Nailali v Ogola (Civil Appeal E006 of 2023)
[2025] KEHC 5026 (KLR) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5026 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E006 OF 2023

WM MUSYOKA, J

APRIL 28, 2025

BETWEEN

GILBERT OKOCH NAILALI ..... APPELLANT

AND

VICTORINE SHIKUKU OGOLA ..... RESPONDENT

(An appeal arising from orders made in the ruling of Hon. L. Ambasi, Chief Magistrate, CM, in Busia CMCSC No. 140 of 2012, of 31st May 2022)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, said to be in Busia CMCSC No. 140 of 2012, of 31st May 2022.

2. The grounds of appeal revolve around the trial court not appreciating that the appellant had purchased 3, and not 2, acres from the deceased in 1978; ignoring the evidence and dispossessing the appellant of 1 acre; issuing a certificate of confirmation of grant against orders that had awarded him 3 acres; failing to properly interrogate the facts about Samia/Budongo/1077; failing to find that Patrick Ogolla had sold a further 3½ acres to the appellant during lifetime, and reduced his allocation to 2 acres without justification; failing to deal with the estate of the late Patrick Ogolla in separate proceedings in his estate; re-distributing the estate of the deceased, when the same had already been distributed as per the certificate of confirmation of grant of 10th August 2000; ignoring the judgement in Busia ELC No. 82 of 2016, which had confirmed the appellant as the absolute owner of Samia/Budongo/2373 measuring 3 acres, and purporting to cancel titles and re-distributing the estate; among others. It is sought that the appeal be allowed, the orders made on 31st May 2022 be set aside, the estate be re-distributed, and that he be awarded 6½ acres.

3. The cause, in Busia CMCSC No. 140 of 2012, was in the estate of Ogola Onyango, who had died sometime in 1988, was initiated in Busia SPMCSC No. 108 of 1995. The cause was at the instance

of Paul Mukanda Ogola, in his capacity as son of the deceased. He listed himself and Barasa Ogola as the survivors of the deceased. The deceased was said to have died possessed of ½ share of Samia/Budongo/1072. Letters of administration intestate were duly made on 13th December 1995, to Paul Mukanda Ogola, and a grant was issued, of even date. That grant was confirmed on 10th August 2000. A certificate of confirmation of grant was issued, dated 10th August 2000. Barasa Ogola got ½ share of Samia/Budongo/1072, while Gilbert E. Okochi Naliali, the appellant herein, a purchaser, got 3 acres from the ½ share due to the deceased.

4. A revocation application, dated 17th July 2017, was mounted by Victorine Shikuku Ogolla, the respondent herein, upon the demise of Paul Mukanda Ogola and Barasa Ogola, both sons of the deceased. The respondent was a widow of the late Paul Mukanda Ogola, and wished to take over from him as administratrix. That application was allowed on 13th May 2019, as it was not opposed, paving way for appointment of the respondent as administratrix of the estate.

5. The respondent then filed an application for confirmation of her grant, dated 2nd October 2020. She identified 12 individuals as survivors of the deceased, being herself, Barasa Ogolla, Johnson Oloo Barasa, Alex Bwire, Mophat Nyongesa, Peter Oduori, Erick Barasa, Eugene Wandera Ogolla, Kevin Odhiambo Barasa, Lucas Ogos, Vincent Okuku and Julius Oundo. The actual relationship between those individuals and the deceased was not disclosed. She proposed distribution of 2 assets, Samia/Budongo/1072 and 1077. It was proposed that Amos Ofunja Magunia get 3 acres, with the remainder being registered in the joint names of the children of Barasa Ogolla Onyango, said to be Johnson Oloo Barasa, Alex Bwire, Mophat Nyongesa, Peter Oduori, Erick Barasa, Eugene Wandera Ogolla and Kevin Odhiambo Barasa. She proposed joint registration of the 5 acres in Samia/Budongo/1077 to herself and Lucas Ogos, Vincent Okuku and Julius Oundo, with the appellant taking 2 acres.

6. The appellant protested, vide an affidavit he filed on 14th December 2020. He explained that he had bought a portion of Samia/Budongo/1072 in 1978, from the deceased, and Samia/Budongo/2373 was hived off it in 2000, at transmission, and registered in his name. He essentially argued that Samia/Budongo/1072 no longer existed, and could not be distributed in the manner proposed by the respondent.

7. The matter was thereafter transferred to the Chief Magistrate's court. The record is vague on how the confirmation application, with the protest to it, was disposed of. It is not clear whether any oral or viva voce hearing was conducted, nor whether the application was canvassed by way of written submissions. What is clear is that an order was made on 17th June 2021, dismissing the protest, confirming the grant and approving the distribution proposed by the applicant. That 1-line order was followed by a ½ page ruling along similar lines. It appears to have been a sort of ex tempore order, followed by what was meant to be a detailed ruling. A certificate of confirmation of grant was subsequently issued, dated 21st June 2021.

