



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH

OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 116 OF 2016

BETWEEN

ODUOR HAWI AMBALA.....1ST APPELLANT

OGOLA KODHEK AMBALA.....2ND APPELLANT

VERSUS

MARVIN OPIYO AMBALA.....1ST RESPONDENT

CHIZI ADHIAMBO AMBALA.....2ND RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Kenya

at Kisumu, (Chemitei, J) dated 29th day of June, 2016)

in

HIGH COURT SUCCESSION CAUSE NO. 68 OF 1986

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court, (*Chemitei, J.*) whereby the High Court revoked two previous grants of letters of administration and three previous court orders; appointed three joint administrators of the estate of **Aggrey Otieno Ambala (deceased)** and redistributed the estate to the beneficiaries.

[2] Since the death of Aggrey Otieno Ambala on 8th June, 1985, many things have taken place in his estate. The Court will refer to only a few events which are germane to this appeal.

[3] The deceased in his lifetime married three wives. His first wife, **Perez Alice Auma Ambala (1st wife)** died in 1973. The deceased and his first wife had five sons namely: **Otieno Aggrey Ambala Junior who died in December, 2004, Oduor Hawi Ambala, Odhiambo Taabu Ambala, Nyerere Omondi Ambala (deceased) and Ogola Kodhek Ambala.** The deceased and his second wife **Berly Lilian Achieng Odinga (2nd wife)** had two children, **Perez Auma Ambala and Chizi Adhiambo Nyanginya.** In 1981, the 2nd wife filed a divorce case and thereafter the marriage was dissolved and the 2nd wife remarried. The custody of her two children was given to the deceased. The 3rd wife **Nancy Adhiambo Ambala** was married in 1981 under Luo Customary Law. They had four children, **Marvin Ambala, Adongo Ambala, Akinyi Ambala and Opiyo Wagenaar Ambala.**

[4] Sometime after the death of the deceased a Will allegedly executed by the deceased on 5th September, 1979 was found. Nancy Ambala disputed the Will which was executed before she was married. Apparently the Will was not subjected to probate and the family decided to abandon the Will and deal with the estate as if the deceased had died intestate.

In our view, the family made the correct decision because as **Section 19** of the Law of Succession Act (LSA) provides, a Will is revoked by the marriage of the maker unless it is made in contemplation of marriage with a specified person. In 1986, the deceased's family instructed **Rajni Somaia (Somaia)**, who was the deceased's lawyer to deal with the administration of the estate. The family also agreed that four administrators be appointed. Thereafter, a petition for Grant of Letters of Administration intestate was filed in the High Court at Kisumu and a grant given on 26th August, 1986 to **Nancy Ambala, Otieno Ambala Junior, Joseph Odhiambo and Barrack Wilson Odhiambo Ambala**.

[5] Upon his own application, Barrack Wilson Odhiambo Ambala was discharged as an administrator of the estate on 13th October, 1988. In 1989, the administrators sold **LR No. 1160/285** – a five acre piece of land in Karen to **Samuel Mwangi Njoroge** and the sale was approved by Court on 12th January, 1989. Subsequently, some beneficiaries including Nancy Ambala applied for the revocation of the previous grant and by a consent order made on 26th June, 1989, the grant given on 26th August, 1986 was revoked and a fresh grant given to **Harbans Revi Sahi (H.R. Sahi)** on the same day.

By an application dated 24th September, 1990, H.R. Sahi sought the leave of the Court to sell three properties **LR 1160/286, LR 1160/287** and **LR 1160/290** situated at Karen Nairobi to defray various liabilities of the estate. Nancy Ambala filed a replying affidavit in which she agreed to the sale of LR Nos. 1160/286 and LR 1160/287 but opposed the sale of LR No. 1160/290 on the ground that she and her 4 children were being maintained from the rent collected from the house on the property.

The application was allowed by Shields, J. on 12th November, 1990. LR 1160/290 is a five acre piece of land with a six bedroomed house. The administrator (*H.R. Sahi*) died on 24th September, 1991, apparently before he completed the sale of LR 1160/290. The property was later sold by the Housing Finance Company of Kenya - the chargee at a public auction.

[6] On or about 17th December, 1991, Rajni K. Somaia filed a notice of change of advocates indicating that he had been appointed as an advocate for the estate and replaced **Kamau Kuria** who had been appointed by Nancy Ambala, Oluoch who had been appointed by Otieno Ambala, Beryl Odinga and her two children, **Nzamba Kitonga** for Oduor Ambala and Nyerere Ambala, **Khaminwa** for Odhiambo Ambala and **Kiraitu & Ringera**. Thereafter, Somaia filed a petition on half of **Bhupen Shah**, a chartered accountant, for grant of letters of administration. Bhupen Shah stated in the petition that he had been requested by all the beneficiaries of the estate to be an administrator of the estate. A Limited Grant was initially granted to Bhupen Shah and on 25th October, 1995, he was granted letters of administration intestate. That Grant was confirmed by **Kuloba J.** on 2nd November, 1995.

