



REPUBLIC OF KENYA



**In re Estate of Gideon Kibitok Tarus (Deceased) (Succession Cause 92 of 2005) [2024] KEHC 276 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 92 OF 2005  
RN NYAKUNDI, J  
JANUARY 24, 2024**

**IN THE MATTER OF THE ESTATE OF GIDEON KIBITOK TARUS – DECEASED**

**BETWEEN**

**VICTORIA JEPKOSKEY BITOK ..... 1<sup>ST</sup> APPLICANT**

**NICHOLAS BITOK ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SOPHIE JERUTO CHERES & 8 OTHERS ..... RESPONDENT**

**RULING**

1. The applicants approached this court vide an application dated 10<sup>th</sup> July 2023 seeking the following orders;
  - a. Spent.
  - b. That Grant of Letters of Administration intestate made on 10<sup>th</sup> May 2023 and confirmed on 8<sup>th</sup> may 2023 in respect of the Estate be Revoked and/or Annulled.
  - c. That costs of this Application be borne by the Respondent
  - d. Any other relief that this Honourable Court shall deem fit to grant
2. The application is premised on the grounds set out therein and the averments in the supporting affidavit sworn by the 1<sup>st</sup> Applicant.
3. The 1<sup>st</sup> Respondent filed an application dated 19<sup>th</sup> September 2023 seeking the following orders;
  1. That the honourable court do issue orders directing the deputy registrar to execute the transfer and/or transmission documents on behalf of the administrators of the estate of Gideon



Kibitok Tarus, Victoria Jepkosgei Bitok and Lydia Cheronno Cheshire who have declined or refused to sign the same.

2. The application is premised on the grounds set out therein and the contents of the supporting affidavit. As the second application depends on the outcome of the 1<sup>st</sup> application, the court shall determine the first application then consider the second one.

### **Applicant's Case**

4. The applicant's case is that the grant made on 10<sup>th</sup> May 2023 was obtained through material non-disclosure of non-availability of Eldoret Municipality Block 15/25 awarded to the applicant in the mediation and confirmed by the court on 8<sup>th</sup> May 2023. The applicant stated that the parcel was sold to a third party and the property having been allocated to the 9<sup>th</sup> respondent. The property was sold by one of the beneficiaries and secretly transferred in favour of the current proprietors without the knowledge of the applicant.
5. In support of the applicant's case Mr. Misoi filed written submissions dated 6.11.2023 based on the following contentions: The said applicants avers that upon accepting the outcome of the mediation cause, they went for a search at the lands offices to purposely ascertain the current proprietorship of the land and confirmed that the same is registered in the names of a company known as D.L Koisagat Ltd
6. It is the applicants contention that the family deliberately, gave the 2<sup>nd</sup> Applicant all that property known as Eldoret Municipality Block 15/25 which they knew or ought to have known that one of the family members sold and transferred the same to a third party and therefore the property was awarded to the 2<sup>nd</sup> Applicant on the basis of untrue allegation and statements which in law justified the revocation of Grant
7. It is Applicants contention that unless the issues touching on the said property are ironed out, the grant confirmed on the 8<sup>th</sup> May 2023 in respect of the estate in favour of other beneficiaries to his exclusion has no weight and should be revoked We invite the court to look at the grounds set out and the supporting affidavit in arriving at a fair decision of allowing the prayers south by the applicants.
8. In opposing the application dated 10<sup>th</sup> July 2023, a Replying affidavit by Ludia Chesire undated and unsworn, and not commissioned is on record. We urge this court to disallow the same for being defective and inadmissible in law. We invite this court to look at the contents therein in arriving at its fair decision on the matter.
9. The main question for determination is whether property known as Eldoret Municipality Block 15/25 is part of the Estate of the deceased and whether the same is available for distribution. It is the submission of the applicants that the non-availability of the property for distribution goes into the substance of the Estate and means that the 2<sup>nd</sup> Applicant will not benefit from the property.