8. The respondent herein filed an application, dated 7th February 2022, seeking cancelation of Samia/Budongo/2371, 2372 and 2373 to revert them to Samia/Budongo/1072; and Samia/Budongo/1995 and 1996, to revert them to Samia/Budongo/1077. These subdivisions had been after the initial confirmation orders of 2000, and the cancellation sought was to facilitate transmission of the estate in accordance with the confirmation orders of 2021. The appellant herein, as a protestor, contested that, on grounds that he was unaware that the matter had been transferred to the lower court, and had proceeded.

9. He filed an application, dated 11th April 2022, seeking to have the proceedings, which had culminated in the confirmation orders of 17th June 2021 set aside. He averred that the orders by Karanjah J, of 8th April 2021, for transfer of the matter to the lower court, were made in his absence. Regarding the

mention for 27th April 2021, before the Chief Magistrate, he averred that the respondent had served his Advocate with a notice to appear at the High Court. The matter, nevertheless, proceeded before the Chief Magistrate, without him. A further mention happened on 18th May 2021, in respect of which he was never served. A ruling was delivered without his input. He urged that the proceedings be set aside, to allow him to have his day in court.

10. The respondent replied to the application, dated 11th April 2022. She averred that the appellant was aware of the proceedings of 27th April 2021, 18th May 2021 and 17th June 2021, as he had filed an affidavit of protest, sworn on 11th December 2020, which was served on her Advocate. He was accused of taking dates for hearing, then failing to attend court on the due date, and 8th April 2021 was given as an example. She averred that the appellant had been served with a notice of the date scheduled for hearing, but failed to appear, and 27th April 2021 was given as an example. It was urged that the application was frivolous.

11. The application, dated 11th April 2022, was argued on 24th May 2022, with the Advocates for both sides being heard. The application was dismissed on 31st May 2022, in a ruling dated 30th May 2022. The application, dated 7th February 2022, was canvassed by written submissions, and was allowed on 25th May 2023, in a ruling of even date.

12. The appellant was aggrieved by the ruling delivered on 31st May 2022, and obtained leave of the High Court, on 8th November 2022, in Busia HCC Miscellaneous Application No. E038 of 2022, to challenge the orders made in that ruling, and brought the instant appeal, founded on the grounds that I have set out in paragraph 1 of this judgement.

13. Directions were taken, on 29th April 2024, for canvassing of the appeal by way of written submissions. I have seen, from the record, written submissions by both sides.

14. In his written submissions, the appellant has not identified the issues for determination, but has submitted on the individual grounds of appeal in his memorandum of appeal. On his entitlement to 3 acres out of Samia/Budongo/1072, he submits that the 3 acres were carved out, and Samia/Budongo/2373 was registered in his name. He submits on how the 3 acres had been awarded to him in proceedings before the Funyula Tribunal Court. On Samia/Budongo/1077, he submits that the same does not form part of the estate of the deceased, as it belonged to the son of the deceased, called Patrick Ogola, the late husband of the respondent. He submits that the same ought to not have been disposed of in the confirmation application. He submits that the trial court was obliged to understand the case before it, and where more information was required, to have sought it, to obviate sanctioning fraud, as he submits happened here, with respect to the loss, he allegedly largely suffered, of 1½ acres, because of the trial court not appreciating the facts of the case. He has cited In re Estate of Job Ndunda Muthike (Deceased) [2018] eKLR (Odunga, J) and Babadurali Ebrahim Samji vs. Al Noor Jamal & 2 others [1998] eKLR (Gicheru, Akiwumi & Tunoi, JJA).

15. The respondent submits the appeal is on the ruling of 31st May 2022, on the application, dated 11th April 2022, which turned on the proceedings that were conducted on 27th April 2021, 18th May 2021 and 17th June 2021. She argues that that application was not on the disposal or distribution of the estate, but on the dismissal of the application, dated 11th April 2022. She submits that an appeal against the confirmation orders should have been against the orders made on 17th June 2021. She further submits that the appeal, as framed, in the grounds of appeal in the memorandum of appeal, raises issues that have nothing to do with the proceedings of 27th April 2021, 18th May 2021 and 17th June 2021. She submits that the appeal should be about not being given an opportunity to be heard on 27th April 2021, 18th May 2021 and 17th June 2021, but not on how the appellant purchased 3 acres in Samia/

Budongo/1072, how the trial court ignored his evidence on Samia/Budongo/2373, how the trial court ignored the order of 10th August 2000 and how that court failed to take into account the judgement in Busia ELC No. 82 of 2016.