[7] By an application dated 23rd March, 1998, made by **Waruhiu & Muite Advocates** on behalf of Otieno Ambala Junior and Nancy Ambala against Bhupen M. Shah, the applicants sought an order, *inter alia*, that the order of the confirmation of the Grant of letters of administration made by Kuloba, J. on 2nd November, 1995, be reviewed, varied or set aside and that Rajni Somaia do cease from acting for and on behalf of the estate. The administrator filed a replying affidavit sworn on 2nd June, 1998. The record does not show whether or not the application was heard. A more comprehensive application dated 21st April, 2004 was filed by the firm of **Waruhiu, K'owade & Ng'ang'a Advocates (K'owade)** on behalf of Otieno Ambala and Nancy Ambala against Bhupen M. Shah. It sought orders that:

- (i) *the order made on 2nd November, 1995 by Kuloba, J. confirming the grant be reviewed, varied or set aside.*
- (ii) *Bhupen M. Shah do cease from acting as administrator.*
- (iii) *the administrator do submit the administrator's account.*
- (iv) *the estate to be audited by an independent auditor and*
- (v) *time be set by the Court when the administration of the estate would be wound up.*

That application apparently led to the recording of a consent order dated 3rd December, 2014 distributing the vast estate to the beneficiaries.

[8] The consent order of 3rd December, 2004, was recorded in the presence of **Mr. Oguso** – advocate for Odhiambo Ambala, **Odeny** – Advocate for Bhupen M. Shah and **K'owade** - advocate for the “*rest of beneficiaries*”. The consent order provided for eleven beneficiaries – the five sons of the 1st wife, Auma and Chizi, the children of the 2nd wife and the four children of Nancy Ambala but did not provide for Nancy Ambala. By the consent order, the land in Karen was to be divided equally amongst the five sons of the 1st wife – that is *Otieno, Oduor, Odhiambo, Nyerere and Ogola Ambala*.

The consent order also provide that:-

“Walter Ambala and Alfred Jacob Ambala are authorized by Court to execute and/or sign any legal document necessary for purposes of effecting the distribution of the estate stated above.”

Subsequently, a certificate of confirmation of the grant issued to Walter Ambala and Alfred Jacob Ambala was granted on 10th February, 2006, confirming the distribution of the estate in accordance with the consent order. In April, 2006, Walter Ambala applied to be discharged as an administrator of the estate and the Court on 4th May, 2006 sanctioned his withdrawal – leaving Alfred Jacob Ambala as the sole administrator.

[9] By an application dated 14th August, 2007, the firm of **Mungu & Co. Advocates** acting on behalf of Oduor Hawi Ambala, Nyerere

Omondi Ambala, Perez Auma Ambala and Chizi Adhiambo Ambala applied for orders that Walter Ambala and Alfred Jacob Ambala do file an account of all money received and expenditure and also a report on progress in respect of sub-division of various properties. Earlier, **M/S Gichaba & Co. Advocates** acting for Alfred Jacob Ambala and Walter Abuto Ambala filed an application dated 30th November, 2006 against Bhupen M. Shah for orders that the latter do surrender all original documents held by him and file his bill of costs. The two applications were settled by the consent order recorded on 2nd April, 2008. The consent order provided in part that upon presenting their accounts, Walter Ambala and Alfred Ambala do cease acting as administrators of the estate and that upon the specified beneficiaries filing a document confirming their specific portion of the properties specified in the consent order, the Deputy Registrar of the Court do have power to sign or execute any documents for and on behalf of estate.

[10] Apparently, pursuant to the consent order of 2nd April, 2008 requiring the beneficiaries to file a document confirming their specific portion, the beneficiaries of Karen land file a consent letter dated 19th November, 2008 which was affirmed by **J. R. Karanja, J.** on 25th November, 2008.

By that consent order, the beneficiaries of the Karen land acknowledged that the original land L.R. 1160/234 which comprised of 15 acres was sub-divided into three portions L.R. 1160/286, 288 and 289; that Otieno Ambala Junior had sold 3 acres in L.R. 1160/286 and Nyerere Omondi Ambala 2 acres from L.R. 1160/286 and that Oduor Hawi Ambala and Odhiambo Taabu Ambala would inherit 3 acres and Nyerere Omondi one acre of the remaining ten acres. The consent order of 3rd December, 2004 was varied to that extent.

