



**Pacific Frontier Seas Ltd v Kyengo & another (Civil Appeal
32 of 2018) [2022] KECA 396 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 396 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 32 OF 2018
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
MARCH 4, 2022**

BETWEEN

PACIFIC FRONTIER SEAS LTD APPELLANT

AND

JANE MUTULU KYENGO 1ST RESPONDENT

OKAPI ESTATE LTD 2ND RESPONDENT

*(Appeal from the Judgment and Decree of the High Court of Kenya at Malindi
(Chitembwe, J.) dated 16th May 2018 in H.C. Succ. Cause No. 97 OF 2015)*

The estate of a deceased shareholder of a company is only entitled to the shares of the deceased in the company and not the company's property.

The Court of Appeal considered the extent of the jurisdiction of the High Court when handling a succession cause. It decided that where a dispute veered into questions about internal matters of companies under the Companies Act in an application for confirmation of grant, the court would not determine them. The court also held that the beneficiaries of a deceased shareholder of a company were only entitled to the shares of the company and not the company's property.

Reported by Kakai Toili

Law of Succession – intestate succession – distribution of a deceased's property to beneficiaries – where the deceased was a shareholder of a company which owned properties – whether the beneficiaries to the estate of a deceased who was a shareholder in the company were entitled to the company's property.

Company Law – shareholders of a company – estate of a deceased shareholder – where the beneficiaries to the estate of a deceased shareholder claimed to be entitled to the company's property – whether the High Court, when entertaining a succession law matter, had the jurisdiction to determine internal company issues of a company in which the deceased was a shareholder.

Jurisdiction – jurisdiction of the High Court – jurisdiction of the High Court as a succession court – whether a court could base its decision on unpleaded issues in cases where it had jurisdiction.



Brief facts

The deceased died intestate and the 1st respondent in her capacity as the widow of the deceased, petitioned the High Court for grant of letters of administration intestate of the estate of the deceased. She indicated that she was the only dependant surviving the deceased, and listed the three suit properties among five assets of the deceased. A grant of letters of administration intestate was issued to the 1st respondent and two months later the grant of letters of administration was confirmed and a certificate of confirmation of grant was issued.

Later on, the 2nd respondent claiming to be the owner of two of the suit properties applied for revocation of the confirmed grant. The 1st and 2nd respondents entered into a consent order whereby they agreed *inter alia* that one of the suit properties belonging to the 2nd respondent be transferred to the 1st respondent and another parcel of the suit properties also belonging to the 2nd respondent, be sold and the proceeds held in a joint interest-earning account in the names of the parties' advocates. Clause 2 of that consent order dealt with the other parcel of the suit properties which was neither the property of the 1st respondent nor of the 2nd respondent, who were the parties to the consent order. The registered owner of that particular property, the appellant, was not a party to the consent order.

The appellant took out a summons for revocation of the confirmed grant and sought an interim injunction to stop the respondents from interfering with the suit property. The application was based on the grounds that the confirmation of the grant was obtained fraudulently and by concealing material facts. The court made various holdings including that at the time of his death the deceased held shares in the appellant and in the 2nd respondent; that at the time of the death of the deceased, the shareholders of the appellant were the deceased and another person whilst the shareholders of the 2nd respondent were the deceased and another person; that the persons purporting to be directors of the appellant and of the 2nd respondent were not the genuine owners of the suit properties; and that although the suit properties were registered in the names of the appellant and 2nd respondent, there was nothing wrong with the 1st respondent including them as assets of the deceased. Aggrieved, the appellant filed the instant appeal.

Issues

- i. Whether the beneficiaries to the estate of a deceased who was a shareholder in the company were entitled to the company's property.
- ii. Whether a succession court had the jurisdiction to determine internal issues of a company in which the deceased was a shareholder.
- iii. Whether a court could base its decision on unpleaded issues in cases where it had jurisdiction.

Held

1. Where a deceased owned majority shares in a company, those shares could only be transferred after the succession process had been concluded. The ruling in *Re Estate of James Kanyotu* [2013] eKLR could not be an authority for the proposition that the succession court had jurisdiction to hear and determine each and every dispute that arose in the course of administration and distribution of an estate. All that it decided was that the succession court had the power to preserve the estate and stop intermeddling with its assets (including shares) until the conclusion of the succession process as contemplated by sections 45 and 47 of the Law of Succession Act. That ruling merely preserved the shares of the deceased in the named companies and stopped the respondents from interfering with or disposing of them. It did not venture into such issues as who were the shareholders, the extent of the shareholding, the directors, the properties, and the liabilities of the company among others.
2. *Rosemary B. Koinange & 5 others v Isabella Wanjiku Karanja & 2 others*, CA No. 126 of 2016, was not authority for the overly broad proposition that the succession court had jurisdiction to hear and determine each and every dispute that arose in the course of administration and distribution of an estate. The court in fact allowed the appeal against the nullification of the transfer of shares by the deceased and set aside the order of the High Court on the basis that there was no cogent evidence and proper hearing on the matter.