16. She asserts that the grounds of appeal turn on distribution of the estate, which happened on 17th June 2021, yet the appeal claims to be against the orders that were made on 31st May 2022. It is submitted that no leave to appeal was obtained against the ruling of 31st May 2021. It is acknowledged that there was leave obtained on 30th November 2022, but the appeal was lodged on 10th March 2023, without extension of time to file appeal. It is urged that the appeal is incompetent.

17. 2 issues emerge for determination, from the filings before me. The first is whether the appeal before me is competent, and the second is whether there is merit for the setting aside of the orders made on 31st May 2022.

18. Let me start by stating that these proceedings started as a succession cause at the Senior Principal Magistrate's Court at Busia, being Busia SPMCSC No. 108 of 1995. The initial grant issued out of Busia SPMCSC No. 108 of 1995. That grant was confirmed by the Resident Magistrate, Hon. WO Okutta, on 10th August 2000, and a certificate of confirmation of grant was subsequently issued, of even date. The matter then moved to the High Court, in proceedings that are not clear, as they are not apparent on the record before me, for I see that by 2012 the file had been taken over by the High Court, and had become Busia HCSC No. 140 of 2012. It was handled by several Judges, thereafter, being W. Tuiyott J, now of the Court of Appeal; W. Korir J, now of the Court of Appeal; Kiarie J and Karanjah J. Karanjah J made an order, on 8th April 2021, transferring the matter to the Chief Magistrate's Court. The transfer happened and the matter has since been handled by Hon. Mrs. L. Ambasi, CM, and Hon. EA Nyaloti, CM. The impugned order of 31st May 2022 was by Hon. Mrs Ambasi, CM.

19. Why do I give all this history? Sometimes one gets a sense that some consider it a difficulty to deal with orders that were made at the High Court, before the matter was transferred from the High Court to the Chief Magistrate's Court. I should see no difficulty with that, for once the file is transferred, the orders made by the High Court would be adopted by the Chief Magistrate's Court, and would become orders of the Chief Magistrate's Court, to be handled as orders of that court and not of the High Court. See Musine vs. Osamo (Sued as co-administrator of the Estate of Stephen Osamo (Deceased) [2023] KEHC 20217 (KLR)(Musyoka, J). I shall, if I will have to, should that issue come up, handle the orders made by W. Tuiyott J, W. Korir J, Kiaire J and Karanjah J as if they were orders that were made by the Chief Magistrate.

20. The appeal herein is a first appeal, from the Chief Magistrate to the High Court. I sit as a first appellate court, and I am required by law to evaluate the record of the trial court and to come to my own conclusions. See Peters vs. Sunday Post Limited [1958] EA 424 (Sir Kenneth O'Connor P, Briggs VP & Sir Owen Corrie, Ag JA), Selle and Another vs. Associated Motor Boat Company Ltd & Others [1968] EA 123 (Sir Clement De Lestang, VP) and In re Estate of Charles Macharia Muraguri (Deceased) [2025] KEHC 4849 (KLR) (Odero, J). Besides exercising an appellate jurisdiction over the matter, I am alive to the fact that I am also entitled to exercise a supervisory jurisdiction over the Chief Magistrate's Court, by dint of Article 165(6)(7) of the Constitution of Kenya, 2010, which empowers me, as High Court, to call for the records of a subordinate court, to satisfy myself of the correctness of the proceedings conducted by that court, and to make such orders as appropriate, to right any errors in those proceedings, for the sake of justice. I shall handle this appeal bearing in mind those 2 overlapping jurisdictions.

21. Article 165(6)(7) of the Constitution of Kenya states as follows:

> " 165. High Court
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> (1) ...
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> (2) ...
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> (3) ...
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> (4) ...
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> (5) ...
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> (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
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> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

22. I have very closely and scrupulously perused the file herein. There are gaps in the manner the matter was handled. Whereas the matter commenced at the magistrate's court, it somehow ended up at the High Court. There is no clarity as to how that happened. That clarity should have been brought out. It could be that a revocation application was mounted, at the High Court, as was the practice prior to 2016, after the new Magistrates Court Act, Cap 10, Laws of Kenya, commenced on 2 January 2016, by way of a miscellaneous cause, and the grant made in Busia SPMCSC No. 108 of 1995 was revoked, and the matter in Busia SPMCSC No. 108 of 1995 was taken over by the High Court, and was handled as a High Court cause, until it was subsequently transferred back to the magistrate's court, as indicated above.