[11] By an application dated 17th February, 2009, Marvin Opiyo Ambala, the 1st respondent in this appeal supported by his affidavit, sought the following orders:-

(i) *the grant of letters of administration issued to Nancy Otieno Ambala, Joseph Odhiambo and Otieno Ambala Junior on 26th March, 1987 be and hereby is revoked.*

(ii) *the certificate of confirmation issued on 2nd November, 1995 to Bhupen Shah and the certificate of confirmation dated 10th February, 2006 be and hereby cancelled.*

(iii) *the Court do appoint an independent and recognized accountant to undertake and audit the estate and receive all the amounts from the beneficiaries and administrators of any kind.*

(iv) *all beneficiaries and administrators that have handled the estate do submit the accounts to the Court appointed auditor.*

(v) *beneficiaries be restrained from dealing with Siaya and Muhoroni, L.R. No. 5812 Nairobi and Karen land L.R. No. 1160/288 and L.R. No. 1160/289.*

The grounds of the application were *inter alia* that, no application for confirmation of the grant was filed, no consent was obtained from the beneficiaries before confirmation, consent to confirmation was done by two advocates who were not representing the interest of all beneficiaries, beneficiaries were not aware of the confirmation and hence they could not file protest or objections in time, proceedings to confirm the grant were defective and that the distribution of the estate favoured only one house.

[12] A second application dated 17th March, 2009, was filed by Chizi Ambala, the 2nd respondent in the appeal, supported by her affidavit for orders that the orders of 3rd December, 2004; 2nd April, 2008 and 28th November, 2008 be reviewed or set aside; the matter be set down for full hearing and redistribute the assets and liabilities equally either per house or unit and that beneficiaries be restrained from dealing with any property belonging to the estate, more specifically, **L.R. No. 1160/288** and **1160/299 Karen**, pending the determination of the application. The application was based on several grounds including the ground that the applicant has never been involved in any of the proceedings since turning 18 years, the consent on the mode of distribution was entered into without the applicant's knowledge, authority, consent or approval; distribution gave preference to members of one household and discriminated against female members of the family and no substantive application for confirmation of the grant was made which denied all beneficiaries the opportunity to file written consents on the mode of distribution. The two applications were made through the firm of **J.M. Theuri & Associates**.

[13] Oduor Hawi Ambala, the 1st appellant in his two lengthy replying affidavits sworn on 18th March, 2009 and 13th May, 2009 respectively stated, amongst other things, that all the properties forming the estate were acquired by his deceased father during his marriage with his late mother who made immense contribution to acquisition of the property; that the sons of the 1st wife are heirs of both their father and mother; that it is just that the estate be inherited as his father wished in the Will; that his deceased father was not polygamous and Nancy Ambala is not legally a widow and her four children are merely dependants; debate on distribution started in 1999 when Somaia's proposal was received and discussed by all family members and accepted; all beneficiaries agreed to be represented by K'owade advocate who was an advocate for Nancy Ambala and Otieno Ambala except Odhiambo Ambala who had instructed **Oguso Onyango**; the consent recorded on 3rd December, 2004 was ratified by all beneficiaries at a family meeting held on 14th December, 2004, the estate has been distributed with the consent of all beneficiaries and beneficiaries have taken respective portions; Nancy Ambala sold some Karen property and deliberately refused to service the mortgage causing the portion where a house was standing to be sold; Otieno Ambala Junior sold his portion of the Karen property before he died and others have sold their portions of the Karen property based on legitimate court orders and that the application brought by the 1st respondent after 5 years is intended to defeat a suit at Nairobi Milimani Commercial Courts and the impending prosecution of a person who illegally acquired some of the estate's properties in Karen.

The 1st appellant referred to three correspondences, by Auma Ambala – Chizi's sister indicating that she had a power of Attorney from Chizi and that she and Chizi supported the Somaia's proposal.

[14] **Lt. Col. (RTD) Farooq Asif Butt** represented by **Miller & Co. Advocates** filed a caveat dated 12th March, 2010 claiming that he had

bought one acre portion of L.R. No. 1160/288 Karen. Two other parties **Josphat Maina Nderito** and **Jane Wanjiru Ndegwa** also filed an application dated 4th October, 2011 seeking an injunction to restrain the administrators and beneficiaries from interfering with construction on parcel No. L.R. 1160/1951 – a sub-division on 1160/288 Karen. The applicants filed documents showing that they purchased the one acre plot from Oduor Hawi Ambala for Shs. 10,000,000/= which they had paid and had constructed a house on the plot. The record does not show whether or not the application was heard or that the advocates for the parties were informed of the hearing of the two applications.

[15] The two applications were heard and allowed by **Nambuye, J.** (*as she then was*) by a judgment delivered on 9th August, 2011. However, on appeal, the Court of Appeal in **Kisumu Civil Appeal No. 111 of 2012** allowed the appeal by a judgment dated 7th February, 2014 and remitted the application to the High Court for *viva voce* hearing. The applications were subsequently heard by Chemitei, J. by *viva voce* evidence leading to the present appeal.

[16] The learned Judge framed six issues arising from the applications and made findings on each.

