiary under her employer’s medical cover from where his medical treatment was paid; that further, they sired three children together who are all grown-ups; and that she lived with the deceased for a period exceeding 18 years until his untimely death There can be no doubt that these facts are indeed supportive of a presumption of marriage, and the trial Judge was right in so finding See also the case of *Ndunda vs Mutunge* [2022] KECA 1308 (KLR).

51. That said, though Gertrude variously admitted that she knew that Agnes was the deceased’s wife, she argued that she lacked the status of a wife since the deceased was still married to Edith.

52. Much as the evidence did not clearly disclose whether or not the deceased’s marriage to the 1st respondent, Edith, subsisted by the time of his demise, Agnes demonstrated that she was customarily married to the deceased But, having said that, her status as his wife can nevertheless be presumed under the concept of presumption of marriage set out under Section 3(5) of the *Law of Succession Act* The provision specifies persons to be considered as wife and children of the deceased for purposes of succession It provides that:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act”

53. When faced with similar circumstances, this Court in the case of *Musela vs Wambui & another & 3 others* [2024] KECA 679 (KLR) held:

“As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage In the *Hortensia Wanjiku Yawe v Public Trustee* (supra), Wambuzi, P noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted He emphasized that it may even be shown that the parties were not married under any system”



54. The Court in the above-cited case emphasised that the onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage.
55. In view of the clear pronouncements of the law regarding the presumption of marriage as it exists today, without a doubt, Gertrude’s argument cannot hold having regard to the facts and circumstances of this case Given that the evidence pointed undisputedly to Agnes as the deceased’s wife, which evidence Gertrude did not controvert, it can be concluded that Agnes was the deceased’s wife, and that the trial Judge was right in so holding.
56. Next, there was the question of whether Gertrude was a dependent of the deceased The learned judge dismissed this claim for the reason that no evidence was adduced indicating that the deceased supported her, thereby rendering her a dependant.
57. Section 29 of the *Law of Succession Act* defines a dependant as:
- “ a Wife, or wives, or former wives, and the children of the deceased whether or not maintained by the deceased immediately or prior to his death;
 - b Such of the deceased’s parents, step parents, grandparents, grandchildren, step grandchildren, children who the deceased had taken into his family as his own, brothers and sisters, and half bothers and half-sisters, as were being maintained by the decease immediately prior to his death and where the deceased was, her husband if he was being maintained by her immediately prior to the date of her death”
58. The provision is clear that it is a person who so claims to be a dependant that must prove that he or she was being maintained by the deceased immediately prior to his demise It is not merely the relationship that matters What is required is proof of dependency In the instant case, save for stating that she was the deceased’s mother, the 1st appellant did not produce a scintilla of evidence proving that she was maintained by the deceased prior to his death Save to state that she was his dependant, nothing on the record was supportive of her assertions We therefore find that the trial Judge rightly dismissed her claim for dependency.
59. The next issue concerned the properties of the deceased Gertrude’s complaint was that plot no 4A Sagana belonged to the Estate of Francis Waita, and not to the deceased’s estate, and that plot no 627 was registered in the deceased’s name to hold in trust for Gertrude and the deceased’s siblings.
60. In addressing this contested ownership of the deceased’s properties, the trial Judge held:
- “As concerns inclusion and distribution of plot No, 4A Sagana, parties are in agreement that it was given to the deceased during the distribution of his father’s estate in Succession cause No 92 of 1997 The said property has since changed ownership to the petitioners However, the grant in succno 92 of 1997 has been revoked with no orders yet made on the status of the properties already distributed under Section 83 of the *Law of Succession Act* In my view, this property’s distribution can only be reversed under file number 92 of 1997 In the circumstances, I will not make orders reversing its distribution in this file for now.As concerns plot number 627, the same was litigated in the ELC case number 84 of 2013, and the suit dismissed The property is registered in the deceased’ name The applicants claimed that it was registered in the deceased’s name in trust for their benefit This is a probate court



and not an ELC court to arbitrate over land ownership dispute based on trust For those reasons, I do not wish to arrogate myself such powers This court simply has no jurisdiction to determine a dispute on land ownership on account of trust Since the property is registered in the deceased's name and the ELC court has dismissed the claim, I will not interfere with the distribution of that property.”

61. Section 3 of the *Law of Succession Act* defines an “estate” as the free property of a deceased person while “free property” in relation to a deceased person is defined to mean the property that a person is legally competent and free to dispose of during his lifetime, and of which his interest has not been terminated by his death.

62. Rule 41(3) of the Probate and Administration Rules provides that:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

63. This Court in the case of *Lekaso vs Mutwiri (Civil Appeal 96 of 2018)* [2024] KECA 1291 (KLR) adopted with approval the persuasive High Court decision in the case of *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR (Musyoka,J) where it was held:

“The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets Disputes of course do arise in the process The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants However, claims by and against third parties, meaning persons who a(sic) neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators ...”