23. I raise this as the court, in Busia SPMCSC No. 108 of 1995 had confirmed the grant, in 2000, and a certificate of confirmation of grant issued, distributing ½ share of Samia/Budongo/1072, between Barasa Ogola and the appellant herein. There are documents in the file, indicating that forms, to facilitate transmission of the estate, as per the distribution of 2000, were generated and executed by the magistrate. There are documents, on record, pointing to the estate having been transmitted in accordance with the confirmation orders of 2000.

24. When the matter came to the High Court, in 2012, as Busia HCSC No. 140 of 2012, it would appear that the issue as to what became of the proceedings in Busia SPMCSC No. 108 of 1995 did not come up, and it is not clear of what became of the orders that had been made in that cause. Were they set aside, to set the stage for fresh confirmation proceedings? None of the parties have addressed that issue in these proceedings. Whatever happened to the orders made in Busia SPMCSC No. 108 of 1995 would have a bearing on the proceedings conducted in Busia HCSC No. 140 of 2012, which have given rise to these appellate proceedings. Was the grant in Busia SPMCSC No. 108 of 1995 revoked by the High Court, and, if so, on what terms, and for what reasons? In which proceedings was that done? And where is a copy of the judgement made in those proceedings? Indeed, without evidence that the confirmation proceedings of 2000, in Busia SPMCSC No. 108 of 1995, were ever set aside,

it would be remiss to conduct fresh confirmation proceedings. It would appear that that is where the appellant is coming from, for it does appear that the confirmation orders in Busia SPMCSC No. 108 of 1995 were implemented, transmission happened, Samia/Budongo/1072 was subdivided, and Samia/Budongo/2373 was created and registered in favour of the appellant.

25. The other possibility, which I find more likely, is that there were no separate revocation proceedings, to revoke the grant in Busia SPMCSC No. 108 of 1995, but that, as was the practice prior to 2016, when the High Court station was established at Busia, the magistrates court lost jurisdiction over succession matters, and Busia SPMCSC No. 108 of 1995 was automatically taken over by the High Court, and became Busia HCSC No. 140 of 2012. The High Court began sitting at Busia in 2010/2011, and that could explain it. That takeover, if at all, of the succession cause by the High Court, meant that the administrator appointed, in Busia SPMCSC No. 108 of 1995, remained in office, and the proceedings conducted in Busia SPMCSC No. 108 of 1995 became proceedings of the High Court, inclusive of the confirmation, in 2000, of the grant made in 1995, and the said grant of 1995 and its certificate of confirmation of 2000 should have been re-issued under the High Court cause.

26. The administrator appointed in Busia SPMCSC No. 108 of 1995, in 1995, Patrick Mukanda Ogola, the late husband of the respondent, died. The respondent filed an application, dated 17th July 2017, for substitution of her late husband as administrator. She disclosed that he died in 2000. That application was allowed on 13th May 2019, by Kiaire J, on grounds that it was unopposed. The Advocate for the appellant was present in court, and he indicated that he had no objection to the application being allowed. The allowing of that application made the respondent the administratrix of the estate.

27. There is often debate on the issue of substitution of dead administrators, and the courts have held that the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules, do not allow for such substitution. See In the Matter of the Estate of Mwangi Mugwe alias Elieza Ngware (Deceased) [2005] eKLR (Khamoni, J) and In re Estate of Popp Hans Joachim Ernst Gustav (Deceased) [2018] eKLR (W. Korir, J), In re Estate of Ngaigwo M'Shomba (Deceased) [2019] eKLR (Muchemi, J) and In re Estate of Muroko Kimitu (Deceased) [2019] eKLR (Gitari, J). It has been pointed out that once an administrator dies, their grant becomes useless and inoperative, whereupon an application ought to be mounted, under section 76(1)(e) of the Law of Succession Act, for revocation of the grant made to the dead administrator, and appointment of a fresh administrator. See John Karumwa Maina vs. Susan Wanjiru Mwangi [2015] eKLR (Kwach, Shah & O'Kubasu, JJA) and In re Estate of Elijah Okitah Mikah Tsimbwele (Deceased) [2021] eKLR (Musyoka, J). That is what the respondent herein should have done. That debate, around substitution and revocation of grants, is not ideal. Revocation of a grant technically kills the grant, by bringing its life to an end. The death of a grant-holder does not revoke it, for it merely renders it useless and inoperative. It would still, however, be a valid court paper, and can be used by a fraudster, hence the need to revoke it.