3. Where there was no dispute on the shares held by the deceased in a company, the succession court had the jurisdiction to decide whether they were available for distribution and how they should be distributed. When there was intermeddling and interference with the properties of the deceased, including shares, the court had jurisdiction to stop the intermeddling and to preserve the estate. However, when the dispute veered off to contestations on who were the company's shareholders, and directors, the extent and number of shares, the properties of the company, the filing of annual returns, occupation of the company's properties, liabilities of the company among others, those were issues for the company to be resolved under the legal framework provided by the Companies Act.
4. There were disputes that arose in the context of a succession case which had to be resolved through the dedicated institutions or the specific mechanisms provided by the law for that purpose. Rule 41(3) of the Probate and Administration Rules contemplated situations where it was not possible or convenient to resolve disputes that arose in the course of determining an application for confirmation of a grant, such as the identity of persons claiming to be beneficiaries, their share or estate, conditions or qualifications attaching to such share or estate among others. In such instances, the court was empowered, before confirming the grant, to await a determination of the question in proceedings under order 37 rule (1) of the Civil Procedure Rules (Originating Summons). Order 37 rule (1) would not have been necessary if the succession court was entitled to deal with all and sundry issues that could arise in a succession cause.
5. Even when it had jurisdiction, the court would not base its decision on unpleaded issues because the issues determined by the court had to flow from pleadings. It was the pleadings that guided the litigation and succinctly informed the parties and the court of what was in dispute. However, where the parties led evidence and addressed the unpleaded issues and from the cause adopted at trial it appeared that the unpleaded issues had been left for the decision of the court, the court would validly determine the unpleaded issues. Nevertheless, parties could not validly leave unpleaded issues over which the court had no jurisdiction for it to decide, simply because parties could not by consent, confer jurisdiction to a court which in law it did not have.
6. The trial court did not have jurisdiction to deal with the contested matters it entertained in the application for revocation of the grant, which were for all intents and purposes internal to the two companies and reserved for resolution under the framework of the Companies Act. The question of the parties having left the issues outside revocation of the grant to the court to decide did not arise. The parties could not by consent or conduct confer on the court jurisdiction it did not otherwise have.
7. The suit properties were the properties of the appellant and the 2nd respondent and were registered as such. That fact was first borne out by the consent order dated June 15, 2016, on the basis of which the grant was confirmed. That consent order expressly described the suit properties as the properties of the appellant and the 2nd respondent. Secondly, in her evidence-in-chief, the 1st respondent told the court that one of the suit properties belonged to the appellant. Thirdly, even in submissions before the court, the 1st respondent acknowledged ownership of the suit properties by the appellant and the 2nd respondent.
8. In sanctioning the inclusion of the properties of the two companies as assets of the deceased, the trial court stated casually that the 1st respondent was within her right to file the cause and secure the properties of the deceased. What the estate of a deceased shareholder was entitled to were only the shares of the deceased in the company, and not to the property of the company. Even in disputes on the division of matrimonial property, while the court could divide between spouse's shares held by them or one of them in a company, it had no jurisdiction to share out properties registered in the name of a company to a spouse.
9. There was no basis for the trial court to have departed from settled law and treated the suit properties as assets of the deceased even after finding that they were duly registered in the name of the appellant and the 2nd respondent.



10. The appellant and the 2nd respondent had raised other issues which ought to have raised a red flag that all was not well in the manner in which the instant dispute was conducted and determined. There was the initial confirmation of the grant within two months, long before the expiry of the normal six months. There was the irregular consent order that purported to transfer to the 1st respondent properties which she acknowledged to belong to the two companies.
11. The consent order purported to transfer to the 1st respondent the property of the appellant, whilst the appellant was not a party to the consent order. Although the court set aside the consent order, nevertheless it upheld the confirmed grant which had been obtained on the basis of the nullified consent order. There was also the absolute non-disclosure that the deceased was survived by three children. Even if those children were not interested in the estate of the deceased, of which there was no cogent evidence on record, that did not absolve the 1st respondent from her duty of truthfulness and full disclosure, in her capacity as the petitioner for grant and applicant for its confirmation. It was not enough to merely claim the petition for the grant was published in the Kenya Gazette and that there was no objection.
12. The irregular conversion of summons for revocation of grant into a suit under the Civil Procedure Act instead of recourse to the procedure prescribed by rule 41(3) of the Probate and Administration Rules was another irregularity of great concern. The irregular assumption of jurisdiction to purport to resolve intricate and contentious disputes of internal matters of companies under the Companies Act in an application for confirmation of grant, not to mention the purported distribution of properties of the two companies as part of the assets of the deceased, led to the conclusion that the merits of the appeal could not be called in question.

Appeal allowed with costs.

Orders

- i. *The entire judgment of the High Court dated April 18, 2018, and delivered on May 16, 2018, set aside.*
- ii. *The matter was remitted back to the High Court to be heard and determined in accordance with the law as explained, by a judge other than Chitembwe, J.*

Citations

Cases

Kenya

1. *Captain Harry Gandy v Caspair Air Charters Ltd* (1956) 23 EACA 139 - (Explained)
2. *Chalicha Farmers Co-operative Society Limited v Odhiambo & 9 others* Civil Appeal 27 of 1986; [1987] KECA 70 (KLR); [1987] KLR 182 - (Applied)
3. *In re Estate of Alice Mumbua Mutua (Deceased)* Succession Cause 3142 of 2003; [2017] KEHC 8289 (KLR) - (Applied)
4. *In re Estate of James Kanyotu (Deceased)* Succession Cause 1239 of 2008; [2010] KEHC 3292 (KLR) - (Applied)
5. *In re estate of Kirumba Mugochi (Deceased)* Succession Cause 1441 of 2011; [2017] KEHC 3691 (KLR) - (Applied)
6. *In Re Estate of Mbiyu Koinange - (Deceased)* Succession Cause 527 of 1981; [2014] KEHC 5672 (KLR) - (Applied)
7. *In re Estates of Gitere Kabura & another (Both Deceased)* Succession Cause 265 of 2016; [2018] KEHC 6629 (KLR) - (Explained)
8. *Kigwe, Patrick Kibathi & 2 others v Charles Kigwe Gathecha* Succession Cause 445 of 2012; [2015] KEHC 5865 (KLR) - (Applied)
9. *Koinange, Rosemary B (suing as legal representative of the Late Dr Wilfred Koinange and also in her own personal capacity) & 5 others v Isabella Wanjiku Karanja & 2 others* Civil Appeal 126 of 2016; [2017] KECA 102 (KLR) - (Explained)



10. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
11. *Mapis Investment (K) Ltd v Kenya Railways Corporation* Civil Appeal 14 of 2005; [2005] KECA 358 (KLR); [2005] 2 KLR 410 - (Applied)
12. *Mawji, Baber Alibhai v Sultan Hashim Lalji & another* Civil Appeal 269 of 2001; [2010] KECA 306 (KLR) - (Applied)
13. *Mbiyu, Margaret Njeri & another v David Njunu Mbiyu Koinange & 13 others* Civil Application 12 & 14 of 2017; [2018] KECA 348 (KLR) - (Applied)
14. *Mbugua v Mbugua* [2001] 2 EA 445 - (Applied)
15. *Mereka v Mereka* (2008) 1 KLR (G&F) 263 - (Applied)
16. *Muthembwa v Muthembwa* [2002] 1 EA 186 - (Applied)
17. *Ngacha, Gladys Wanjiru v Treresa Chepsaat & 4 others* Civil Appeal 94 of 2009; [2010] KECA 44 (KLR) - (Explained)
18. *Odd Jobs v Mubia* [1974] EA 476 - (Applied)
19. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
20. *Petra Development Services Limited v Evergreen Marine (Singapore) PTE Ltd & another* Civil Suit 65 of 2014; [2014] KEHC 2989 (KLR) - (Explained)
21. *SNK v MSK & 5 others* Civil Appeal 139 of 2010; [2015] KECA 1010 (KLR) - (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) In general - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 37(1) - (Interpreted)
3. Companies Act (Repealed) (cap 486) sections 75, 78, 79- (Interpreted)
4. Law of Succession Act (cap 160) sections 3, 76(b); 45; 47; 76- (Interpreted)
5. Probate and Administration Rules (cap 160 Sub Leg) rules 41(3); 44- (Interpreted)

Advocates

Messrs. Nchogu, Omwanza & Nyasimi Advocates for the appellant

Messrs. Kilonzo & Aziz Company Advocates for the 1st respondent

Messrs. Masika Koros Advocates for the 2nd respondent

JUDGMENT

1. The dispute in this appeal arises from the judgment of the High Court of Kenya at Malindi (Chitembwe, J) dated April 18, 2018 and delivered by Korir, J. on May 16, 2018. By that judgment, the High Court held that the parcels of land known as Kwale/Galu Kinondo/779 registered in the name of Pacific Frontier Seas Ltd., and Kwale/Galu Kinondo/198 and Kwale/Galu Kinondo/ 1222 registered in the name of Okapi Estate Ltd, were part of the estate of Peter Werner, an alleged shareholder in the two companies. For convenience and where the context allows, we shall refer to the three properties in dispute as "the suit properties". Although there are several other ancillary issues in the appeal, whether the suit properties were properly adjudged to be assets of the estate of the deceased and therefore available for distribution to his beneficiaries is the heart of the appeal.
2. The background to the appeal is that the Peter Werner, (hereafter the deceased) died intestate on December 10, 2014 at Diani, Kwale County. On July 28, 2015, Jane Mutuku Kyengo (the 1st respondent), in her capacity as the widow of the deceased, petitioned the High Court for grant of letters of Administration intestate of the estate of the deceased. She indicated that she was the only dependant



surviving the deceased, and listed the three suit properties among five assets of the deceased. A grant of letters of administration intestate was issued to the 1st respondent on October 9, 2015. Two months later, on December 11, 2015, the grant of letters of administration was confirmed and a certificate of confirmed grant was issued.

3. On February 25, 2016, Okapi Estate Ltd (the 2nd respondent), claiming to be the owner of Kwale/Galu Kinondo/198 and Kwale/Galu Kinondo/ 1222, applied for revocation of the confirmed grant. The next day the High Court suspended, *ex parte*, the confirmed grant in favour of the 1st respondent and set a date for inter partes hearing. On 15th June 2016, the 1st and 2nd respondents entered into a consent order whereby they agreed inter alia that Kwale/Galu Kinondo/198 belonging to the 2nd respondent be transferred to the 1st respondent and Kwale/Galu Kinondo/1222, also belonging to the 2nd respondent, be sold and the proceeds held in a joint interest earning account in the names of the parties' advocates.
4. Surprisingly, clause 2 of that consent order dealt with Kwale/Galu Kinondo/779, which was neither the property of the 1st respondent nor of the 2nd respondent, who were the parties to the consent order. The registered owner of that particular property, the appellant, was not a party to the consent order. The clause provided as follows:

“Plot No Kwale/Galu Kinondo/779 belonging to Pacific Sea Frontiers Ltd (sic) shall be transferred to the Defendant, Jane Mutuku Kyengo to hold by way of transmission 51% of the shares in Pacific Sea Frontiers Ltd (sic) and Daniel Nahenza Mangale to hold 49% of the shares in Pacific Sea Frontiers Ltd (sic). The current directors of the plaintiff shall immediately upon the execution of this consent hand over the title document of Plot No. Kwale Galu Kinondo/779 to the defendant’s advocates.” (Emphasis added).
5. Other clauses in the consent order provided that the County Police Commander, Kwale, shall evict any person on Kwale Galu Kinondo/779 and give vacant possession thereof to the 1st respondent and Daniel Nahenza Mangale; that the cause be marked as settled on the terms of the consent order; and that the grant of letters of administration issued to the 1st respondent “be validated and confirmed” in the terms of the consent order. On July 26, 2016 the High Court adopted the consent order as an order of the court.
6. Not surprising, on September 14, 2016 the appellant took out summons for revocation of the confirmed grant and sought an interim injunction to stop the respondents from interfering with the suit property. The application was based on the ground that the confirmation of the grant was obtained fraudulently and by concealing material facts and that Kwale Galu Kinondo/779 belonged to the appellant rather than to the deceased. Matters had become murkier earlier on, when on August 29, 2016, the 2nd respondent also applied to set aside the consent order, arguing that plots Nos Kwale/Galu Kinondo/198 and Kwale/Galu Kinondo/1222 belonged to it rather than to the deceased. On September 16, 2016 the High Court certified the appellant’s application urgent and directed the respondents’ advocates to file replying affidavits explaining the circumstances under which the consent order was entered into. A return date was set when the court would give further directions.
7. Ultimately the court directed the dispute to be heard by *viva voce* evidence, and transforming the summons for revocation of the confirmed grant into a suit. The objectors (the appellant and the 2nd respondent) became the plaintiffs with their pleadings treated as the plaint, whilst the petitioner (the 1st respondent) became the defendant with her pleadings being treated as the defence.
8. The court heard the dispute, with the appellant and the 2nd respondent calling seven witnesses whilst the 1st respondent called three witnesses. It appears that sight was lost of the straightforward question



in the summons for revocation of the confirmed grant, namely whether the court should revoke the confirmed grant because of fraud and deliberate inclusion, among the assets of the deceased, of the suit properties that were alleged to belong to the appellant and the 2nd respondent. Instead of the primary issue in the summons, the trial court identified the following six issues for determination:

- i. whether the 1st respondent is the deceased's dependant or beneficiary;
- ii. whether the deceased held shares in the appellant and the 2nd respondent at the time of his death;
- iii. who were the directors of the appellant and the 2nd respondent at the time of the deceased's death;
- iv. whether the appellant and the 2nd respondent were the lawful owners of Plot Nos Kwale/Galu Kinondo 198, 779 and 1222;
- v. whether the 1st respondent was right in including the above properties in the Succession Cause; and
- vi. whether the appellant and the 2nd respondent were entitled to benefit from the deceased's estate.