The first issue was whether the grant of letters of administration issued to Nancy Ambala, Otieno Aggrey Ambala Junior, Joseph Odhiambo and Barrack Ambala on 26th August, 1986 was ever revoked. The learned Judge after going through the proceedings concluded:

“From the foregoing there is no shadow of doubt that the grant of letters of administration issued on 26th November, 1986 was revoked by an order of the Court issued on 14th July, 1989 and the administration of the estate was taken over by the late H.R. Sahi.”

That finding means that the 1st prayer in the 1st respondent’s application was rejected. **Rule 93(1)** of the Court of Appeal Rules, 2010 provides:-

“A respondent who desires to contend at the hearing of the appeal that the decision of the Superior Court or any part thereof should be varied or reversed, either in any event or the event of the appeal being allowed in whole or in part, shall give a notice to that effect specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.”

By **Rule 95(1)**, such notice of cross-appeal is required to be served on the appellant and copies on persons directly affected before or within seven days after lodging the notice of cross-appeal.

The 1st respondent did not file a notice of cross-appeal against the finding and the issue would not be considered any further.

[17] The second issue considered was whether subsequent grants issued to H.R. Sahi and Bhupen Shah were valid. The trial Judge considered the submission of the caveator that the grants were illegal as the estate had minors. The 2nd prayer of the 1st respondent’s application targeted the Grant issued to Bhupen Shah and the confirmation of the Grant on 2nd November, 1995. The learned Judge made a finding that Bhupen Shah made an application for grant of representation which was allowed and the grant confirmed on 2nd November, 1995 on application. The learned Judge further held:

“In the light of the foregoing, it is my view that Bhupen reserved a right to apply for a full grant which he did and the same was confirmed. Consequently any act carried out by him on behalf of the estate was valid.”

The respondent has not filed a cross-appeal contesting that finding nor has the interested party (*Caveator*) raised any issue about that finding in the cross-appeal. It is not therefore an issue for adjudication in this appeal.

[18] The 3rd issue was whether the caveator has a valid claim over the land in Karen. The finding on this Court in essence was that the persons who sold L.R. No. 1160/286 and one acre in L.R. 1160/288 had ceased to be administrators when the grant was revoked in 1989 and thus the sale of the two parcels of land to the caveator amounted to intermeddling with the estate and the parcels of land therefore should revert to the estate for distribution. These findings are the subject of appeal and cross-appeal.

[19] The fourth issue was whether the consent filed on 3rd December, 2004 was in line with the provisions of the Law of Succession Act for purposes of the distribution of the estate and consequently whether the appointment and distribution by Walter and Jacob Ambala as administrators was within the law.

The learned Judge made a finding that in the absence of any appointment authority and instructions from all the beneficiaries, K’owade lacked *bona fide* authority to enter into a consent order on their behalf; that the consent was not binding on them and that the signing of the minutes of 14th December, 2004 by beneficiaries was inconsequential as K’owade had already entered into a consent on their behalf. Further, the learned Judge made a finding that as the consent of 3rd December, 2004 under which Jacob and Walter Ambala were appointed as administrators was invalid any action taken pursuant to that consent was invalid and a nullity.

[20] The final issue was, who were the beneficiaries and what was available for distribution. The learned Judge made a finding that all the children of the deceased and Nancy Ambala were beneficiaries and excluded Beryl Odinga on the ground that she re-married after the demise of the deceased. There is no appeal or cross-appeal against that finding.

[21] As regards the estate, the Court made findings *inter alia* that: L.R. No. 1160/286 was illegally transferred by Otieno Aggrey Ambala Junior to Asif Farooq Butt (*caveator*); L.R. No. 1160/287 was transferred to **Samuel Mose Nyamato** during the administration of Bhupen

Shah; Otieno Ambala illegally transferred one acre in L.R. No. 1160/288 to Asif Farooq Butt which was in the hands of Oduor Hawi Ambala and which he had sold to a third party, and that the sale to the caveator of L.R. No. 1160/286 by Otieno (*deceased*) was null and void as he was not the administrator of the estate.

[22] The Court proceeded to revoke all grants and orders in the following terms:-

“Consequently I revoke all the grants earlier issued to any of the parties herein in particular the grants dated 26/3/1987, and 10/2/2006 and further the consent orders together with its consequences following therefrom dated 3/12/2004; 2/4/2008 and 28/11/2008.”

In addition, the Court ordered that the Karen land L.R. Nos. 1160/286; 1160/288 each measuring 5 acres (*total 15 acres*) to revert to the estate and redistributed the total of the 15 acres to the beneficiaries. Regarding the rest of the other estate, the Court said:-

“As earlier noted, the following properties have since been distributed by consent and it appears that none of the beneficiaries has any objection and I shall simply reconfirm...”

Lastly, the Court appointed Oduor Hawi Ambala, Perez Alice Auma and Nancy Ambala as joint administrators of the estate.