28. The concept of substitution of an administrator is alien to probate and administration. It is not provided for in the Law of Succession Act and the Probate and Administration Rules. An order for substitution of a dead administrator is one without legal foundation, for it is not provided for in the law. The status of an administrator of an estate is different from that of a party in ordinary civil proceedings. An administrator is not akin to a party in ordinary civil proceedings, in respect of which the law governing them provides for substitution of parties. See Order 1 rule 10 of the Civil Procedure Rules. Parties who apply for substitution of dead administrators, in probate and administration, and courts which grant such orders, appear to come from that mindset, guided by the provisions of the Civil Procedure Rules. However, these a probate and succession proceedings, which are guided by their own rules of procedure, set out in the Law of Succession Act and the Probate and Administration Rules. The processes, provided for in the Law of Succession Act and the Probate and Administration

Rules, do not provide for substitution of dead administrators, and the courts should be shy about granting such orders. I will explain why that should be so here below.

29. The effect of a substitution is that the person making the application takes over the position held by the person who has died. In ordinary civil proceedings, the applicant takes over the position of the dead party as a party, to continue the suit. A party in ordinary civil proceedings holds no grant. Such a party is not in the suit because the court has appointed them to some office, and they do not appear in the proceedings by dint of such appointment. He is a party in the proceedings, because he initiated them as a party, whether as a plaintiff or a petitioner or applicant, and the other side is a party because they were named as such in the suit papers by the other party. No grant is made to either of them, and the issue of revocation of their status in those cases does not arise. Substitution would merely require replacement of the dead party, in the court papers, by the applicant. The substitute is not a new party in the suit. It is not about addition of a new party to the suit. The party would remain the same, as either the plaintiff or petitioner or applicant or defendant or respondent, and the pleadings would equally remain the same, except for amendments to bring in the name of the substitute.

30. In succession proceedings, the party in the proceedings would be the petitioner, that is the person initiating the succession cause, and he or she can, quite properly, be substituted upon their death, based on the procedure provided for under the Civil Procedure Rules. However, that is only possible where a grant of representation has not been made. Where a grant is made, the petitioner becomes the administrator, and he cannot be displaced from that position by or through the simple process of substitution. Why? Because he is appointed administrator through a grant. He can only be removed from that office vide an order which revokes his grant. Where an administrator dies, his grant is not automatically revoked, it remains valid and subsisting, as discussed above, but useless and inoperative. It still must be revoked by an order of the court, to pave way for appointment of another administrator through or by a fresh grant.

31. Substitution of a dead administrator would mean that his grant would not be revoked, but the substitute simply steps into the old grant. It would mean that the name of the dead administrator, in the grant, should be removed, and replaced with that of the substitute. That would mean that the grant made to the initial administrator herein, now dead, Patrick Mukanda Ogola, on 13th December 1995, was not revoked, by the order of substitution, of 13th May 2019. Instead, he was substituted in that grant, of 1995, by the respondent, and the grant of 1995 should have been amended, to remove the name of the dead administrator, and replace it with that of the respondent. Indeed, that was what precisely happened here, for the grant of 1995 was amended on 19th October 2021, and re-issued to the respondent herein, Victorine Shikuku Ogola. That is not what was envisaged in the Law of Succession Act and the Probate and Administration Rules. See John Karumwa Maina vs. Susan Wanjiru Mwangi [2015] eKLR (Kwach, Shah & O'Kubasu, JJA).

32. I reiterate section 76(1)(e) of the Law of Succession Act, that upon the demise of an administrator, their grant becomes useless and inoperative, and a candidate for revocation. A grant of representation is issued in personam. See Florence Okutu Nandwa and another vs. John Atemba Kojwa, Kisumu CACA No. 306 of 1998 (Kwach, Shah & O'Kubasu, JJA)(unreported). It can only issue to the person it purports to appoint. It cannot be transferred to another person. See In re Estate of Ngaruhia Kamau (Deceased) [2021] eKLR (Sewe, J). When a person must be removed from office as administrator, that removal is achieved by the grant making his appointment being revoked, and not otherwise. The same applies to a dead administrator. The de-appointment, if such a word exists, is achieved through revocation of the grant. It is for that reason that substitution is an anathema. A dead administrator cannot be substituted. That would apply also to an administrator who has to be de-appointed.

33. The amended grant of letters of administration intestate, that was issued to the respondent, on 19th October 2021, was contrary to section 76(1)(e) of the Law of Succession Act. She could not be validly appointed on a grant made to a person who had died. She could not substitute him on his grant. The grant made to her is incompetent, ineffective, null and void. See John Karumwa Maina vs. Susan Wanjiru Mwangi [2015] eKLR (Kwach, Shah & O'Kubasu, JJA).

34. Upon being appointed, through that flawed process, the respondent then moved to have her incompetent grant confirmed. Her application was dated 2nd October 2020. The said application was itself incompetent, so far as it was founded on, and sought to confirm, an incompetent grant, and more, as shall become apparent shortly. She had succeeded her dead husband as administrator through his 1995 grant. That grant of 1995 had been confirmed in 2000, and a certificate of confirmation of grant had been issued, and transmission had happened based on it, through which the appellant became the proprietor of Busia/Budongo/2373, having been excised from Busia/Budongo/1072 in that transmission. The estate had been distributed, and the administration had been completed. There was nothing to be distributed through the application of 2nd October 2020.