64. The evidence and proceedings disclose that plot No 4A and plot No 6X7 were registered in the name of the deceased As a consequence, they formed a part of the deceased's estate As a result, the trial Judge was right in rejecting the objections concerning their ownership And much as the 1st appellant asserted that the learned Judge was in error when he determined that plots no 2393 and 2519, where the ‘Magongo Night Club’ is located belonged to the deceased, yet they were not matters for determination, our review of the record and the 1st appellant's summons for revocation in particular, discloses that they were matters for consideration See paragraphs 18 and 19 of the 1st appellant's affidavit in support of the summons for revocation dated 1st March 2021.



65. Be that as it may, it cannot be gainsaid that, the question of ownership of land is a matter for determination of the Environment and Land Court and not the Probate court See also *Ngotho Commercial Agencies Ltd vs Mwangi & 3 others* (Civil Appeal 137 of 2018) [2023] KECA 26 (KLR) In this case, however, plot, no 4A and plot no 627 were registered in the deceased's name, as registered owner Being the deceased's properties, the respondents were entitled to include them among the assets as part of the deceased's estate Regarding the ownership status of plots no 2XX3 and 251X where the 'Magongo Night Club' is located, we decline the invitation to address this issue since the matters in controversy were not substantively canvassed before us.

66. As concerns Linda, the 2nd appellant's appeal, the main issue for determination is whether she was a child or dependant of the deceased In determining this issue, the learned Judge had this to say:

“...Linda has no birth certificate indicating the deceased as her father her name reflect one Muthandi who was described as a maternal uncle If indeed Linda who left for USA the year 2006 while the deceased was alive was a daughter, what stopped her from using her father's name to process travel documents

Further in a family meeting held before the area chief Linda was not recognized as a child to the deceased on the other hand when Gertrude filed her revocation application on 22nd September 2014 she did not mention Linda as one of the beneficiaries For her to claim later that Linda was her grand-daughter is questionable There was no evidence tender to show that the deceased ever interacted with or supported one Linda Photographs attached showing Linda and Stephen Mbaki is not sufficient proof of Linda's paternity

On the aspect of Linda producing an alleged baptismal card issued in the year 1998, the same cannot be taken to be an official record to confirm paternity This is just but a church document bearing no signature for the deceased Anybody can quote a church minister a name of any person as a father to the child being dedicated.

It is absurd to generate beneficiaries at the eleventh hour for the sole purpose of inheriting the property of a deceased person whom those claiming his wealth now never wanted to associate with How come since 2014 when Getrude filed her revocation application, the other alleged beneficiaries did not find it fit to challenge the same Linda' application is an afterthought generated by Getrude and Stephen to access the estate through the back door To that extent, and in the absence of any DNA test it is my finding that there is no sufficient proof that Linda was a child to the deceased hence not entitled to a share and nor notification of these succession proceedings.”

67. Section 3(2) of the *Law of Succession Act* describes a child thus:

“Include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.”

68. In support of her claim, the only evidence Linda produced was a baptism card indicating the deceased as her father The only other evidence was the testimonies of Kezia Njeri and Stephen However, as observed by the learned Judge, the baptism card did not bear the deceased's signature and, besides the deceased's name appearing on the card, there was nothing denoting his involvement in its issuance The card in and of itself could not therefore amount to conclusive evidence of her paternity Since she did not produce a birth certificate or a passport or other official document that could lend credence to



her claim As rightly observed by the Judge, a DNA test would have been far more persuasive than the baptism card she sought to produce We would also add that the evidence of Kezia Njeri and Stephen was not of any probative value in this regard As a consequence, we are not persuaded that Linda proved that she was the deceased's child and, as such, the learned Judge cannot be fault for so finding, with the result that her claim is also dismissed.

69 The final issue is whether the learned Judge should have revoked the grant and confirmation of grant for reasons of the alleged infractions Section 76 of the *Law of Succession Act* sets out the conditions on which a court of law can either revoke or annul a grant or reject a plea for such revocation It provides:

“ 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 substantive,
- 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 un true allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or in advertently,
- d That the person to whom the grant was made has failed after due notice and without reasonable cause either-
 - i To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - ii To proceed diligently with the administration of the estate; or
 - iii To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particulars; or
- e That the grant has become useless and in operative through subsequent circumstances”

70. The provision has been construed and the law on this aspect crystallized by the decision of this Court in the case of *Matheka and another vs Matheka* [2005] KLR 455 where it was held inter alia that:

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



71. The appellants' allegations were that the grant and confirmation of grant for the deceased's estate were obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case, and further that it was obtained by means of an untrue allegation of facts essential in point of law. We have reevaluated the evidence adduced before the trial court and find that the claims of forged signatures and alleged concealment of children and properties of the deceased were not by any means established. The allegations by the appellants seeking to revoke the grant were unfounded and without basis. In essence, just as did the learned Judge, we find that nothing warranted the revocation of the grant issued on 15th August 2012 and confirmed on 30th August 2013.
72. In sum, Mombasa Civil Appeal No E030 of 2023 and Mombasa Civil Appeal No E032 of 2023, (consolidated) are without merit and are hereby dismissed with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

A K MURGOR

JUDGE OF APPEAL

DR K I LAIBUTA CArb, FCI Arb

JUDGE OF APPEAL

G W NGENYE-MACHARIA

JUDGE OF APPEAL