[23] The appeal is brought on the grounds *inter alia* that, the learned Judge erred in law and in fact in holding that:-

- (i) the beneficiaries could not ratify the consent entered on 3rd December, 2004.
- (ii) the firm of Waruhiu, Muite & K’owade was not acting on behalf of all the beneficiaries.
- (iii) the consent of 3rd December, 2004 was null and void while sanctioning part of the consent.
- (iv) the two applications had been bought after a long delay.
- (v) in distributing the estate without valuation.
- (vi) the decision was against the weight of evidence.

The main relief sought by the appellants is that the consent entered on 3rd December, 2004 be reinstated and upheld. The cross-appeal by the caveator is based on the grounds that the Judge erred in law and fact in holding: that the original letters of administration were revoked; that L.R. No. 1160/286 was illegally transferred; and that L.R. No. 1160/286 was available for distribution. The reliefs sought include an order that L.R. No. 1160/286 was not available for distribution.

[24] It is important at the outset to understand the implication of the revocation of the grant and orders by the learned Judge.

Firstly, the Grant dated 26th March, 1987 was revoked. The learned Judge does not refer to that grant in his judgment nor can it be traced in the record. The record shows that the 1st grant issued to the four administrators is dated 26th August, 1986. The 2nd grant was issued to H.R. Sahi on 26th June, 1989. It is not clear to which grant the order refers. The grant dated 10th February, 2006 refers to the certificate of confirmation of the grant issued by **Tanui, J.** to Walter Ambala and Alfred Jacob Ambala which distributed the estate in accordance with the consent order of 3rd December, 2004. The effect of revocation of the confirmed grant is that the distribution was revoked. The consent order of 3rd December, 2004 distributed the estate to the beneficiaries. The consent order of 2nd April, 2008 required the beneficiaries to file a document confirming their specific portions in respect of the Karen property, Siaya property and Ambala shops in Kisumu. The order also required Walter Ambala and Alfred Jacob Ambala to give accounts and upon presentation of accounts to cease from acting as administrators. There was no order given on 28th November, 2008. Apparently the revocation relates to the consent order recorded on 25th November, 2008 where beneficiaries of the Karen property distributed it amongst themselves.

It is clear that one aspect of the judgment appealed against was to invalidate all dealings and transactions relating to the estate with effect from 3rd December, 2004.

The second aspect of the judgment was to invalidate all prior transactions relating particularly to L.R. 1160/286, 287 and 288 Karen and to revert them to the estate for distribution to the beneficiaries.

[25] It is apparent from the judgment appealed from that the court invalidated the consent order of 3rd December, 2004 on two grounds; firstly, that K’owade who represented the beneficiaries at the time the consent was recorded had not been instructed by all the beneficiaries and hence he could not have entered into a binding contract on their behalf and, secondly, the beneficiaries had not consented to the distribution of the estate as shown on the consent order.

[26] As regards the appointment and authority of James Ratiri K’owade (*now deceased*), the firm of Waruhiu & Muite Advocates in which he was working filed the application dated 23rd March, 1998. The application was made by Otieno Ambala Junior and Nancy Ambala against Bhupen M. Shah who was the administrator of the estate. By then Rajni Somaia was acting for the estate and the respondent. Bhupen M. Shah had been appointed as an administrator at the request of all beneficiaries. The applicants wanted the grant that was confirmed in favour of Bhupen M. Shah, reviewed, varied and set aside and the removal of Rajni Somaia as advocate for the estate. K’owade gave a notice of that

application to Beryl Achieng, Chizi Ambala and Auma Ambala. That application was supported by Beryl Achieng Odinga as shown in her affidavit. The affidavit filed in response to the notices indicates that it was drawn by herself and her two children Auma Ambala and Chizi Ambala. Subsequently, now the firm of Waruhiu, K'owade advocates filed an application dated 21st April, 2004 already referred to. It is that application which precipitated the recording of the impugned consent order of 3rd December, 2004.

[27] Nancy Ambala is the one who made the application jointly with Otieno Ambala, the eldest son of the deceased. Nancy Ambala stated in her evidence that she was at first appointed as one of the four administrators to look after the interest of her four children and Joseph Odhiambo was approached by Beryl Achieng Odinga to look after the interest of her two children. Odhiambo testified at the trial that at the time the consent was recorded K'owade was representing Oduor, Nyerere, Ogola, Nancy, Auma, Akinyi, Opiyo, Adongo, Beryl and other beneficiaries; that he was represented by Oguso and that the consent was between him and the rest of the beneficiaries. Oduor Hawi Ambala stated in his evidence that K'owade was representing almost everybody.