35. Why do I say so? I have discussed the matter of substitution above, and brought out the fact that substitution merely means that the administrator, purportedly appointed through substitution, steps into the shoes of the dead administrator, in his grant. Of course, that is an anathema in law, for, under section 76(1)(e) of the Law of Succession Act, such a grant would be useless and inoperative. It cannot be made useful and operative through substitution of the dead administrator. Secondly, a grant of representation is personal, to the person appointed. The same grant cannot be used to appoint another person to take the place of the initial appointee following their death. As the respondent was taking over the 1995 grant, which had already been confirmed, and the property distributed thereafter, there would have been no basis for her to seek to have a fresh distribution, when her predecessor had already had the grant, which she took over, confirmed and the estate distributed.

36. There is no proof that that confirmation and distribution, of 2000, had been invalidated or set aside, subsequently, to pave way for another confirmation and distribution process. The order by Hon. Kiarie, of 2019, for the ill-fated substitution of the dead administrator with the respondent, did not interfere with the orders of 2000, which confirmed that grant of 1995; neither did the order of 2019 interfere with the transmission that happened under the confirmation orders of 2000. The application, upon which those substitution orders were made in 2019, dated 17th July 2017, did not invite the court to set aside the confirmation orders of 2000, nor to invalidate the transmission of the estate done on the strength of those confirmation orders. There was only 1 principal prayer, the substitution of the dead administrator. That was the order that the court granted, and the same could not possibly have had the effect of invalidating the confirmation orders of 2000, nor nullification of the transmission that followed under those orders.

37. For avoidance of doubt, the prayers, in the Notice of Motion, dated 17th July 2017, read as follows:

> " 1. That this application be certified urgent and heard on priority basis.
>
> 2. That the Petitioner Patrick Mukanda (deceased) be substituted with the Applicant herein by Victorine Shikuku Ogolla.
>
> 3. That costs of this application be provided for."

38. Again, for avoidance of doubt, I will recite the proceedings of 13th May 2019, when that application was allowed. It is recorded in the following terms:

> " 13.5.19
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> Before Hon. Justice Kiarie W. Kiarie J
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> C/A: Neuno/Doreen
>
> Inter: Eng/Kisw
>
> Mr. Ashioya for applicant
>
> Mr. Jumba for interested party
>
> Mr. Ashioya: - The application is not opposed.
>
> Mr. Jumba: - No objection.
>
> Ct: Application is allowed."

39. In view of the above, there was no legal foundation for the mounting of the application, dated 2nd October 2020, and for the making of the orders based on it. That would mean that all the consequential proceedings conducted thereafter, based on orders made on that application, and all the orders made thereafter were incompetent, null and void.

40. Let me say the last thing on substitution, before I get out of there. Although the courts have emphatically pronounced that there is no provision, in the Law of Succession Act and the Probate and Administration Rules, for substitution of dead administrators, and that the correct procedure is that the grant is revoked, and the proposed substitute is appointed on a fresh grant, parties still mount these substitution applications, and the courts still entertain them. There should be 2 approaches, whenever a court finds itself confronted by such applications. The first is to simply dismiss them, and direct the parties to file for revocation of the grant made to the dead administrator, and for appointment to take his place. The second is to presume that the party applying, for substitution of an administrator, is seeking revocation of the grant made to the dead administrator, and for their appointment to that office instead. In such cases, the court could proceed on that presumption, but make a clear order, that the grant to the dead administrator is revoked, and the applicant is appointed on a fresh grant.

41. The temptation to grant applications as prayed, because they are not opposed, should also be decried. Writing a considered ruling on any application is prudent, particularly in probate and administration matters, as that would give a chance to the court to go through the entire record, before it makes its orders. Not every unopposed application is merited. Granting unopposed applications, on the spot, without the benefit of having closely perused and appreciated the record and the history of the matter, could cause grief to the parties, instead of resolving the matter.

42. The handling, by the trial court, of the application of 2nd October 2020, was also problematic. It was a summons for confirmation of grant. A protest had been lodged against it, which made it contentious. That should have signalled that a formal hearing be conducted. Indeed, Rule 41(1) of the Probate and Administration Rules calls for such a hearing. The only time a formal hearing, of a confirmation application, would be unnecessary, is where there is compliance with Rule 40(8) of the Probate and Administration Rules. That is where a consent, in conformity with Form 37, is filed, duly executed by all the persons ascertained to be beneficially entitled to a share in the estate, and whose shares have been properly ascertained. Otherwise, the filing of a protest portends that a formal hearing be conducted.