9. By the impugned judgment, the court found and held as follows:

- i. that the 1st respondent was a wife of the deceased through presumption of marriage and therefore his dependant;
- ii. that at the time of his death the deceased held shares in the appellant and in the 2nd respondent;
- iii. that at the time of the death of the deceased, the shareholders of the appellant and were the deceased and Johan Stover whilst the shareholders of the 2nd respondent were the deceased and Irmgrad Beig;
- iv. Persons purporting to be directors of the appellant and of the 2nd respondent were not the genuine owners of the suit properties;
- v. that although the suit properties were registered in the names of the appellant and 2nd respondent, there was nothing wrong with the 1st respondent including them as assets of the deceased; and
- vi. that the objections had no basis and should be dismissed.

10. The appellant was aggrieved and lodged the current appeal, which is supported by the 2nd respondent. The appellant faults the trial court for going beyond its jurisdiction and purporting to determine shareholding of companies in a succession cause; by failing to revoke the confirmed grant even after finding that the suit properties belonged to the appellant and the 2nd respondent; by ordering removal of the names of the directors of the appellant from the records of the Registrar of Companies; by upholding the certificate of confirmed grant even though the deceased had three children who were not disclosed or provided for; and by ordering evictions from Kwale Galu Kinondo/779, orders which no party had applied for.

11. Before us, the parties elected to canvass the appeal through written submissions without any highlighting. In support of the appeal, the appellant, represented by Messrs. Nchogu, Omwanza & Nyasimi Advocates, submitted that the only issue before the learned judge was whether the suit



- properties belonged to the deceased and were available for distribution in the succession cause. It was contended that by dealing with shareholding of a company in a succession cause the court went beyond its jurisdiction and that the procedure of converting summons for revocation of a grant into a suit was alien to the Law of Succession Act. The appellant cited Chalicha Farmers' Cooperative Society Ltd v. Odhiambo & 9 Others [1987] KLR 182 and submitted that the learned judge ought to have decided only the issue that was before him, namely whether the confirmed grant should be revoked for including the suit properties as assets of the deceased.
12. The appellant also relied on Patrick Kibathi & 2 Others v Charles Kigwe Gathecha [2015] eKLR and submitted that whilst the succession court can deal with the issue of distribution of shares of a deceased person, any dispute on shareholding of a company in which the deceased is a shareholder is the business of the commercial court. The decision of the High Court in Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR was cited to support the submission that the Law of Succession Act and the Probate & Administration Rules are intended to resolve disputes between personal representatives of a deceased, survivors, beneficiaries and dependants and that disputes involving third parties ought to be resolved outside the succession framework.
 13. It was the appellant's further contention that under section 3 of the Law of Succession Act, an estate of a deceased person connotes the free property of the deceased which he or she was legally competent to dispose of during his life time. In this case, it was urged, the suit properties were not the free property of the deceased because they were registered in the names of the appellant and the 2nd respondent; that the 1st respondent acknowledged as much, and that the trial court itself expressly found that the suit properties belonged to the appellant and the 2nd respondent. For that reason, it was contended that the learned judge erred in not revoking the confirmed grant.
 14. The appellant further submitted that the trial court should have revoked the confirmed grant for fraud and concealment of material facts under section 76(b) of the Law of Succession Act because first, the suit properties did not belong to the deceased and second, the deceased had three children, namely, Thomas Werner, Castro Werner and Christian Werner, who were neither disclosed nor provided for. The decision of the High Court in Re Estate of Kirumba Mugochi (Deceased) [2017] eKLR was cited in support of the proposition.
 15. Next the appellant faulted the trial court for issuing orders for eviction of the directors of the appellant or any other person in occupation of Kwale Galu Kinondo/779 whilst the appellant, who owned that property, had not sought such prayers. Additionally, the court was faulted for directing the Registrar of Companies to remove from the record returns filed by the directors of the appellant and the 2nd respondent, based on returns allegedly filed on September 26, 2016 and signed by the deceased, yet the deceased had died way back on December 10, 2014. For the above reasons the appellant urged us to allow the appeal.
 16. On its part, the 2nd respondent, represented by Messrs. Masika Koros Advocates supported the appeal adding that the learned judge erred by holding that the suit properties, which belonged to the appellant and the 2nd respondent were available for distribution as assets of the deceased. It was contended that the court erred by confusing distribution of shares in a company with distribution of the properties of the company. It was further contended that having found that the deceased and Irmgrad Beig were the shareholders of the 2nd respondent holding 50% each of the shares, the court erred by treating the properties of the 2nd respondent as the property of the deceased. In the 2nd respondent's view all that the estate of the deceased was entitled to were only his shares in the 2nd respondent.
 17. The 2nd respondent further faulted the trial court for relying on the 1st respondent's concocted evidence so as to eject the directors of the 2nd respondent and seize its properties under the pretext that