Marvin Opiyo Ambala (1st respondent) testified that he was aware that his mother Nancy Ambala had appointed K'owade and that he and his sisters never told their mother after coming of age that they wanted to take care of the estate. He admitted that he visited K'owade's office. The appellant's counsel has also referred to e-mails exchanged between the beneficiaries showing that K'owade continued to be the family lawyer – a position which Ogola Ambala objected to in 2005. Odhiambo Ambala testified that at the time the consent was recorded no other advocate was acting for the estate.

[28] The record shows that on 3rd December, 2004, when the consent was recorded Oguso appeared for Odhiambo Ambala, Odeny for Bhupen Shah and K'owade for the rest of the beneficiaries. The genuineness of the judicial proceedings relating to the recording of the consent order has not been impugned. After the consent was recorded, a family meeting which discussed the distribution of the estate was held on 14th December, 2004. The two respondents were present and nobody disputed that K'owade was acting for the family.

[29] Referring to the evidence, **Mr. Mungu**, learned counsel for the appellant submitted that K'owade was acting for the family. The respondents' counsel did not in her written submissions address the issue of the appointment of K'owade.

[30] We have reconsidered the evidence. It is clear that the application which led to the recording of the consent was for the benefit of the estate. Nancy Ambala, the mother of the 1st respondent was one of the two applicants who instructed K'owade to file the application. K'owade gave notice of that application to Beryl Achieng Odinga, the mother of the 2nd respondent also to the 2nd respondent and her sister Perez Auma. They all supported the application and filed an affidavit. No beneficiary other than Odhiambo Ambala appointed any other advocate. We are satisfied that the finding by the learned Judge that K'owade had not been appointed by the respondents was erroneous and against the preponderance of the evidence.

[31] On the issue whether the consent of 3rd December, 2004 was made with the authority of the beneficiaries, the appellant relied on the documentary evidence before and after the recording of the consent order and the oral evidence. The respondents' counsel did not refer to the evidence in her written submissions. The respondents' counsel however submitted, *inter alia*, that, the consent was an illegality as there was no application for confirmation of the grant supported by an affidavit and consents of the beneficiaries on distribution, and that such an illegal consent order was not capable of ratification.

[32] The issue of illegality of the confirmed grant due to procedural defects has not been properly brought before this Court.

Whilst it is true that the respective applications by the respondent in the High Court were mainly based on the omission to follow the procedural requirements before the confirmation of a grant, nonetheless the High Court did not base the relevant part of the decision on that issue. **Rule 94(1)** of the Court of Appeal Rules provides:-

“A respondent who desires to contend on an appeal that the decision of the Superior Court should be affirmed on grounds other than or additional to those relied upon by the Court shall give notice to that effect specifying the grounds of his contention.”

The respondents did not give and serve such a notice on the appellants' counsel with the result that the appellants' counsel did not submit on that issue.

[33] For completeness, however, we observe that both **Section 71** of the LSA and **Rule 40** of the Probate and Administration Rules (*P & A Rules*) regulate the confirmation of grants.

As **Section 71(2)** of LSA indicates, the court exercises its jurisdiction to deal with the confirmation of the grant either when such application for confirmation is made or when a dispute in respect of confirmation of the grant has been referred to court.

The proviso to **Section 71(2)** states that:-

“in case of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

By **Section 71(2) (b)**, a court has power to issue a confirmed grant to a person other than the one holding a grant. **Rule 40(1)** and **40(2)** of P & A Rules requires that the application for confirmation should be made by summons in prescribed form supported by an affidavit. A person who wishes to object to confirmation is allowed by **Rule 40(6)** to file an affidavit of protest, and by **Rule 40(8)**, if no such affidavit of protest is filed and consents of beneficiaries in the prescribed form has been received, the court may allow the application without the attendance of

any person.

[34] As **Section 72** of the Interpretation and General Provisions Act provides deviation from the prescribed form which does not affect the substance or which is not calculated to mislead does not render a document void.

Further it is now a guiding principle in the administration of justice under **Article 159 (2) (d)** that justice shall be administered without undue regard to procedural technicalities. In the process of the confirmation of the grant the substantive requirements are that the respective identities and shares of all persons beneficially entitled are ascertained and that each person is given an opportunity to consent to the confirmation or to file an affidavit of protest.

In the light of the foregoing, the fact that a formal application for confirmation supported by an affidavit and formal consents of beneficiaries was not made does not solely render the impugned consent null and void.

[35] Moreover, the application which led to the confirmation of the grant raised several complaints of maladministration of the estate including failure by the administrator to take steps to wind up the estate. By the time the application was made, the estate had not been distributed for over 18 years. The impugned consent had ascertained the identities of the beneficiaries and their respective shares. The application brought the dispute relating to the winding up of the estate to the door of the court and the court had jurisdiction by virtue of **Section 71 (2)** LSA to record a consent presented to court orally by the estate's advocate and other advocates and to issue a confirmed grant to the two other persons. It follows that the consent order confirming the grant is not null or void.