### **Respondent's Case**

10. The 1<sup>st</sup> respondent opposed the application vide a replying affidavit dated 18<sup>th</sup> July 2023 denying the contents of the application. She stated that the administrator is not a direct beneficiary and cannot purport to apply to have the confirmation of grant nullified. She urged that the rest of the estate that is not contested be transmitted or transferred to the beneficiary pursuant to the certificate of confirmation of grant issued on 8<sup>th</sup> May 2023. Further, that the applicant has not demonstrated any valid grounds to warrant nullification of the grant.



11. The 1<sup>st</sup> respondent submitted that the issues of distribution of property forming part of the estate of Gideon Kibitok Tarus (deceased) was willingly agreed upon by all beneficiaries during mediation where the beneficiaries signed the mediation agreement dated 13.12.2023 without duress, coercion or undue influence. The mediation agreement dated 13.12.2022 was adopted as the judgement of the Court and thereafter the grant confirmed. The same is therefore binding to all the beneficiaries and therefore no one should be blamed for nondisclosure of the unavailability of the parcel of land No. Eldoret Municipality Block 15/25. Counsel cited the case of *In Re Estate Of Mbugua Njogu (Deceased)* [2018] eKLR in support of this submission. Further, the Land registrar's report dated 4.8.2023 clearly indicates that the parcel of land No. Eldoret Municipality Block 15/25 has never belonged to the estate of Gideon Kibitok Tarus (deceased). The same was therefore erroneously listed as an asset of the estate Gideon Kibitok Tarus (deceased) by the Petitioners at the time of filing this petition. It was the duty of the administrator, the Applicant herein who is also the 1<sup>st</sup> Petitioner and Lydia Cherono Chesire to ascertain whether the assets listed in the petition belong to the estate and not just listing for the sake of it.
12. keen perusal of the certificate of confirmation of grant issued on 8.5.2023, save for the parcel of land No. Eldoret Municipality Block 15/25, one Nicholas Cheruiyot Bitok has been given the parcel of land No. Soy/Kipsang Block 2 (Saniakj/24 measuring 40 acres and the parcel of land No. Soy/Kipsang Block 2 (Saniak)/13 measuring 26 acres which he is to share with Eunice Bitok. In total, Nicholas Bitok was allocated 53 acres share of the estate. It is therefore evident that he has the largest share and therefore removing the parcel of land No. Eldoret Municipality Block 15/25 from the parcels of land allocated to him does not prejudice him in any way.
13. It is the 1<sup>st</sup> Respondent's submission that the certificate of confirmation of grant issued on 8.6.2023 be amended and the parcel of land No. Eldoret Municipality Block 15/25 be removed and not revoked as proposed by the Applicant. Revoking the grant will not serve the beneficiaries any good since the mode of distribution will not change save that the same will be in exclusion of the parcel of land No. No. Eldoret Municipality Block 15/25.
14. The grant of administration was confirmed on 8.5.2023 and therefore, the administrators are obligated to distribute the estate of the deceased as per the agreement of the beneficiaries. However, that is not the case here, since the administrators have refused and/or declined to sign the transfer and transmission documents to complete the administration process of the estate. The transfer and transmission of the estate of the deceased are done by the administrators of the estate of the deceased as per Section 61(2) of the *Land Registration Act, 2012*. The administrators have been obligated to administer the estate diligently and without undue delay. Where an administrator wilfully fails to diligently carry out his statutory duties, the Honourable Court has the powers vested under Section 73 of the *Probate and Administration Rules* to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The respondent urged the court to direct the deputy registrar to execute the transfer transmission documents.
15. The 9<sup>th</sup> respondent filed a replying affidavit in opposition to the application urging that the grant was obtained through a duly signed mediation settlement agreement adopted by the honourable court on 13<sup>th</sup> December 2022. That the 2<sup>nd</sup> applicant attended the mediation settlement and signed the mediation settlement without any coercion or intimidation. In the settlement agreement, the 2<sup>nd</sup> applicant was given 66 acres of land parcel Soy/Kipsang/Block 2 (Saniak) Plot No. 13 and Eldoret Municipality Block 15/25. Further, that the certificate of confirmation of grant issued to the late Jane Tongoi Tarus on 2<sup>nd</sup> March 2009, the land parcel Eldoret Municipality Block 15/25 was given to her but she did not sell or transfer the property to a third party. The application is based on the fact that the



property Eldoret Municipality Block 15/25 given to the 2<sup>nd</sup> applicant under the mediation settlement agreement does not form part of the deceased's estate and the same is not available for distribution. She maintained that she did not sell the parcel of land to D.L Koisagat Tea Estate Limited.