- they belonged to the deceased. Citing *Gladys Wanjiru Ngacha v. Teresa Chepsaat & 4 Others* [2013] eKLR, it was contended that the court erred by holding that the directors of the 2nd respondent were fraudulent yet no fraud was pleaded or specified against them or strictly proved as required by law.
18. The 2nd respondent maintained that the succession court acted in excess of jurisdiction when it purported to determine issues of shareholding and directorship in the appellant and the 2nd respondent when the issue before it was only succession to free properties of the deceased. Relying on the decision of the High Court in *Re Estate of Gitere Kabura & Another* [2018] eKLR, the 2nd respondent submitted that property belonging to a company where a deceased is a shareholder is not available for distribution as part of the estate of the deceased and that disputes on shareholding of a company are not the business of the probate court. Accordingly, the 2nd respondent urged us to find that the trial court erred by failing to revoke the grant and on that basis allow the appeal.
 19. The 1st respondent who is represented by Messrs. Kilonzo & Aziz Company Advocates opposed the appeal and defended the judgment of the trial court. It was submitted that the succession court had jurisdiction to inquire into and determine the shareholding of the appellant and the 2nd respondent for the purposes of protecting the estate of the deceased, which was in danger of being wasted. The 1st respondent submitted that strangers had fraudulently manipulated the records to acquire shares in the two companies which would have been to the disadvantage of the 1st respondent, the holder of a confirmed grant. It was further contended that the 2nd respondent identified shareholding as an issue and led evidence in that regard, thus leaving the issue to the determination of the court. In the 1st respondent's view the appellant and the 2nd respondent, having subjected themselves to the jurisdiction of the succession court, were estopped from challenging the court's jurisdiction.
 20. As regards the contention that the succession court did not have jurisdiction to determine disputed shareholdings in the two companies, the 1st respondent cited the decision of this Court in *Re Estate of Charles Karuga Koinange*, CA No 126 of 2016 and that of the High Court in *Re Estate of James Kanyotu* [2013] eKLR and submitted that the succession court has jurisdiction to address shareholding in a company where the deceased held shares. On ownership of the suit properties, the 1st respondent conceded that they are registered in the names of the appellant and the 2nd respondent. However, the 1st respondent submitted that the trial court had to determine the directors of the two companies so as in turn to determine whether the deceased had any interest in the companies and in the suit properties. It was contended that the trial court came to the correct finding on the directors and shareholders of the appellant and the 2nd respondent when it rejected evidence and contentions of impostors out to seize the two companies.
 21. Turning to the contention that the trial court erred in ordering the Registrar of Companies to remove the names of the directors of the appellant and the 2nd respondent, the 1st respondent submitted that having found the people claiming to be the directors of the two companies were imposters, it was the right and just order to make so as to protect the interests of the deceased. The 1st respondent relied on *Re Estate of Mbiyu Koinange* [2015] eKLR pointing out that the succession court revoked transfer of shares in an asset of the deceased from a beneficiary back to the estate. On failure to disclose that the deceased had children, and was not survived by only the 1st respondent, it was submitted that the 1st respondent's petition was duly gazetted and published and the said children neither filed any objection nor showed any interest in the estate.
 22. Lastly, on the order for eviction of persons on the suit property, the 1st respondent submitted that the trial court had a duty to protect the estate of the deceased. For the foregoing reasons, the 1st respondent urged us to uphold the judgment of the trial court and to dismiss the appeal with costs.



23. We have carefully considered the record of appeal, the grounds of appeal, the judgment of the High Court, the submissions by the parties and the authorities cited. As we have already stated, the straight forward question raised in the summons for revocation of the confirmed grant was whether the confirmed grant was obtained fraudulently and by non-disclosure of material facts, namely that the suit properties were the properties of the appellant and the 2nd respondent rather than of the deceased. We shall address the grounds of appeal in the course of addressing that central question.
24. To begin with both the appellant and the 2nd respondent protest that the learned judge ignored the central issue in the summons for revocation of the confirmed grant and veered off to matters of shareholding and directors of the two companies which were internal to the companies and outside his jurisdiction as a succession court. In response, the 1st respondent submits that the court had jurisdiction to inquire into all the issues; that the appellant and the 2nd respondent submitted to jurisdiction of the succession court; that the issues of shareholding were raised, addressed and left to the court to decide; and that the appellant and the 2nd respondent are now estopped from raising the question of the court’s jurisdiction.
25. The arguments presented by the parties on jurisdiction and unpleaded issues encompass two distinct propositions which are a bit mixed up. The first is a pure jurisdictional issue, namely whether the succession court had the legal authority to determine the dispute it did. Without that authority, the court is supposed to down its tools. It is in that sense that the word “jurisdiction” is used in *Owners of the Motor Vessel ‘Lilian S’ v. Caltex Oil (K) Ltd* [1989] KLR 1 and in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR. The second issue is whether the court heard and determined matters that were not pleaded or submitted to it by the parties for decision. In this sense, the issue is not a “jurisdictional” question strictly speaking; it is merely an issue of fair hearing and observance of the rules of pleadings. A court which has jurisdiction in the first sense will still be in error if it determines matters that the parties have not raised. The confusion arises because ordinarily where the court determines unpleaded issues, it is said that it did not have “jurisdiction” to determine those issues or that it acted “in excess of jurisdiction”.
26. Be that as it may, we have re-evaluated the pleadings and the evidence on record. What is clear is that in its submissions, the appellant took the view that the only issue in dispute before the succession court was whether the confirmed grant should be revoked on the grounds of fraud and non-disclosure of material facts because of including the suit properties among the assets of the deceased. Thus for example, after quoting from *Petra Development Services Ltd v. Evergreen Marine (Singapore) PTE Ltd & Another* [2014] eKLR regarding the separate legal personality of a company, the appellant stated as follows in paragraph 21 of its written submissions in the High Court:
- “It therefore follows that this court does not have jurisdiction to adjudicate on the issue of transfer of distribution of the property of the 1st objector.”
27. In addressing the issue of the shareholding in the company, the appellant indicated that it was doing so “without prejudice” to its position that the succession court had no jurisdiction on the matters. It is therefore not surprising that the very first ground raised by the appellant in this appeal is that:
- “The learned judge erred in law by going beyond its jurisdiction by dealing with the shareholding of a company in a succession cause.”
28. On the question of jurisdiction, the appellant and the 2nd respondent take the view that in a succession dispute, the court has no jurisdiction to hear and determine other disputes that in law are reserved for determination by other courts or legal mechanisms. A straightforward example is a dispute relating to



ownership of land that is alleged to constitute part of the estate of the deceased. If the issue arises in the course of distribution of an estate, is it for the succession court to determine the issue or is it for the Environment and Land Court?