43. Did that happen in this case? No. There was no consent, duly executed by all persons beneficially entitled, in conformity with Form 37, was filed to enable the court to proceed under Rule 40(8) of the Probate and Administration Rules. There was also no hearing of any kind. My reading of Rule 41(1) of the Probate and Administration Rules is that the hearing contemplated is viva voce. No hearing of that kind was conducted. Indeed, no hearing of any sort or colour was conducted. Written submissions, in my view, should not be an acceptable way of hearing contested matters. Even then, the parties herein were not invited to argue their respective cases by way of written submissions. No directions were ever taken or given on the manner of the disposal of the application, dated 2nd October 2020, before the trial court purported to dispose of it by its ruling of 17th June 2021. No directions had been taken or given, on that application, before or by the High Court, before the transfer order was made on 8th April 2021.

44. The trial record, after the matter was transferred from the High Court to the court of the Chief Magistrate, leading up to the making of the confirmation orders on 17th June 2021, reads as follows, going by the handwritten record:

> " 27-4-2021
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> Before: Hon Mrs Lucy Ambasi - CM
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> C/A: Diana
>
> Inter: Eng/Kisw
>
> Ashioya for Petitioner
>
> -Pray to submit & mention in 14 days.
>
> Court: Matter be heard in Ct & in on 18/5/2021.
>
> Signed 27/1/2021.
>
> 18-5-2021
>
> Before: Hon Mrs Lucy Ambasi – CM
>
> C/A: Diana
>
> Inter: Eng/Kisw
>
> Ashioya for 2nd objector
>
> Ct Ruling on Protest 17/6/2021.
>
> Signed
>
> 18/5/2021
>
> 17/6/2021
>
> Before: Hon Mrs Lucy Ambasi – CM
>
> C/A: Diana
>
> Inter: Eng/Kisw
>
> Petitioner pro se
>
> Grant confirmed & distribution as prayed. Protest dismissed. No. Orders.
>
> Signed 17/6/2021.
>
> Ruling

The N/M of 2/10/2020 seeks to Confirm a Grant of Letters and for the distribution of Estate as set out in Paragraph of the supporting affidavit.

The respondent filed a Protest affidavit where he deponed that "I pray the instant summons be dismissed only to the extent of interfering with my occupation of.." "suit land" at Paragraph 7.

In light of the above the Protestor having confirmed he has his 2 acres (in Paragraph 6) then I deem the Motion for Confirmation as unopposed and the same is granted as prayed, and the Estate be distributed as set out Para 5 of the Affidavit of the petitioner.

Each party to bear their costs.

Signed 17/6/2021."

45. The approach, adopted by the trial court, to dispose of the application, dated 2nd October 2020, without hearing the parties, and even without taking or giving directions on how the contested matter was to proceed, was unacceptable and contrary to the express provisions of Rule 41(1) of the Probate and Administration Rules, which states:

> "At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative."

46. Of course, I am alive to the fact that the appeal herein does not challenge that decision, but another made on 31st May 2022, but I am under an obligation, as an appellate court of first instance, to review the entire record, and come up with my own conclusions, on the propriety of the proceedings and the decision arrived at. I also have a duty, under Article 165(6)(7) of the Constitution, to supervise subordinate courts, and power to call for their records, and, upon perusing their proceedings, make orders or give appropriate directions on the proceedings conducted by them.

47. Let me now advert to the decision of 31st May 2022. The respondent has raised several preliminary issues, around the appeal being incompetent, for having been filed either without leave of court, or outside the leave period. There is also the issue of the grounds of appeal not being aligned to the order challenged.

48. I will start with the first issue, the matter of leave. According to the memorandum of appeal, the order, appealed against, was made by the trial court on 31st May 2022. The memorandum of appeal was lodged herein on 10th March 2023. An appeal ought to be filed within 30 days of the decision sought to be appealed against, according to section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya. The proviso to section 79G of the Civil Procedure Act permits admission of appeals out of time. 30 days expired on or about 1st July 2022. There was, therefore, need for the appellant to obtain leave of the court to have his appeal admitted out of time.

49. For avoidance of doubt, I will reproduce section 79G of the Civil Procedure Act. It states:

> "79G. Time for filing appeals from subordinate courts
>
> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as

having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

50. In the record of appeal, the appellant has attached a copy of an order, made on 8th November 2022, granting him leave to appeal against the order of 31st May 2022. That order was made in Busia HC Miscellaneous Civil Application No. E038 of 2022. The formal order was extracted, and signed by the Deputy Registrar, on 30th November 2022. The order did not limit the period within which the appeal was to be filed. It was open-ended. A blank cheque. It reads: "The Applicant be and is hereby granted leave to appeal against the Ruling dated and delivered on 31st May, 2022 by the Honourable L Ambasi (Mrs.)(CM) in CMCC Busia Succession Cause No. 140 of 2012, In the Matter of the Estate of Ogla Onyango (DECEASED) out of time."