16. As for the 1<sup>st</sup> respondent legal counsel Mr Omwenga in addition with the replying affidavit he made the following observations in the written submissions to season the issues under adjudication by this court. As a starting point he invited the court to appraise the evidence in line with the following issues. First whether the grant issued on 10.5.2023 and confirmed on 8.5.2023 should be revoked. Second whether the court should issued orders directing the Deputy Registrar to execute the transfer and transmission documents on behalf of the administrators of the estate of Gideon Kibitok Tarus (deceased) Victoria Jepkosgei Bitok and Ludia Cheronon Chesire who have declined and/or refused to sign the same.
17. In buttressing the two issues learned counsel cited and relied on the following authorities: Section 76, 83, 47, of the *Law of Succession Act* and Section 61(2) of the *Land Registration Act* 2012. Learned counsel also contended that the principles in the cases of in the *Re Estate of David Kyuli Kaindi (Deceased)* (2016) eKLR, *Estate of Kihara Mwangi Karuku (Deceased)* (2019), *Re Estate of George Gikundi (Deceased)* (2021) eKLR are applicable to the facts of the instant application. Learned counsel argued and submitted that the issues of distribution of property forming part of the estate of Gideon Kibitok Tarus (deceased) was willingly agreed upon by all beneficiaries during mediation where the beneficiaries signed the mediation agreement dated 13.12.2023 without duress. Coercion or undue influence. The mediation agreement dated 13.12.2022 was adopted as the judgement of the court and thereafter the grant confirmed. The same is therefore binding to all the beneficiaries and therefore no one should be blamed for nondisclosure of the unavailability of the parcel of Land No. Eldoret Municipality Block 15/25. Learned counsel further contended that the Land Registrar's report dated 4.8.23 clearly indicates that the parcel of land No. Eldoret Municipality Bloc 15/25 has never belonged to the estate of Gideon Kibitok Tarus (deceased). The said was therefore erroneously listed as an asset of the estate Godeon Kibitok Tarus (deceased) by the petitioners at the time of filing this petition. Counsel further submitted that a keen perusal of the certificate of confirmation of grant issued on 8.6.2023 be amended and the parcel of Land No. Eldoret Municipality Block 15/25 be removed and not revoked as proposed by the Applicant, Revoking the grant will not serve the beneficiaries any good since the mode of distribution will not change save that the same will be in exclusion of the parcel of land No. Eldoret Municipality Block 15/25. On this point learned counsel relied on the principles in the case of re-Estate of Kihara Mwangi (supra). In a nutshell learned counsel contended that the application dated 10.7.2023 is unmerited and intended to frustrate the distribution with the deceased intestate estate. In addition, the 2<sup>nd</sup> the 9<sup>th</sup> Respondents being represented by learned counsel Z.K Yego advanced the following arguments in their submissions. First the 1<sup>st</sup> Applicant herein lacks the locus standi to file an application for revocation of the grant with regard to the estate of the deceased as the has no identifiable interests in the estate of the deceased. Under Section 76 of the *Law of Succession Act*, any person who can show an identifiable interest in the estate of the deceased can apply for revocation of grant. This provision of was upheld in the decided case of *Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche* (2019) eKLR where the court of Appeal cited the authority in *Re-Estate of Shongo Omedo* (2018) eKLR where the court held as follows:

“Persons with locus standi to seek revocation of grant includes any person with a right or expectancy to the estate. It therefore follows that an interested person under section 76 does not only envision the heirs enumerated under Section 66 of the Act, rather it includes a person who can show an interest in the estate.”