29. The appellant relied on the decision of the High Court *in Re Estate of Alice Mumbua Mutua* [2017] eKLR. One of the issues before the succession court was a challenge to irregular sale of assets comprising the estate of the deceased. An application was made by a purchaser of the contested property to transfer the dispute on the sale of the land from the succession court to the Environment and Land Court on the basis that it was the latter court that had jurisdiction in the matter. In granting the application, Musyoka, J. held that not every dispute over property of a deceased person ought to be pushed to the probate court and that the intervention of that court is limited. The learned judge stated thus:

“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 are 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.” (Emphasis added).

30. In the same vein, the appellant cited *Patrick Kibathi & 2 Others v. Charles Kigwe Gathecha* [2015] eKLR, also a decision of the High Court. A beneficiary to whom the deceased had bequeathed shares in a company that owned a parcel of land applied for an order to compel the executors of the will to apply for confirmation of the grant and to determine the acreage of the company’s land that he was entitled to by virtue of the shares bequeathed to him. The application was opposed among others, on the ground that the determination of the acreage of land represented by the shares was a matter for the company, not the executors and that the succession court had no jurisdiction to apportion the land of the company, which was a matter for the company itself.

31. In rejecting the applicant’s argument, Muigai, J. stated as follows:

“The main issue is that this court determines the transfer of shares, distributes the land in question and confirm the Protestor’s benefit’s worth so that he may obtain his share of property. The reality is, this court can only adjudicate on transfer of shares to the extent the process involves the deceased’s property and estate. However, the valuation of shares of a company, valuation and apportionment of the company’s property is subject to the *Companies Act*, the memorandum and articles of association of the company. This court’s jurisdiction begins and ends with the transfer of shares in accordance with the Will of the deceased and preservation of the estate until distribution. Thereafter, the Beneficiary is at liberty to pursue his rightful role and shares from the company. In case of any dispute,



then the matter be adjudicated by the Commercial Division of the High Court.” (Emphasis added).

32. Nevertheless, the court affirmed that it had jurisdiction to issue orders to stop wastage of the estate and to preserve it until distribution.
33. For its part, the 2nd respondent relied on the decision of the High Court in *Re Estates of Gitere Kabura and Mary Nyokabi*, HC. Succ. Cause Nos. 265 of 2009 and 373 of 2016, which again vividly demonstrates the limits of the jurisdiction of the succession court when it comes to disputes touching on a company where the deceased held shares. One of the prayers in that cause was for the High Court to remove administrators of two estates and to order them to account for their administration. Another prayer was for an order for settlement of liabilities alleged to belong to the deceased persons. The court found as a fact that the property alleged to have been misappropriated as well as the liabilities sought to be settled did not belong to the deceased persons but rather to a company in which they held one share each. In rejecting the prayers, Musyoka, J. stated:

“If the assets said to have been mishandled belong to the company, it would mean that is a matter subject to the company law and should be handled in accordance with the provisions of the *Companies Act*, Cap 486 Laws of Kenya.”

Regarding the liabilities, the learned judge added:

“I have perused through the material herein and noted that those liabilities are not of the estate but of the company. They should not in any way affect distribution of the assets belonging to the estate herein. The issue of those liabilities have nothing to do with this court and should be raised at the appropriate forum.” (Emphasis added)

34. On her part the 1st respondent takes the position that the succession court has jurisdiction to hear and determine any dispute that arises in the course of administration and distribution of an estate. She relies on the ruling of the High Court *In re Estate of James Kanyotu* [2013] eKLR. The matter involved an application for injunction to restrain the respondents from dealing with properties of the deceased and the shares of the deceased in 22 companies, pending the hearing and determination of the succession dispute. In granting the injunctions, Kimaru J. stated:

“There is a notion that where a deceased owned shares in a company, then those shares could be dealt with under the provisions of the *Companies Act* to the exclusion of the provisions of the *Law of Succession Act*. With respect, this is not the correct position of the law. Where a deceased owned majority shares in a company, those shares can only be transferred after the succession process has been concluded”

35. With respect, this ruling cannot be authority for the proposition that the succession court has jurisdiction to hear and determine each and every dispute that arises in the course of administration and distribution of an estate. All that it decides is that the succession court has power to preserve the estate and stop intermeddling with its assets (including shares) until conclusion of the succession process as contemplated by sections 45 and 47 of the *Law of Succession Act*. The above ruling merely preserved the shares of the deceased in the named companies and stopped the respondents from interfering with or disposing of them. It did not venture into such issues as who were the shareholders, the extent of the shareholding, the directors, the properties, and the liabilities of the company, etc.
36. The other decision relied upon by the 1st respondent is the decision of this Court in *Rosemary B. Koinange & 5 Others v. Isabella Wanjiku Karanja & 2 Others*, CA No. 126 of 2016, arising from a



ruling of the High Court (Kimaru, J.) dated 22nd January 2015 in Succession Cause No. 998 of 2006, In the Matter of the Estate of Charles Karuga Koinange. One of the issues before the High Court was whether the deceased had mental capacity to transfer to one of his sons shares in a limited liability company or whether the transfer was fraudulent and therefore the shares formed part of the estate of the deceased. It was contended that the succession court did not have jurisdiction to inquire into the transfer of shares in the limited liability company, which was the preserve of the procedures of provided under the *Companies Act*. The High Court held that the deceased did not have the mental capacity to transfer the shares. On appeal this Court expressed itself as follows:

“There can be no argument that the shares of a deceased in a limited liability company are assets which the family (court) has power to distribute in a Succession Cause. The argument is rather that when there is a dispute on ownership of the shares, only a ‘Companies Court’ has jurisdiction to adjudicate. In this case, there is no dispute that the shares in the 2nd appellant were held by the deceased and Njoki at inception. It is averred that the deceased gifted his shareholding to Wilfred in 1994, but whether this was so is a matter the Succession court is capable of determining. If the court holds that the shares were gifted to Wilfred, just as other gifts were made to the other beneficiaries, that would be the end of the matter. If they were not, then they vest in the administrators who may engage with the company or companies under the relevant Company laws and Articles of Association to wrest them back to the estate.”

37. Thus, while accepting that shares of a deceased person in a limited liability company are assets to be distributed by a succession court, the court noted that it was an entirely different proposition when there was a dispute on ownership of shares, which the appellants were contending only the companies court has jurisdiction to adjudicate. The Court found as a fact that in this appeal there was no dispute that the shares in question were held by the deceased and therefore the succession cause was only to decide whether or not he had gifted them to the son in question. Again, with respect, this judgment is not authority for the overly broad proposition made by the 1st respondent that the succession court has jurisdiction to hear and determine each and every dispute that arises in the course of administration and distribution of an estate. It is apt to add as a postscript to the Rose B. Koinange case that this Court in fact allowed the appeal the against the nullification of the transfer of shares by the deceased and set aside the order of the High Court on the basis that there was no cogent evidence and proper hearing on the matter.
38. Then there is the decision of the High Court *in Re Estate of Mbiyu Koinange* [2015] eKLR, cited by the 1st respondent, perhaps unaware that it was reversed by this Court on appeal in *Margaret Njeri Mbiyu v. David Njunu Mbiyu Koinange & 13 Others*, CA No. 47 of 2016.
39. The relevant facts were that the administrators of the estate of the deceased transferred his shares in a company to one of the beneficiaries after they were satisfied that the deceased had nominated that beneficiary to receive the shares. During confirmation of the grant, it was contended that the shares should not have been transferred to the beneficiary, that they formed part of the estate of the deceased, and that they were available for distribution. The High Court agreed and revoked the transfer of the shares. On appeal, this Court held that under sections 75, 78 and 79 of the repealed *Companies Act*, the deceased was within the law to nominate the beneficiary to receive his shares and that the administrators had the power to transfer the shares to the beneficiary as they had done. Clearly, therefore, just like the other decisions relied upon by the 1st respondent which we have analysed above, this decision too does not avail her because there was absolutely no dispute that the shares in question were held by the deceased. The succession court was not called upon to delve into matters of the company such as the



- identity of its shareholders, directors, extent of shareholding, and properties, as it did in this appeal. It was only called upon to determine distribution of the shares.
40. In our view the above judgments of this Court and the decisions of the High Court in *Re Estate of Alice Mumbua Mutua (supra)*, *Patrick Kibathi & 2 Others v. Charles Kigwe Gathecha (supra)* and in *Re Estates of Gitere Kabura and Mary Nyokabi (supra)* represent the correct law. Where there is no dispute on the shares held by the deceased in a company, the succession court has the jurisdiction to decide whether they are available for distribution and how they should be distributed. When there is intermeddling and interference with properties of the deceased, including shares, the court has jurisdiction to stop the intermeddling and to preserve the estate. However, when the dispute veers off to contestations on who are the company's shareholders, directors, the extent and number of shares, the properties of the company, the filing of annual returns, occupation of the company's properties, liabilities of the company, etc., those are, with respect, issues for the company to be resolved under the legal framework provided by the [Companies Act](#).
41. We are fortified by rule 41(3) of the Probate and Administration Rules in the view that there are disputes that arise in the context of a succession case which must be resolved through the dedicated institutions or the specific mechanisms provided by the law for that purpose. That provision contemplates situations where it is not possible or convenient to resolve disputes that arise in the course of determining an application for confirmation of a grant, such as identity of persons claiming to be beneficiaries, their share or estate, conditions or qualifications attaching to such share or estate, etc. In such instances, the court is empowered, before confirming the grant, to await determination of the question in proceedings under order 37 (1) of the [Civil Procedure Rules](#) (Originating Summons). This provision would not have been necessary if the succession court was entitled to deal with all and sundry issues that may arise in a succession cause.
42. As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. (See [Captain Harry Gandy v. Caspar Air Charters Ltd](#) [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] EA 476, *D.E.N. v. P.N.N. (supra)*, [Baber Alibhai Mawji v. Sultan Hashim Lalji & Another](#), CA No 296 of 2001; and [Mapis Investment \(K\) Ltd v. Kenya Railways Corporation](#) (2005) 2 KLR 410). Nevertheless, we should add that parties cannot validly leave unpleaded issues over which the court has no jurisdiction for it to decide, simply because parties cannot by consent, confer jurisdiction to a court which in law it does not have.
43. We are satisfied that the trial court did not have jurisdiction to deal with the contested matters it entertained in the application for revocation of the grant, which were for all intents and purposes internal to the two companies and reserved for resolution under the framework of the [Companies Act](#). Having so found, the question of the parties having left the issues outside revocation of the grant to the court to decide does not arise. The parties could not by consent or conduct confer on the court jurisdiction it did not otherwise have.
44. As we stated earlier, the gravamen of this appeal is whether the trial court erred in declining to revoke the confirmed grant and by treating the suit properties as part of the estate of the deceased. The applications that were before the trial court which were determined by the impugned judgment were taken out under section 76 of the [Law of Succession Act](#) and rule 44 of the Probate and Administration Rules and prayed for revocation of the confirmed grant on the grounds of fraud and material non-disclosure.



45. To begin with, there is hardly any dispute between the parties that the suit properties are indeed the properties of the appellant and the 2nd respondent and registered as such. This fact is firstly borne out by the consent order dated 15th June 2016 on the basis of which the grant was confirmed. That consent order, the relevant parts of which we have already adverted to in this judgment, expressly described the suit properties as the properties of the appellant and the 2nd respondent. Secondly, in her evidence in chief the 1st respondent told the court that Kwale/Galu Kinondo/1222 belongs to the appellant. Thirdly, even in submissions before this Court, the 1st respondent acknowledges ownership of the suit properties by the appellant and the 2nd respondent. In paragraph 10 of those submissions, the 1st respondent states:

“It is not in contention that Kwale/Galu Kinondo/779 and Kwale/Galu Kinondo/198 and Kwale/Galu Kinondo/1222 are registered in the name of Pacific Frontier Seas Limited and Okapi Estate Limited.”

46. The High Court itself, in considering the issue of whether the 1st respondent was correct to include the disputed properties in the succession cause, concluded as follows:

“Turning back to the issue of the properties being registered in the name of the companies, it is clear that the properties were registered in the name of the companies... It is not disputed that the properties were registered in the names of the two companies. The consent recorded in court does appreciate this fact.”

47. So, back to the crux of the dispute, is property that the court finds to be owned by a company available for distribution as part of the estate of a deceased shareholder? We should bear in mind that the High Court found that the shareholders of the appellant were the deceased and Johan Stover whilst the shareholders of the 2nd respondent were the deceased and Irmgrad Beig.

48. In sanctioning the inclusion of the properties of the two companies as assets of the deceased, the trial court stated casually that the 1st respondent was within her right to file the cause and secure the properties of the deceased. The court reasoned:

“The defendant (1st respondent) knew that her late husband and Johan Stover owned Pacific Frontier Seas Ltd which in turn owned Plot No. 779. She was entitled to that property as part of the deceased’s estate. The same applies to the other plots. The defendant applied to the court to have the properties transferred into her names.” (Emphasis added).

49. It is trite law that what the estate of a deceased shareholder is entitled to are only the shares of the deceased in the company, and not to the property of the company. We have already adverted to the decision in *Re Estates of Gitere Kabura and Mary Nyokabi (supra)*. In the course of determining an application for confirmation of grant, the High Court realised that the properties that the parties wanted to distribute did not belong to the deceased persons, but to a company in which they held shares. In refusing the application, the court stated that the jurisdiction of the probate court lies with the distribution of the shares, but not the liquidation of the company or distribution of its assets, which belong to the company. The court added that such properties ought not to be listed at all among the assets of the deceased and further that it is only the shares held by the deceased in the company that ought to be listed as his assets. The Court concluded:

“I have carefully perused through the voluminous papers filed herein by the parties. What emerges from the pleadings, the various affidavits and other documents on record is disturbing. I get the sense that the parties herein, virtually all of them, are inviting me to



distribute assets that do not belong to the estates of the deceased persons. The averments and documents on record suggest that the assets that are alleged to belong to both estates actually is property registered in the name of the company known as Gitere Kahura Investments Limited, in which each of the deceased persons held one share... It is abundantly clear that a substantial part of the assets listed in the two confirmation applications do not belong to the estates of the deceased persons or are not registered in the names of the deceased persons or the said deceased persons were not the registered owners thereof, but were registered in the name of the company in which the two deceased held equal shares. It would appear that most of these assets were initially registered the name of one or both of the deceased persons before the two formed the company and transferred the assets to the name of the company. From the material before me, it is clear beyond peradventure that the bulk of what is claimed by the administrators to be assets in the estates of the two deceased persons do not in fact belong to them but to the company in which they held shares. The said assets are therefore not available for distribution in these two causes.” (Emphasis added).

50. By parity of reasoning, the High Court and this Court have consistently held, even in disputes on division of matrimonial property, that while the Court can divide between spouse’s shares held by them or one of them in a company, it has no jurisdiction to share out to a spouse properties registered in the name of a company. (See *SNK v MSK & 5 Others* [2015] eKLR, *Mbugua v Mbugua* [2001] 2 EA, *Muthembwa v Muthembwa* [2002] 1 EA 186 and *Mereka v Mereka* [2008] 1 KLR (G&F) 263).
51. That is the correct exposition of the law and we find absolutely no basis for the trial court in this appeal to have departed from settled law and treated the suit properties as assets of the deceased even after finding that they were duly registered in the name of the appellant and the 2nd respondent. In making the orders it did, the trial court stated that it was protecting the estate of the deceased. But what of the interests of the other two shareholders in the companies that the court found held, with the deceased, shares in the ratio of 51% to 49% in the appellant and 50% each in the 2nd respondent? The court fleetingly stated that those shareholders were not complaining and that the 1st respondent, to whom it had, through some legal abracadabra moves, gifted the properties of the companies, had a duty to account to them. This then begs the question how those shareholders were supposed to complain in a matter that, instead of being handled under the procedures prescribed by the *Companies Act* as the law provides, was handled as a private matter of the deceased’s estate?
52. The appellant and the 2nd respondent have raised other issues which ought to have raised a red flag that all was not well in the manner in which this dispute was conducted and determined. There was the initial confirmation of the grant within two months, long before the expiry of the normal six months. There was the irregular consent order that purported to transfer to the 1st respondent properties which she herself acknowledged to belong to the two companies. That consent order purported to transfer to the 1st respondent the property of the appellant, whilst the appellant was not a party to the consent order. Although the court set aside the consent order, nevertheless it still upheld the confirmed grant which had been obtained on the basis of the nullified consent order. There was also the absolute non-disclosure that the deceased was survived by three children. Even if we assume that those children were not interested in the estate of the deceased, of which there is no cogent evidence on record, that did not absolve the 1st respondent from her duty of truthfulness and full disclosure, in her capacity as the petitioner for grant and applicant for its confirmation. It is not enough to merely claim the petition for grant was published in the Kenya Gazette and that there was no objection.
53. There is also the issue of orders for cancellation and alteration of entries and records in the Companies Register and eviction of persons from the suit properties which neither of the companies had applied for, over and above the misuse of the police in civil disputes and questionable evictions. The irregular



conversion of summons for revocation of grant into a suit under the Civil Procedure Act instead of recourse to the procedure prescribed by rule 41(3) of the Probate and Administration Rules is another irregularity of great concern. But above all, the irregular assumption of jurisdiction to purport to resolve intricate and contentious disputes of internal matters of companies under the Companies Act in an application for confirmation of grant, not to mention the purported distribution of properties of the two companies as part of the assets of the deceased, lead us to the conclusion that the merits of this appeal cannot be called in question.

54. Accordingly, we allow the appeal with costs and set aside the entire judgment of the High Court dated April 18, 2018 and delivered on May 16, 2018. The matter is remitted back to the High Court to be heard and determined in accordance with the law as explained above, by a judge other than Chitembwe, J. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

S. Ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