51. The issue then is whether the appellant would have been entitled to file appeal at any time, given that the time extended was unlimited by the order. The law, on the period within which an appeal against an order of a civil nature could be filed, is 30 days. An order, extending that time beyond the 30 days, cannot possibly be unlimited or open-ended. The reasonable way, in my humble view, to deal with such an open-ended order, is to presume that the period extended is equivalent to the period allowed in law for filing civil appeals, which is 30 days, so that anything which goes beyond 30 days would be unreasonable.

52. The order was made on 8th November 2022, and the 30 days period began to run from that date. 30 days, therefore, expired on 8th December 2022. An appeal ought to have been lodged by that date. The filing of the appeal on 10th March 2023 was way outside the 30 days that would have been permissible, and was unreasonable. The appeal, therefore, would be incompetent. However, the appellant is not to blame. He went to court for extension of time to file appeal, and he was given an order, which granted to him a blank cheque, as it did not limit him in any way. He should have the benefit of that slip by the court. I shall be disinclined to strike out his appeal on account of that.

53. The other issue relates to the grounds of appeal not being attuned to the issues that arose in the order appealed against, made on 22nd May 2022. The ruling, delivered on that date, was on an application, dated 11th April 2022. That application sought to set aside the proceedings conducted on 27th April 2021, 18th May 2021 and 17th June 2021, on grounds that the appellant was never served with notices of attendance relating to the dates in question, the proceedings were conducted ex parte to his detriment, and the resultant ruling was sub judice. The grounds of appeal, in the appeal herein, are around distribution of the estate, and appear to be intended to challenge the orders of 17th June 2022. I agree with the respondent. The grounds are not attuned or aligned to the orders appealed against, but against other orders, in respect of which leave to appeal had not been obtained. Parties are bound by their pleadings. The court determines appeals based on the pleadings.

54. How should I rule on this appeal? The appeal was obviously filed outside time. However, leave was granted, extending the time to file appeal, without limiting it. I have held above that I shall let the appellant enjoy the benefit accruing to him from that slip by the court. The appeal is not arguable, as the grounds, upon which it is premised, are not in line with the order appealed against. That should be adequate to have it dismissed.

55. However, upon review of the record of the trial court, it emerged that the respondent herein was appointed improperly as administratrix, for she was appointed on the grant of her dead husband,

instead of that grant being revoked, and a fresh grant being made to her. Her appointment was incompetent, and it could not support any of the proceedings conducted and the orders made thereafter, based on it. Secondly, the grant, into which she wrongly succeeded, had been confirmed, and the estate distributed, and there was no foundation for her to seek and obtain confirmation of that grant a second time, when the earlier confirmation orders had not been vacated. To look the other way, and pretend that all is well, on the basis that the grounds of appeal do not support the case by the appellant, and to ignore the substantial lapses, in the manner the proceedings were handled, would be to cause substantial injustice, and to bring administration of justice in Kenya into disrepute.

56. There is inherent jurisdiction, vested in an appellate court, to review the entire record, come to its own conclusions and make appropriate orders. There is also jurisdiction, vested in the High Court, under Article 165(6)(7) of the Constitution of Kenya, to review the record of a subordinate court, and to make appropriate orders or give appropriate directions, to ensure the fair administration of justice. There is also jurisdiction, under section 76 of the Law of Succession Act, for a court, suo moto, to revoke a grant, where the proceedings to obtain it were defective in substance.

57. Consequently, I do hereby allow the appeal herein. All the proceedings conducted, and all the orders made, by the trial court, in Busia SPMCSC No. 108 of 1995, from 13th May 2019 to 25th May 2023, both dates inclusive, are hereby vacated. For avoidance of doubt, the grant of letters of administration intestate, made on 13th December 1995, and amended on 19th October 2021, is hereby revoked, and the certificate confirming it, dated 21st June 2021, is hereby cancelled. Each party shall bear its own costs.

58. I note that the trial court records still bear the High Court number, Succession Cause No. 140 of 2012, that shall be corrected, by way of restoring it to its original Chief Magistrate's Court number, Succession Cause No. 108 of 1995. The filing of an appeal, from this determination, to the Court of Appeal, would require leave. I hereby grant leave to appeal, of 30 days, to whoever shall be aggrieved. The original trial court records shall be returned to the relevant registry. The appeal file herein shall be closed. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 28TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Oonge, instructed by Were & Oonge, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.