18. Learned counsel invited the court to impeach the conduct for the 1<sup>st</sup> applicant who seeks to challenge the confirmation proceedings and subsequent certificate of grant on the framed issues which lack



probative evidence in support of the application. Learned counsel further submitted that the 1<sup>st</sup> applicant is one of the administrators of the estate of the Late Gideon Kibitok Tarus. As an administrator the 1<sup>st</sup> Applicant's role with regard to the estate of the deceased would be to ensure that the estate is preserved and distributed fairly to all the beneficiaries. In addition to her role as an administrator, the 1<sup>st</sup> Applicant is bound to protect and implement the grant and not challenge it. On the contrary filing this application for revocation of grant in favour of the 2<sup>nd</sup> Applicant, her father, an act actuated by greed and malice against the other Respondents and beneficiaries of the estate of the estate of the deceased.

19. It was also the case for the respondent as argued by learned counsel that lack of locus standi by the 1<sup>st</sup> Applicant, this Honourable court lacks jurisdiction to hear and determine this application for revocation for grant as the grant was issued pursuant to mediation settlement Agreement duly signed by all parties to this suit including the 2<sup>nd</sup> Applicant. The 2<sup>nd</sup> Applicant and the Respondent attended a mediation session where they agreed on the distribution of the property and assets of the deceased.
20. Upon reaching a settlement the 2<sup>nd</sup> Applicant and the Respondents voluntarily signed a mediation settlement Agreement. Once signed, the mediation settlement Agreement is binding on all parties to the mediation and it can only be set aside by a new agreement between the parties. If the settlement agreement has not been set aside by the parties to it, the parties are required to honour the mediation agreement unless there is proof of vitiating factors with regard to mediation session and the mediation agreement. In support of this contention learned counsel placed reliance in the case of *Fatuma Hassan v Sports Stadia Management Board* (2019) eKLR, Section 76 of the *Law of Succession Act*, Rule 26 of the *Probate and Administration Rules* and further principles in the cases of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR and *Moses Parantai & Peris Wanjiru Nujuru (Suing as the Legal representative of the estate of Sospeter Mukuru Mbere (deceased) v Stephen Njoroge Machari* (2020) eKLR. As it stood from learned counsel's submissions the object of revocation is being pursued by a party who has no locus standi and on scrutiny the test under Section 76 of the Law of Succession has not been met for this court to render a decision in favour of the Applicant.

### **Analysis & Determination**

21. Upon considering the pleadings and the responses thereto, and the submissions of the parties, the following issues emerge for determination;
  1. Whether the grant of letters of administration issued on 8<sup>th</sup> May 2023 should be revoked
  2. Whether the deputy registrar should be compelled to sign the transfer/transmission documents

### **Whether The Grant Of Letters Of Administration Issued On 8<sup>th</sup> May 2023 Should Be Revoked**

22. Revocation of grant is governed by section 76 of the *law of succession act* which provides as follows;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

23. The grounds of the application for revocation is that there was material non-disclosure that Eldoret Municipality Block 15/25 did not form part of the estate and therefore, it was not available for distribution. This court issued an order dated 19<sup>th</sup> July 2023 directing the Land Registrar to submit a summary of the white card in respect of the said piece of land. According to the report dated 4<sup>th</sup> August 2023, shows that on 13<sup>th</sup> May 2015 shows that Kenya Re Insurance Corporation Limited was issued with a certificate of lease. Further, that on 18<sup>th</sup> June 2015, the property was charged to Paramount Bank Limited for Kshs. 120,000,000/- with other lands. The current registered owner is D.L Koisagat Tea estate limited and the property is still charged.
24. By virtue of this report, the property does not belong to the estate of the deceased and never belonged to him at any point in time. Unfortunately, the same was distributed to Nicholas Cheruiyot Bitok and Eunice Bitok which was shared equally between them. The question that arises therefrom is whether the failure to disclose this is material enough to warrant the revocation of the grant. The allegation that the property was sold by one of the beneficiaries is unfounded as there was no evidence of the same in the report. In the Frame of the Succession Act free property in relation to the deceased person means the property of which that person was legally competent freely to dispose during his life time and in respect of which his interest has not been terminated by his death.
25. This court is cognisance of the fact that the beneficiaries went through a mediation process to identify the assets survived of the deceased and the respective beneficiaries under Section 29 of the Succession Act. As a consequence a certificate of confirmation of grant was issued by this court to prompt the process of individual allocation of the assets to each beneficiary. Before the set of occurrence of completeness on distribution of the estate the 1<sup>st</sup> applicant prompted the court with yet another application under section 76 of the *Law of Succession Act*. Therefore, inviting the court to adjudicate on matters which had already been determined at the mediation forum. Even though the *Law of Succession Act* grants this court jurisdiction to entertain the present application it must be correctly argued that for the sake of good order and good governance the threshold of Section 76 of the Act must be met on the merits by an Applicant. This court can only assume jurisdiction upon construing the provisions of Section 76 of the *Act* as a whole and by undertaking a purposive interpretation of the Act. In the same vein Rule 41 (3) provides that: “ Where a question arises as to the identity, share or estate of any person



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

I note from the application that the applicant is contending that Parcel No. Eldoret Municipality Block 15/25 is part of the deceased estate. However, the claim asserted by the applicant against the respondents as a matter relating to the subject of the cause of action was rebutted by the report from the Land Registrar Uasin Gishu County. If this court were to consider the matters raised by the applicant the requirement upon a party to discharge the burden of proof on a balance of probabilities has to be met. In the instant case in the substantive matters in the Applicants Application remain answered by the report from the Land Registrar dated 4.8.2023. The court in *Re-Estate of Stone Kathuli Muinde (Deceased)* ((2016) eKLR it was observed:

“ With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.

26. Similarly, in *Alexander Mbaka-vs- Royford Muriuki Rauni and 7 Others* (2016) eKLR “ It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”
27. It is clear from the Land Registrar’s report the fundamental subject matter lies elsewhere and not necessarily in the probate court. The Applicant as such as applied for revocation of grant with insufficient evidence to satisfy the criteria set out under Section 76 of the *Law of Succession Act*. In cases of intestacy the grant of letters of administration are issued to the legal representatives who take oath to administer the estate faithfully, fairly and justly upon identifying the beneficiaries and the assets survived of the deceased. This is one case I hold strongly that if the questionable asset referenced as Eldoret Municipality Block 15/25 was incorporated in the certificate of confirmation of grant without prima facie evidence of the legal instruments recognizable within our statutory framework then that is an error on the face of the record which ought to be reviewed, set aside, and quashed as an asset of the



deceased. The 1<sup>st</sup> Applicants evidence is sketchy with no documentary evidence in support to warrant this court factor in the immovable property as part of the estate of the deceased.

28. The applicants participated in the mediation proceedings and at no juncture did they raise the issue of the ownership of the property. It is my considered view that the application does not merit the revocation of grant. Considering the age of the cause, a revocation of the grant will serve to delay the conclusion of this matter.
29. The issues of inordinate delay in such proceedings cannot be left unattended. This is what the court in *Benjoh amalgamated Limited & Another V Kenya Commercial Bank Limited* had this to say:
30. This court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being. In dealing with Laches, *Halsbury's Laws of England*, 4<sup>th</sup> ed Vol. 16(2) AT 910 has this to say: "A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of Limitation equity aids the vigilant, not the indolent or delay defeats equities". A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (Laches).
31. Lord Selbourne L.C delivering the opinion of the Privy Council in the *Lindasay Petroleum Co. V Hurd* (1874)L.R 5 P.C 221 said at page 240.

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically adjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

The applicants in this case came to court for review after 14 years. That is a long period of time. All along they were alive to the issue relating to the review. In a review application, the length of the delay and what has transpired in the interim period is critical as it bears on the balance of justice. The title to the properties that are the subject matter of the review application are said in the application to have been transferred to a third party and in turn charged. There is not a whiff that the third party to whom the respondent transferred the properties in tainted in any way with regard to the antecedent events relating to the issue of consent and the judgement that ensured therefrom"

32. Notwithstanding the argument in support of revocation of certificate of confirmation of grant undoubtedly there has been a delay of invoking Section 76 of the *Law of Succession Act* without acknowledging the binding nature of the mediation agreement in settling the substantial part of the estate. Nothing was placed before this court to show that the certificate of confirmation of grant as



issued by this court is incapable of being executed unless a revocation order has been issued by this court.

33. The delay in my view is inexcusable for a probate cause which was filed in court on the 10.5.2005. Just to recap on the litigation history of this estate on 2.3.2009 a certificate of confirmation of grant was issued by P.M Mwilu J as she then was detailing the identity of beneficiaries and the assets survived of the deceased. Incidentally, the impugned parcel of land namely Eld/Mun Block 15/25 was identified as part of the free asset capable of being inherited by the beneficiaries. As the certificate of confirmation of grant demonstrates the shares thereto were allocated to Lydia Chesire. In an unprecedented proceedings the same parties sought leave of the court to pursue yet another form of proceedings in an alternative forum of mediation in a matter which the high court had adjudicated and determined with finality way back on 2.3.2009. The outcome of the mediation agreement rendered the decree of the court on Succession matters as issued by P.M Mwilu J as she then was obsolete in the session presided by this court on 8.5.2023 to give effect to the mediation agreement a certificate of confirmation of grant was issued detailing the name of heirs, description of the property and allotment of shares within the framework of the Succession Act. In the current operating certificate of confirmation of grant the questionable property referenced as Eld/Mun Block 15/25 was meant to be inherited jointly by Nicholas Cheruiyot Bitok and Eunice Bittok. Unfortunately, it is thus clear from the custodian of the instruments of registration of land in Uasin Gishu County the registered owner is one DL Koisagat Tea Estate. The land registrar went further to state as follows: That the property has been used as security to secure a sum of Lshs 120,000,000/= and the bank is entitled to sale the property to recover the charge amount if the registered owner fails to clear the loan and discharge the land. In the above context it is obvious to this court that the beneficiaries are operating on a lie that Eldoret Municipality Block 15/25 is free property available for distribution. However, in probate matters a distinction must always be drawn between free property and may be the supposed interest of the intestate estate. It is therefore pretty obvious that the registered owner is DL Koisagat Tea Estate Ltd. I am yet to be apprised of any litigation against the current registered owner and at what period in time the deceased Gideon Bitok Tarus conveyed, transmitted, or transferred, all that interest in Eld/Mun Block 15/25 to DL Koisagat Tea Estate. In that context it is inclusion as free property of the deceased in the certificate of confirmation of grant dated 8.5.2023 is both an error of fact and law which this court must exercise jurisdiction under Section 80 of the *Civil Procedure Act* and Order 45 (1) of the *Civil Procedure Rules* to review the order of the court on confirmation to have that set of property be severed from the rest of the estate.
34. At the heart to this litigation on revocation is the alleged transfer of LR No. Eldoret Municipality Block 15/25 from the deceased to another party as demonstrated by the Land Registrar. The applicant relied on the affidavit evidence to challenge the authenticity of the transfer instruments of the aforesaid property. In the cause of the hearing the Land Registrar submitted a report dated 4.8.2023 detailing the entries in the green card associated with the questionable land parcel subject matter of this proceedings. There is no counter evidence in rebuttal to contradict the Land Registrar's report as to the registration and transfer of the parcel of land. The applicant in this case did not plead existence of fraud either in common law or equity. The burden and standard of proof vests with the applicant at all times on a balance of probabilities that the allegations so deposed in the affidavit are true to the best of her knowledge and capable of being proven to secure judgement in her favour. The learned author D.J Bakibinga, *Equity & Trust* (Law Africa 2011) had this to say on the distinction between fraud and common law and equity

“Fraud or deceit at common law is a misrepresentation of fact made either knowingly, or without belief in its truth, or reckless not caring whether it was true or false. Fraud at common law is often referred to as actual fraud but fraud in equity is referred to



as constructive fraud. Whilst actual fraud or common law fraud relates to statements or misrepresentation of fact, constructive fraud or fraud in equity relates to conduct or transactions in respect of which the court is of the opinion that it is unconscientious of a person to avail himself of the legal advantage he has obtained”

Further in *Halsbury's Laws of England*, Vol 16 para 666 at page 618 states:

“ "Fraud" in its equitable context does not mean, or is not confined to deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties. It is victimization, which can consist either of the active extortion of a benefit or of the passive acceptance of a benefit in unconscionable circumstances. The general principle is that if a party is in a situation in which he is not a free agent and is not equal to protecting himself a court of equity will protect him. In all these cases, there might also be circumstances of contrivance or undue advantage implying actual fraud”

35. A further perusal of the affidavit and evidence reveals that applicant expressed her intention to invoke the court's jurisdiction under Section 76 of the *Law of Succession Act* but it cannot be denied that there is no cogent evidence upon which her claim can be determined as of right at this stage of the proceedings. Hence this court by virtue of Section 76 of the Succession Act there are no sufficient grounds upon which discretionary powers to revoke or annul the grant of letters of administration can be undertaken by this court. It is also well settled that in general the matter which this court takes into account in deciding whether to revoke or annul the grant are as outlined in the textual provisions of Section 76. All the circumstances of the case must be taken into account to identify those factors regarded as relevant to a particular situation. From the above case law fraud stands unproven.
36. In conclusion having considered the arguments and submissions of each counsel as well as the relevant material, works and precedents the following specific orders shall abide:
- a. The application seeking revocation of grant lacks merit and is therefore dismissed with no orders as to costs.
  - b. As the evidence obtained as a result of the affidavits filed and the report from the Land Registrar Uasin Gishu County Eld Mun/Block 15/25 is registered in the name DL Koisagat Tea Estate Ltd. It is therefore not free property of the Estate available for distribution to the heirs as defined in the Succession Act.
  - c. In considering the entirety of the Probative Evidence with regard to this subject matter pursuant to the provisions of Section 80 of the *Civil Procedure Act*, Rule 73(1) of the *Probate and Administration Rules* and Order 45 (1) of the *Civil Procedure Rules* an order be and is hereby made to review the certificate of confirmation of grant dated 8.5.2023 to amend the inclusion of Eld Mun/Block 15/25 as forming part of the intestate estate of the deceased for distribution. That the foresaid property in question for avoidance of doubt can only be litigated as a separate cause of action by any interested party with Locus Standi with a view to persuade the court on the sketchy issues being ventilated by the 1<sup>st</sup> Applicant.
  - d. That the practical impossibility argument by the 1<sup>st</sup> Applicant is that it is impossible for the court to deal with the dispute on this question of parcel of land without first impeaching the registration instruments in favour of DL Koisagat Tea Estate Ltd.
  - e. That a further concern repeatedly featuring in this proceedings is the Locus Standi of the 1<sup>st</sup> Applicant which no evidence was offered in rebuttal.



- f. Consequently, as a matter of urgency the administrators to this intestate estate having taken oath to administer the estate faithfully are hereby directed to transmit the shares as identified in the certificate of confirmation of grant dated 8.5.2023, as duly ordered by this court.
- g. That in default the Deputy Registrar Eldoret High Court be at liberty to sign and execute the transfer instruments of both movable and immovable assets of the deceased within 45 days from today's ruling.
- h. Finally, the costs of this proceedings be in the cause

It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24<sup>TH</sup> DAY OF JANUARY 2024**

**R. NYAKUNDI**

**JUDGE**

In the presence of:

MS. Mukulo Advocate

M/s Z. K Yego Law Officers

Kiplagat J. Misoi & Co. Advocates

Mr. Omwenga Advocate