[36] Turning to the issue of the consent to distribute in accordance with the consent order, it is Beryl Achieng Odinga and her two children; Nancy Ambala and her four children who claimed that they did not give their consent to Mr. K'owade. The distribution of the estate mainly followed the proposal of Rajni Somaia dated 29th June, 1999. The proposal was received by the firm of Waruhiu and Muite. The learned Judge made a finding of fact that the proposal was circulated to the beneficiaries but that there was no formal discussion or agreement on the proposal. Three of the children of Nancy Ambala – Adongo Ambala, Opiyo Wagenaar Ambala and Marvin Ambala stated in their evidence at the trial that they signed the consent agreeing to division of the estate in accordance with Somaia's proposal. There were also e-mails from Perez Auma who claimed to be an attorney for Chizi Ambala, written prior to the consent of 3rd December, 2004 indicating that although she was of the view that the Somaia's proposal was unfair she supported the distribution according to that proposal as it would resolve the disputes in the estate.

[37] The meeting of the family held on 14th December, 2004 was admitted. It discussed the distribution of the estate in accordance with the consent order. The minutes of the meeting show that the consent had been circulated before and **Minute No. 5** shows that Auma Ambala, Chizi Ambala, Opiyo Ambala, Adongo Ambala are amongst the beneficiaries who supported the division according to Somaia's proposal. The consent order authorized the 1st respondent and Alfred Jacob Ambala to execute any legal document for purpose of effecting the distribution of the estate.

[38] Thereafter, the 1st respondent and Alfred Jacob Ambala embarked on the distribution, sold some valuable properties and distributed the proceeds to all the beneficiaries. They also distributed the rest of the properties. On 10th June, 2006, the grant given to the two by virtue of the consent order of 3rd December, 2004 was confirmed by **Tanui, JA**. It is noteworthy that the application dated 14th August, 2007 which led to a consent order of 2nd April, 2008 requiring the beneficiaries to identify their respective portions of the estate and the order of 25th November, 2008, sharing the Karen land to the beneficiaries in accordance with the consent order of 3rd December, 2004 was filed by Mungu & Co. Advocates on behalf of the beneficiaries indicated in the application including Perez Auma Ambala and Chizi Adhiambo Ambala.

[39] The respondents and the beneficiaries who supported their respective applications were claiming equitable beneficial interests in the estate. The equitable principles and equitable defences thus apply. The defences raised by the appellants at the trial included ratification and laches. The appellants' counsel submitted that the beneficiaries ratified the consent at the meeting of 14th December, 2004, and by conduct.

The ratification referred is in essence the equitable doctrine of acquiescence which denotes assent to an act infringing a right after the violation of the right has been completed and the claimant has become aware of the violation.

As regards laches, the authors of **Halsbury's Laws of England – Fourth Edition – Re-issue, Vol.16 (2)** state in part at paragraph 914:

“A court of equity will not allow a dormant claim to be set up when the means of resisting it, if it turns out to be unfounded, have perished.

Where the claim is to set aside a conveyance of property, the defendant may have settled his mode of living upon the assumption that the conveyance was valid. The fact that a property has passed through various hands, and that money has been expended on it, is a strong reason for not setting aside an improper sale by a trustee...”

[40] From the above analysis, it is clear that the respondents were aware of the Somaia's proposal long before the consent of 3rd December, 2004 was recorded. Although they considered the distribution according to the proposal to be unfair, they, particularly, the 2nd respondent and her sisters supported it as means of resolving the dispute. Even after becoming aware of the consent order within two weeks, they acquiesced expressly in the meeting of 14th December, 2004 and by conduct to the consent order being effected. It is only after a lapse of 5 years that the application to reverse all what had happened was made.

In the circumstances, we are satisfied that the respondents and other beneficiaries gave consent to the confirmation of the grant in terms of the consent order. Even assuming that they did not expressly give consent to the distribution (*which is not the case*), they certainly

acquiesced to it and expressly agreed to the vesting of the estate to the respective beneficiaries. The beneficiaries of the Karen land altered their positions and sold part of the Karen land. The doctrines of laches, (*unconscionable delay*) acquiescence and waiver favoured the appellants.

[41] The main purpose of the two applications which were allowed by the High Court was to achieve an equitable distribution of the Karen land. Indeed, the 1st respondent stated in his evidence at the trial that the main contention was the Karen land. The learned Judge appreciated that the controversy was caused by the distribution of the Karen land. The respondents' counsel has reiterated that fact in the written submissions where he states in part:-

“Further, at the look of all the proceedings that has been going on, the distribution of all the other assets in the estate has never been in dispute, dispute only arises for the parcel of land in Karen where beneficiaries from the first house who have never been administrators have greatly benefited by making illegal sales.”

[42] The appellants' counsel submitted in part that the effect of the judgment is that portions of the estate that belong to legitimate purchasers were distributed without hearing them. The counsel for the caveator has submitted in support of the cross-appeal that the Karen land L.R. No. 1160/286 was not an issue in the proceedings and that the property belonged to third parties who were not given an opportunity to be heard. The 1st appellant gave evidence at the trial regarding the status of portions of the Karen land. It was his evidence that Nyamato has developed his portion and that Butt (*caveator*) sub-divided L.R. No. 1160/286 and transferred to many people.

[43] By **Section 93 (1)** of the LSA, the validity of a transfer by a personal representative to a purchaser is not affected by a subsequent revocation or variation of the grant. Pursuant to the order of the Court made on 8th February, 2018, the parties herein filed abstracts of title relating to the three Karen properties affected by the impugned judgment. As already indicated in paragraph 5 of the judgment, it is the administrator H.R. Sahi who applied for leave of the court to sell three parcels of Karen land including L.R. Nos. 1160/286 and 287. The application indicated that he intended to use the proceeds of sale to pay some liabilities of the estate to pave the way for the distribution of the estate. The learned Judge did not revoke the grant issued to H.R. Sahi.

The abstract of title shows that the caveator was registered as proprietor of L.R. No. 1160/286 on 2nd July, 2004. Thereafter the caveator sub-divided L.R. No. 1160/286 into several portions and sold the sub-divisions to several purchasers, sometime in August, 2004. Some of those sub-divisions have been sub-divided by the purchasers and some of the purchasers have charged their portion to banks. L.R. No. 1160/287 was transferred to Samuel Mose Nyamato who was registered as proprietor on 3rd September, 1999. L.R. No. 1160/288 has been sub-divided and the sub-division L.R. Nos. 1160/950 and 1160/951 sold to **Dick Wathika** and **Nderitu Maina** respectively. Three sub-divisions were transferred to **Ogola Kodhek Ambala**. It is not clear whether those parcels are still registered in his name.

There was evidence from the 1st respondent that there were pending suits in the High Court in Nairobi relating to parcel Nos. 1160/286 and 1160/287.

It is also apparent from the record that all the purchasers who bought land from the caveator and other purchasers including Nyamato; Dick Wathika and Nderitu Maina were not given notice of the proceedings or a hearing before their titles were cancelled.

[44] It is clear from the foregoing that L.R. Nos. 1160/286, 1160/287 and L.R. No. 1160/288 were beyond the reach of the estate at the time the impugned judgment was delivered. In the circumstances of the case, the order reverting the three properties to the estate and redistributing the properties was erroneous.

[45] The caveator's cross-appeal relates to L.R. No. 1160/286. It does not relate to the one acre claimed in L.R. No. 1160/288. The transfers done to beneficiaries to effect the impugned judgment of the court all done while this appeal was pending for hearing and the subsequent transfers to **Hadija Asif Butt** (*who bears part of the caveator's name*) do not make this appeal moot.

The contention by the caveator in the cross-appeal that the grant given to the four administrators on 26th August, 1986 was never revoked is frivolous. As the High Court correctly held, the grant was revoked on 26th August, 1986. As **Section 84** of the Evidence Act provides, there is a presumption that the record of the judicial proceeding is genuine and correct. The caveator did not rebut that presumption.

[46] In conclusion, we hold that there was no factual, legal or equitable justification for rescinding the consent order recorded on 3rd December, 2004 or any subsequent orders; that the consent was completely executed by sale of some assets of the estate and by Assents vesting the residual of the estate on the beneficiaries; that the learned Judge erred in law in rescinding lawful orders made by Judges of concurrent jurisdiction particularly the orders of Shields, J. sanctioning the sale of the three Karen properties and, that the L.R. Nos. 1160/286, 287 and 288 were beyond the reach of the estate.

[47] 1. In the premises, the appeal is allowed;

2. the Judgment of the High Court delivered on 29th June, 2016 is set aside in its entirety.

3. For avoidance of doubt:

(a) the consent order of 3rd December, 2004 is restored, the grant dated 10th February, 2006, remains valid plus orders made on 2nd April, 2008 and 28th November, 2008.

(b) The cancellation of transfers of L.R. Nos. 1160/286, 287 and 288 by the High Court is revoked. The Chief Land Registrar to restore entries relating to those three parcels of land and sub-divisions thereof on the Register as of 29th June, 2016.

(c) All transactions relating to L.R. No. 1160/286, 287 and 288 and the respective sub-divisions and Assents after the date of the judgment of the High Court – that is after 29th June, 2016 are revoked and entries thereof to be restored as in (b) above.

4. The cross-appeal is allowed to the extent that the revocation of the transfer of L.R. No. 1160/286 is set aside.

5. As this is a family dispute which has been raging for over 20 years, we order each party to bear his/her own costs of the appeal.

Orders accordingly.

Dated and Delivered at Kisumu this 26th day of April, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR