



**In re Estate of Akala Litili Mikhasi (Deceased) (Succession Cause 90 of 1996) [2024] KEHC 9211 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 90 OF 1996  
JRA WANANDA, J  
JULY 31, 2024**

**BETWEEN**

**JOHN KIPSEREM MARITIM ..... APPLICANT**

**AND**

**FRANCIS LUYALI AKALA (DECEASED) (SUBSTITUTED BY ATHANATUS MUSYOMI MUKHASI) ..... 1<sup>ST</sup> RESPONDENT**

**WINFRED JEPKOECH BARSULA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

- The deceased, Akala Litili Mikasi, died on 9/10/1981. On 16/04/1996, his son, Francis Luyali Akala, as Petitioner, filed an Application for Letters of Administration. In the Petition, he listed himself and his 2 brothers as the survivors of the deceased. The only estate property mentioned was Uasin Gishu/ Ndalat Scheme/454 and the Grant was given by the Court on 20/01/1997. After some litigation in the intervening period, the Grant was subsequently confirmed on 20/06/2016. It was stipulated in the Grant that the property would first be transmitted to the Petitioner as a whole, and who would then transfer it in the following manner:

Simeon Kiptoo Metto	8.6 acres
John Kipserem Maritim (2 <sup>nd</sup> Objector)	5.0 acres
Winfred Jepkoech Barsula (2 <sup>nd</sup> Respondent)	2.0 acres



2. The Application now before the Court for determination is the Summons for Revocation of Grant, dated 16/09/2016 and filed by the Objector, then acting in person but presently represented by Messrs Cheluget & Co. Advocates. It seeks orders as follows:

“That the Grant of Letters of Administration intestate to Francis Liyali Akalo on the 20<sup>th</sup> January 1997 and subsequent confirmation on the 23<sup>rd</sup> day of June 2016 be revoked/or annulled .....

3. The Summons is expressed to be brought under Section 47 and 71 of the Law of Succession Act and Rule 44(1) and 73 of the Probate and Administration Act and “all enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Objector.

4. In the Affidavit, the Objector deponed that he is the purchaser in the estate herein, that he came to know of these proceedings in August 2016 when he was served with Court documents by the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula, that he quickly moved to peruse the Court file and learnt that the Grant had been confirmed and his signature forged on the consent for confirmation, that he had been given 5 acres in the said Uasin Gishu/Ndalat Scheme/454, instead of 8.1 acres which is what he had purchased, and that the Petitioner did not mention the liabilities to the estate. He deponed further that the Objector had even discussed with the Petitioner how they will administer the estate but the Petitioner secretly moved the Court and initiated these Succession proceeding behind the Objector’s back. According to the Objector therefore, the proceedings were defective in substance as it did not indicate his correct share. He also challenged the allocation of 2 acres of the land to the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula, and claimed that the Grant is materially different from what was confirmed, and that the process was tainted with irregularities, misrepresentations and concealment of material facts.

5. During the intervening period, the Petitioner died on 25/06/2018 and upon Application, he was substituted with his brother, Athunatos Musiomi Agalo, as the Administrator. An Amended Grant and an Amended Certificate of Confirmation of Grant were therefore given on 26/10/2020 reflecting this substitution.

6. The Summons for Revocation remained unprosecuted for a long time and it is not clear why this was so but I note that there were several Applications filed before and after the filing thereof and which might have therefore contributed to the delay.

7. It was later observed that although the Objector was litigating as such, he had not filed a formal Objection and in the circumstances, by consent, the Objector was allowed to file such formal Objection. The Objector’s Counsel however seems to have misunderstood this direction since, on 22/02/2023, he filed another separate Summons, this time seeking Review of the Certificate of Confirmation of Grant. Be that as it may, the prayers sought in the fresh Summons are as follows:

- i. That the amended Grant of Letters of Administration dated the 3<sup>rd</sup> of December 2020 issued to Athunatos Musiomi Akala and the earlier Certificate of Confirmation dated the 23<sup>rd</sup> June 2016 and the mode of distribution therein be set aside.
- ii. That the mode of distribution of the estate of Akala Litali Mukhasi among the beneficiaries and/or liabilities contained in the Certificate of Confirmation dated 23<sup>rd</sup> June 2016 be reviewed accordingly and the Certificate of Confirmation be amended and a fresh Certificate of Confirmation be re-issued.



- iii. That the costs be provided for.
8. This fresh Summons is expressed to be brought under Section 73 of the *Law of Succession Act*, Rule 63 of the *Probate and Administration Act*, Order 45 Rule 3 of the *Civil Procedure Rules* and “all other enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Objector.
  9. In the Affidavit, the Objector deponed that he is the beneficial owner of 8.1 acres in Uasin Gishu/Ndalat Scheme/454 having purchased the same from the estate of the deceased herein, that in the year 1992, the Objector’s family and the family of the estate of the deceased exchanged 5 acres of the Objector’s parcel of land situate in Lugari with a portion measuring 5 acres of the said Uasin Gishu/Ndalat Scheme/454, that in the year 1994, the Objector purchased from the estate of the deceased a further 3.6 acres of the said Uasin Gishu/Ndalat Scheme/454, wherein his brother John Kipkemboi took possession of 3.6 acres thereof, that the total size of land that the Objector purchased therefore amounted to 8.1 acres. He deponed further that he later discovered that this Succession proceedings had been undertaken and to his surprise, a consent on the mode of distribution which he did not sign had also been filed and which allocated to him only 5.0 acres of the land, that the signature is not his and was forged, and that using the forged signature, the Grant was later confirmed on 23/06/2016.
  10. He contended further that after he filed the Application for Revocation, the Petitioner/initial Administrator, Francis Liyali Akala (now deceased), filed an Affidavit dated 3/03/2017 drawn and filed by the Petitioner’s brother, Athunatos Musiomi Akaka on 9/11/2017 stating that, among other beneficiaries, the Objector was entitled to 8.1 acres in the property, Uasin Gishu/Ndalat Scheme/454, and that similarly, the said Athunatos Musiomi Akala, on 3/02/2017, also swore an Affidavit filed on 6/02/2017 in which he, too, confirmed that the Objector is entitled to 8.1 acres. He added that since both the Petitioner and his said brother were present in Court during the confirmation of the Grant, they committed an error apparent on the record and that there is mischief on the part of the Administrator as was observed by Hon. Lady Justice H. Omondi in her Ruling of 14/09/2019 by which she allowed the Objector to lodge a caution on the property. He therefore urged this Court to review its orders.
  11. The two Summons, then proceeded for viva voce hearing in which the Objector called 2 witnesses and the Administrator called 4. Prior to the hearing, the parties had also filed Witness Statements which the witnesses then adopted at the trial.

### **Objector’s Evidence**

12. The Objector, John Kipserem Maritim, testified as PW1. Led by his Counsel, Mr. Koskei, he stated that in the year 1994, the family of the deceased sold to him 2 acres of the said Uasin Gishu/Ndalat Scheme No. 454, that on 10/02/1994 they agreed at a figure of Kshs 80,000/- for the 2 acres, that he was with his brother, Jonah Kipkemboi Tarus, and that they agreed to purchase the same together. He testified further that he paid Kshs 60,000/- on that date (for 1 ½ acres) and his said brother was then given 14 days to pay the balance of Kshs 20,000/- (for ½ acres), that there were witnesses including his said brother and also the Chief, who is the one who wrote the Agreement, and that other witnesses are deceased. He reiterated his prayer that be given his 8.1 acres. He insisted that he had exchanged 5 acres with the deceased then later purchased a further 1.5 acres and also claimed that in 1995, he purchased a further 1.6 acres.
13. Under cross-examination by Mr. Amos Songok Advocate, he stated that although this Succession Cause was filed in the year 1996, he was not aware of it until 2016. He denied any knowledge of his father, Joab Maritim Lele, having exchanged any land with the family of the deceased and claimed that



his father had 21 acres in Mautuma, Kakamega and which he had sold it all. According to the Objector, the deceased's said land, Uasin Gishu/Ndalat Scheme/454 was originally 15.6 acres and out of which the family of the deceased gave him 5 acres in exchange for 5 acres of the Mautuma land which he gave to the family of the deceased in return. He reiterated that he never signed the consent dated 24/06/2014 which was relied on during confirmation of the Grant although his name appears thereon. He stated that when he raised the issue, the Administrator conceded and even filed a fresh Affidavit admitting the error and that he did not therefore report the matter to the police. He denied any knowledge that the Administrators had, in turn, accused him of forging their signatures and/or reported him to the police. He then stated that in the Agreement dated 10/02/1994 that he produced, they were 3 joint purchasers of the 2 acres and shows that he paid Kshs 60,000/-, and that the 2<sup>nd</sup> Agreement dated 9/02/1995 is for purchase of 1 acre. He stated further that it was actually Kshs 65,000/- for 1.6 acres, that he paid Kshs 10,000/-, then Kshs 20,000/-, then Kshs 5,000/- and lastly Kshs 7,000/- totalling Kshs 42,000/-. He then stated that there are other payments for Kshs 15,000/- and Kshs 10,000/- respectively, but whose Receipts he did not have. He denied that he had sold any portion thereof.

14. The Objector testified further that he knows the 2<sup>nd</sup> Respondent as a purchaser of a portion of the same land, Uasin Gishu/Ndalat Scheme/454, and that he is aware that the 2<sup>nd</sup> Respondent's sister, Pauline Koitie, was buried in the same land but he denied selling to them any portion. He also denied any knowledge on whether the 2 sisters purchased any land from the family of the deceased. He conceded that there was a criminal case instituted against him and his son in respect to the same land but denied that they were jailed. Pressed further however, he admitted that they were indeed convicted and fined. He further conceded that there was a civil case, namely, Chief Magistrate's Environment & Land Court (ELC) Case No. 92 of 2018 in which he was a party and in which he was restrained from entering the 2<sup>nd</sup> Respondent's portion of land in the said Uasin Gishu/Ndalat Scheme/454. He confirmed that one Simeon Metto was also given some acreage of the land. He denied any knowledge of who brought down the 2<sup>nd</sup> Respondent's house erected on the said land.
15. In re-examination, the Objector reiterated matters already stated and insisted that the exchange of land with the family of the deceased was by himself, not his father. He insisted that he purchased 5 acres and later added another 3.1 acres, and that he paid in instalments. Regarding the decision made in Chief Magistrate's Environment & Land Court (ELC) Case No. 92 of 2018, he conceded that he never appealed against it.
16. PW2 was Mark Liyali Mareja, a son of the initial Administrator, Francis Luyali Akala (who has since died and substituted), and therefore a grandson of the deceased. He stated that his father told him that he sold 3.1 acres to the Objector in 2017 and also exchanged with him another 5 acres. He added that they have had problems with distribution because some purchasers were given less land and some were given more. He claimed that the current Administrator, Athunatos Musomi Akala, is not co-operative, does not involve the rest of the family in matters concerning the estate and that they are therefore in the dark. He denied any knowledge of Simeon Kiptoo Metto and the 2<sup>nd</sup> Respondent. He prayed that the whole land does revert to the estate of the deceased and what can be proven to have been sold be given to the purchasers upon availing of their Agreements.
17. In cross-examination, he stated that he was born in 1973 and conceded that he has not filed any Objection of his own and also conceded that he was not there when the alleged Sale Agreement was written. He stated that the family of the deceased used to live in Uasin Gishu but that he does not know whether the land was exchanged with another. He also that the family of the deceased now lives in Mautuma, Lugari in Kakamega. He denied any knowledge of the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula, or her sister, Pauline Koitie or where the sister was buried. He stated that he does not agree with the distribution made as it did not follow the Agreements and claimed that about 30 other members of



the family also do not agree with the distribution. He denied that the Objector had paid him to testify on his behalf and in conclusion, he stated that 7 ½ acres of the land should remain with the family.

### **Administrator's evidence**

18. DW1 was Athunatos Musomi Akala, the current Administrator and brother to the initial Administrator/Petitioner, Francis Luyali Akala. Led by his Counsel, Mr. Songok, he stated that they, as the 4 children of the deceased, agreed on the distribution. He stated that PW2, son to the said Francis Luyali Akala, was not present when the family agreed and that he therefore knows nothing about this matter. He claimed that no one in the family protested or objected to the distribution. He stated further that the family moved out of Uasin Gishu (the Ndalat Scheme/454 land) as a result of the 1992 land clashes, that they agreed with the family of the Objector's father (Job Maritim Lelei) to exchange their respective parcels of land since Job Maritim Lelei had land in Mautumo, Kakamega, that the families agreed to exchange 12 acres each, that the said Uasin Gishu/Ndalat Scheme/454 land was 15.6 acres and that therefore what remained was 3.6 acres out of which the Objector purchased 1 acre and the Objector's brother, one Jonathan Tarus purchased another 1 acre thus leaving 1.6 acres as the remainder. He testified further that when they sought to commence a survey exercise, the Objector told them not to proceed because he could get them a purchaser for the 1.6 acres remainder, that indeed the Objector brought the 2<sup>nd</sup> Respondent and who then purchased 1 acre. He stated that the 2<sup>nd</sup> Respondent had taken possession of the land even before she paid the said purchase price.
19. He added that in the distribution, they gave the 2<sup>nd</sup> Respondent 2 acres, and stated that the advance occupation of the land by the 2<sup>nd</sup> Respondent before paying the purchase price was pursuant to a sale to her by the Objector, and that the 0.6 acres that remained was sold to one Wilson Kisorio. He added that the 12 acres that the Objector's father had acquired after the exchange with the family of the deceased, the Objector's father distributed it to his children, including the Objector, that in the distribution, they gave the Objector 5 acres which was out of the 12 acres that the Objector's father had exchanged and that the extra 1 acre that the Objector purchased, the Objector sold it to the 2<sup>nd</sup> Respondent. He testified further that during the survey, the Objector insisted on being given 2 acres, including the one purchased by the 2<sup>nd</sup> Respondent, that by that time, the 2<sup>nd</sup> Respondent had already even built a house thereon and that in the distribution, they allocated the 2<sup>nd</sup> Respondent 2 acres. He then summarized that the 12 acres that they exchanged with the Objector's father, they allocated 5 acres to the Objector, and the 8.6 acres that remained (including Jonah's share) went to Simeon Metto and that no one from the family of the Objector protested.
20. He added that the 2<sup>nd</sup> Respondent was later chased away from the land by the Objector despite the fact that she had built a house and her sister was buried there and that the Objector has now forcefully taken over the land. He testified that he is aware that the ELC Court ordered the Objector to hand over the land to the 2<sup>nd</sup> Respondent but the Objector has not complied. He stated further that he is also aware that criminal charges were preferred against the Objector and in one case, the Objector was fined and his son jailed. He also stated that the dispute was resolved by the Chief and the Objector was ordered to hand over to the 2<sup>nd</sup> Respondent.
21. Under cross-examination by Mr. Kosgey Advocate, DW1 was referred to a number of alleged Agreements attached to the Affidavit filed in support of the Objector's Application for Review of Grant. He denied that he signed the Agreement dated 9/02/1995 whereof it is alleged that the family sold 1.6 acres of the land to the Objector and insisted that the Agreement that he signed is the one dated 15/02/1990 whereof he confirmed that the family sold 2 acres to one Peter Lisi Kisaina. He stated further that in 1995, his father had already died and that it is his mother who was selling the land and who is therefore the person who sold the 2 acres. He however noticed a contradiction in his



- answer and swiftly clarified that their mother had also already died by 1994 and 1995 since she died in 1991. He also denied any knowledge of or signing the Agreement dated 10/02/1994. He reiterated that the Agreement that he recalls to have signed is the one dated 15/02/1990 and maintained that he never signed the alleged the Agreement dated 9/02/1995. He testified that the entire family of the deceased relocated to Mautumo in Kakamega, that no person from the family of the deceased is listed as a beneficiary in the Certificate of Grant and that the rest of the people listed in the Certificate as beneficiaries are people who purchased their portions of the land from the family of the Objector.
22. He was then referred to the copy of the Further Affidavit exhibited to the Application and alleged to have been sworn by him on 3/02/2017 and whereof he is alleged to have acknowledged that the Objector was entitled to 8.1 acres. He categorically denied any knowledge of the Affidavit and stated further that he is not even aware of the Ruling dated 14/08/2019 delivered herein by Hon. Lady Justice Omondi in which the Judge relied on the same Further Affidavit in allowing the Objector to lodge a caution. He reiterated that the 2<sup>nd</sup> Respondent purchased 1 acre from the family of the deceased but that he does not know the 2<sup>nd</sup> Respondent's sister. He stated further that the 2<sup>nd</sup> Respondent had already taken possession of her portion of the land even before the family of the deceased sold the same to her since according to him, the 2<sup>nd</sup> Respondent already had an arrangement with the Objector about it. He added that the 0.6 acres that was sold to Wilson Kipsorio is not included in the consent because it was later sold to Simeon Kiptoo Metto to make up the 8.6 acres allocated to Simeon Kiptoo Metto. He claimed that it is the Objector who used to bring all these purchasers, including the 2<sup>nd</sup> Respondent who was allocated the 2 acres, and that this is why in the order made in Chief Magistrate's Environment & Land Court (ELC) Case No. 92 of 2018, there is no mention of the family of the deceased.
23. He was also referred to the copy of the separate Further Affidavit exhibited to the Application herein and allegedly sworn by the said Francis Luyali Akala on 3/03/2017 in which it was deponed that he (DW1) was entitled to 1.5 acres. He termed the same as false since he had no share whatsoever in the Uasin Gishu/Ndalat Scheme/454 land. In re-examination, he reiterated that the copies of the 3 Affidavits exhibited to the Supporting Affidavit to the Objector's Summons for Review are all false.
24. DW2 was the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula. She stated that she purchased 2 acres of the Uasin Gishu/Ndalat Scheme/454 land sometime in December 1995 after she was introduced by a broker to the Objector, and that she also brought her sister. She testified further that the Objector told them that he had 2 acres to purchase but that he did not have sufficient funds to do so, that the Objector also told them that he had managed to purchase only 1 acre and asked them to reimburse him what he had paid for it, and that they could also buy the 2<sup>nd</sup> acre by themselves. According to DW2, they then agreed with the Objector on a figure of Kshs 100,000/- payable in 2 equal instalments of Kshs 50,000/- each, that the 2<sup>nd</sup> Respondent's sister went and sold cows which had been given to her as dowry, and that they paid the 2<sup>nd</sup> Respondent Kshs 50,000/- in the presence of the said broker, Benjamin Kosgey and also in the presence of the 2<sup>nd</sup> Respondent's son-in-law, Moses Cheruiyot.
25. She stated further that in January 1996, the Objector came and surveyed for them the 1 acre that they had purchased and after which the 2<sup>nd</sup> Respondent's sister started tilling the land, built a house and put a caretaker to live there (one Alice Mutola), and that however on 24/06/1996, the sister died and was buried in the same land. DW2 testified further that upon her sister's death, she took over the care of the land, that on 14/04/1997, the Administrators of the estate of the deceased, Francis Luyali Akala and Adriano Mutsotso Akala (DW3) came for a survey exercise because the Objector had a dispute with a third party but the exercise could not proceed because Adriano Mutsotso Akala insisted that the Objector first completes making payments for the 1 acre purchased by him. She testified further that the Objector then came running to her (DW2) and persuaded her to pay for the 1 acre, that DW2 agreed and they went to the house of Simeon Metto where she paid the Kshs 50,000/-, that the payment



was witnessed by the area Chief, Benjamin Maiyo, the said Simeon Metto and also by the Objector's brother, one Tarus. She stated that this was payment for the second 1 acre, that the two plots were joined as one and that by this time, the house was complete.

26. She testified further that in 2011, while she was planting trees on the land, the Objector's children invaded the land, harassed her, uprooted plants and claimed that no land had been sold, that she telephoned the Chief who came and wrote for her a letter to take to the Forest Department which she took as directed and later the police took up the matter and upon which the Objector's 3 sons were arrested, charged and one was convicted and placed on 8 months' probation. She also stated that she later sued for damages and that the suit is still ongoing, and that the Chief convened a meeting to resolve the matter but the Objector and his family boycotted the meeting although about 32 people attended. She testified further that on 2/03/2012, the Objector came to the land and started tilling it with bulls, including the portion where the 2<sup>nd</sup> Respondent's sister was buried, that she again involved the Chief who again wrote a letter. She stated that she then started repairing and cementing the grave but, in the process, the Objector and his sons again invaded the land and chased people away with spears. She stated that she again reported the matter to the police and again, the Objector and his children were arrested and charged in Court with the offence of creating disturbance, were convicted and fined. She stated further that the Objector later filed Chief Magistrate's Environment & Land Court (ELC) Case No. 92 of 2018 in which initially, interim orders were issued directing that the status quo be maintained but that the suit was eventually thrown out.
27. She also testified that sometime in 2013, the Objector came at night and started destroying the house with a steel-bar (tarimbo) and as a result, the lady who was living there as a caretaker took off, that later, the Objector came and cut off the padlock and took the items that were in the house, and that she again reported to the police. She stated further that in 2014, she asked the family of the deceased to initiate Succession to enable her acquire her title deeds, that it is at this time that she discovered that the land had a loan against it and which she paid off. She also stated that after the Succession Cause was concluded, she filed her own suit against the Objector.
28. She termed the said Mark Liyali (PW2), a grandson of the deceased as a liar since his (PW2's) own father, declared in the presence of elders that DW2's share was valid and that the family of the deceased has no issues with DW2's ownership of the land. She added that in the Chief Magistrate's Environment & Land Court (ELC) Case No. 92 of 2018, the Court ruled that the land was DW2's, and that the Survey was to begin but the Objector served an order from this Court stopping the process. According to her, all her houses on the land have now been brought down, and the Objector also has a dispute with the said Simeon Metto who purchased the 8.6 acres.
29. In cross-examination, she reiterated that she is entitled to 2 acres but that she was chased away from the land by the Objector who is currently occupying the whole 2 acres. She insisted that the 2 acres are not part of the 5 acres that was allocated to the Objector as his inheritance, and that the family of the deceased is not at fault because it did its part. She conceded that she did not produce a Sale Agreement but stated that the purchase price for the first 1 acre was paid by her sister and she took over and paid the balance when the sister died. She stated further that she reimbursed the Objector Kshs 50,000/-, that the 8.6 acres given to Simeon Metto was different from DW2's 2 acres, and that for the initial 1 acre, she had paid it to the family of the deceased.
30. DW3 was Adrian Mutsotso Akala. He stated that as a family, they had distributed the said Uasin Gishu/Ndalat Scheme/458 the subject hereof, that the family no longer has any share in the land as they moved away to Mautuma in Kakamega. He repeated that as a result of the land clashes of 1992, his family and that of Job Lelei arap Maritim (Objector's family) exchanged 12 acres with each other although Uasin Gishu/Ndalat Scheme/458 was 15.6 acres. He insisted that the Objector is entitled to 5 acres and not



- 8.1 acres as alleged. He also observed that the Objector has even also wrongly included DW3's brother, Francis Luyali Akala as being entitled to a share when no member of the family of the deceased has asked for any such share. He reiterated that the 2<sup>nd</sup> Respondent (DW2), Winfred Barsula, bought 1 acre and later also bought 1 more acre thus totalling 2 acres.
31. In cross examination, he reiterated that the land was initially 15.6 acres out of which they exchanged 12 acres with the family of the Objector and thus they remained with 3.6 acres. He stated that out of this remaining 3.6 acres, they sold 1 acre to the Objector and another 1 acre to the Objector's brother, Jonah Kipkemboi Tarus, thus leaving a remainder of 1.6 acres. He then stated that their brother Clement felt sick and so they sold the 0.6 acres to one Jackson Kisori to cater for medical costs thus leaving a remainder of 1 acre which they also later sold to the 2<sup>nd</sup> Respondent (DW2), Winfred Barsula. He added that the 2<sup>nd</sup> Respondent's earlier acquired 1 acre was sold to her earlier by the Objector and confirmed that he gave his consent to the manner of distribution that was adopted by this Court. In conclusion, he, too, denied any knowledge of the Further Affidavit exhibited and allegedly sworn by him on 24/01/2017 and which purportedly declared the Objector's claim for 8.1 acres as genuine. He termed the same a forgery. In re-examination, he stated that he reported the forgery to the police.
32. DW4 was Jonah Kipkemboi Tarus, the Objector's brother. He stated that unlike the Objector, he supports the distribution adopted in the Grant issued herein since it is their father, Job Maritim Lelei who oversaw the distribution and it is him (their father) who had exchanged the Uasin Gishu/Ndalat Scheme/454 land with his 12 acres of land located in Mautuma in Kakamega (plot No. 498) with the family of the deceased. He stated that after the exchange, they fell into disputes within the family and therefore their father brought in Simeon Kiptoo Metto and gave him 8.6 acres and he (their father) then gave his children, including Objector and DW4, parcels of land elsewhere. He stated that it is their family that then informed the family of the deceased of the purchase of the 8.1 acres by Simeon Kiptoo Metto because the land was still in the name of the deceased. He stated that members of the family of the deceased then came to oversee the handing over of the 8.6 acres to Simeon Kiptoo Metto and that no objection was received by anyone, not even from the Objector who was present during the exercise, and that their father was also present. He also registered his surprise to learn that a grandson of the deceased, Mark Luyali, (PW2) has also raised an objection yet he (PW2) never raised any objection at that time. He further stated that apart from the 8.6 acres allocated to Simeon Kiptoo Metto, a further 5 acres was given to the Objector and that among their family, only the Objector was left by their father to remain on the land. He trashed the Objector's claims herein and denied that the Objector is entitled to any more land. He contended that the Objector should have complained when their father was still alive.
33. He stated further that when their father commenced the survey process, Adriano Mutsotso (DW3), stopped the exercise because he demanded that, first, payment for another 1 acre of the land (not among the 12 acres exchanged though) sold be settled, that the 2<sup>nd</sup> Respondent, Winfred Barsula (DW2), then came and they talked with the family of the deceased - Francis Luyali and Adriano Mutsotso Akala - and they then signed a document. He added that the Objector and the Chief (Benjamin Maiyo) were also present, that they entered into the house of Simeon Kiptoo Metto where the 2<sup>nd</sup> Respondent (Winfred Barsula), gave Kshs 50,000/- to the Objector to count, that the cash was then given to Francis Luyali Akala and that this money was in payment for purchase of the 1 acre. According to DW4, the Objector was involved only as a witness because being a member of the family of Job Maritim, the Objector was the only one who remained in the land, and that he acted as a broker in the transaction since he already had his separate 5 acres land.
34. He, too, confirmed that the land was initially 15.6 acres, that what was exchanged with the family of the deceased was 12 acres and thus 3.6 acres remained. He, too, confirmed that out of this remainder of



- 3.6 acres, the family of the deceased sold 1 acre to the Objector and 1 acre to DW4 leaving a remainder of 1.6 acres. He stated further that out of the 1.6 acres remainder, the 1 acre that the Objector had purchased, he (Objector), during the survey exercise as aforesaid, sold it to the Respondent's sister, Pauline Koitie, who built a house thereon, started cultivating it and put a caretaker. He confirmed that the said sister is now deceased, was buried on the same land and upon which the 2<sup>nd</sup> Respondent took it over. He added that as aforesaid, that by that time, the 2<sup>nd</sup> Respondent already had the separate 1 acre which she had earlier purchased by herself and that this is how she was allocated 2 acres in the Certificate of Grant.
35. He also claimed that the 2<sup>nd</sup> Respondent stayed on the land for 15 years before the Objector chased her away, forcefully took over her land and started cultivating it. He contended further that the Objector and his sons began demolishing the Objector's house built on the land, that the Objector went to the ELC Court and that the Objector and his son, William Kipruto Serem, were also prosecuted in a criminal case for damage to property, that another charge was threatening to kill and that the son was convicted. He testified further that the ELC Court declared the 2<sup>nd</sup> Respondent (PW2) the legal owner of the said 2 acres of the land but that the Objector ignored the Judgment and is still occupying the land and is even interfering with the Objector's sister's grave with the intention of destroying evidence.
36. In cross-examination, he denied that he has any disagreements with the Objector and insisted that he only came to Court to tell the truth. He reiterated most of the matters already testified upon and reiterated that out of the 3.6 acres remainder referred to, 0.6 acres was sold to one Jackson Kisorio who later also sold it to Simeon Metto, that he (DW4) also later sold his 1-acre plot to the same Simeon Metto and which is what makes the total acreage in the name of Simeon Metto to amount to 8.6 acres. He added that the 2<sup>nd</sup> Respondent and Francis Liyali Akala made an Agreement after the 2<sup>nd</sup> Respondent was called and the 2<sup>nd</sup> Respondent paid Kshs 50,000/- when the family of the deceased stopped the survey exercise and that he recalls seeing the Agreement. He also insisted that the Objector sold the 1 acre to the 2<sup>nd</sup> Respondent's sister but he conceded that he was not there when the transaction was made. He reiterated that the acreage allocated to Simeon Metto in the Certificate of Grant was 8.6 acres since he (DW2) had sold to Simeon Kimetto 1 acre and which means that in total what their family had given Simeon Kimetto was 7.6 acres. He stated further that the Objector is currently occupying 7 acres (5 acres of his own and 2 acres belonging to the 2<sup>nd</sup> Respondent and her sister). In re-examination, he stated that the 8.6 acres is also because his other brother, Moses Kiprotich Maritim, also sold 1 acre to Simeon Metto. In conclusion, he stated that the 7 acres currently occupied by the Objector and the 8.6 acres occupied by Simeon Kimetto aggregates to the 15.6 acres which then accounts for the size of the entire land.

### **Submissions**

37. Upon close of the trial on 5/02/2024, the parties filed written Submissions. The Objector filed his Submissions on 11/06/2024 while the Administrator/Petitioner had filed his earlier on 1/03/2024.

### **Objector's Submissions**

38. The Objector's Counsel reiterated the fact that in the year 1992, the Objector's family and the family of the deceased exchanged 5 acres of the parcel of land situated in Lugari District measuring 5 acres with the 5 acres of the parcel of land known as Uasin Gishu/Ndalat Scheme/454. He submitted further that in the year 1994, the Objector purchased from the family of the deceased a further 3.6 acres out of the said Uasin Gishu/Ndalat Scheme/454 wherein his brother, Jonah Kipkemboi took possession of 0.5 acres of the 3.6 acres and that the total acreage that he purchased and the one that he was allocated upon the exchange amounted to 8.1 acres of the Uasin Gishu/Ndalat Scheme/454.



39. He submitted further that in obtaining the Grant herein, the Objector's signature was forged and that the then Administrator only allocated the Objector 5 acres instead of 8.1 acres which is what he is legitimately entitled to. He then referred to alleged Agreements for Sale and Affidavits sworn by members of the family of the deceased, including by the then Administrator, Francis Liyali Akala. Counsel contended that PW2, a grandson of the deceased, whose testimony was mainly to confirm that his grandfather exchanged the 5 acres of land with the Objector's family and that they further in the year 1994 sold a further 3.6 acres of the same land, in his testimony, twisted the narrative to aver that his father never sold any other portion and that the remaining 7 acres remained with Spenzia Kaziti Marenye, Adriano Mutsotso Akala and Atunatos Musyomi.
40. Regarding the 2<sup>nd</sup> Respondent's (DW2) claim that she was entitled to 2 acres, Counsel submitted that DW2 could not provide proof of purchase thereof. Regarding DW3's (Adriano Mutsotso Akala - current Administrator) averment that there is no land that remained since their family sold the entire portion, Counsel submitted that DW3 was unable to explain the discrepancy between the distribution as per his Statement dated 21/02/2023 and the Certificate of Confirmation of Grant despite disowning his own Affidavit and claiming that the same was forged. Regarding DW4 (Jonah Kipkemboi Tarus - the Objector's own brother and who testified against the Objector), Counsel observed that although DW4 confirmed that the families exchanged 12 acres of land and that 3.6 acres remained with the family of the deceased, and although he stated that it is not true that the Objector (his brother) deserved 8.1 acres, he however could not explain why he has not claimed his 1 acre which he allegedly purchased from the family of the deceased. According to Counsel, the testimonies of the witnesses paint a picture of a maze where each witness from both parties rejects and tend to complicate the facts to suit their own interest in this matter and thus further complicating the puzzle.
41. On the question whether the Applications are properly before this Court, Counsel submitted that the Objector has approached this Court seeking a review of the Certificate of Confirmation of Grant in respect to the acreage allocated to him, that Section 74 of the Law of the Succession Act provides that rectification can be done by the Court on "errors in names, description or in setting out the time and place of deceased's death or the purpose of limited grant ....". He added that Rule 63 of the Probate and Administration Rules applies Order XLIV of the Civil Procedure Rules (now Order 45) to Succession matters, and that by dint thereof, a party who discovers a new matter of evidence after an Order has been made may apply for review to the Court which made the order. He cited the case of In Re Estate of Charles Kibe Karanja (Deceased) [2015] eKLR and the case of In Re Estate of John Mwaka Koka (Deceased) [2019] eKLR. He also urged that the Court can invoke its inherent powers and cited the case of Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR.
42. On whether the Objector has proven his case to warrant a review of the Grant, Counsel cited the case of Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya [2019] eKLR regarding the grounds under Order 45 Rule 3 which must be demonstrated by a party seeking Review. He then submitted that the Objector exhibited Affidavits sworn by the Administrators advancing a different mode of distribution and in which they acknowledged that the Objector is entitled to a share of 8.1 acres, and that during the hearing, in as much as Adrian Mutsotso Akala (DW3) rejected his Affidavit claiming that it was forged, he was at pains to justify the mode of distribution set out in his Statement. He added that it is not in dispute that the Objector's family exchanged 5 acres for 5 acres from Mautuma belonging to the family of the deceased, that the Objector produced agreements to effect that he bought a further 3.1 acres thus bringing his total to 8.1 acres, that therefore the Administrators discovered a new fact that was not in their knowledge during the confirmation or that the parties involved mistakenly omitted to include the 3.1 acres. He submitted that the Court cannot



in the exercise of its inherent power review and restructure the distribution of the estate and that consequently it calls for revocation of the grant that was confirmed.

43. On revocation of the Grant, Counsel cited Section 76 of the *Law of Succession Act* and submitted that it is not however cast in stone that a Court must revoke a certificate of grant. He cited the case of *Re Estate of Joel Cheruiyot Rono* [2016] eKLR, in which, he submitted, the Court found that revocation of a certificate of confirmation was not a viable option. According to Counsel therefore, this calls for the Court to make a finding that the grant of representation does not meet the requirements of Section 76 by virtue of the evidence adduced and that the same ought to be revoked and timelines set for parties to propose a new mode of distribution.

### Administrator's Submissions

44. On his part, Counsel for the Administrator submitted that all beneficiaries were included according to their share, including the Objector, who was always kept informed but failed and/or refused to participate despite being contacted and that he wilfully refused to sign the consent to mode of distribution and also ignored Court sessions for confirmation of the Grant. Counsel therefore contended that the proceedings were lawful and also denied that the Objector's signature was forged.
45. On the principle that allegations of fraud must be distinctly pleaded, distinctly proved and not left to inference, Counsel cited the case of *In re Estate of Dedan Kabiru Kibonge (Deceased)* [2021] eKLR, the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, the case of *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [27], and also the case of *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, among others.
46. On the principle that the standard of proof when alleging fraud is higher than that of "a balance of probabilities" but not to the standard of criminal cases of "beyond reasonable doubt", Counsel cited the case of *Ndolo v Ndolo* [2008] 1KLR (G&F) EA 314, and also the case of *Central Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR. He then also cited Section 109 of the *Evidence Act* and submitted that the burden of proving fraud rested on the person alleging fraud. In regard thereto, he cited several authorities including the case of *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR and the case of *Urmilla w/o Mahendra Shah v Barclays Bank International Ltd & Another* [1979] eKLR.
47. On whether the Objector has demonstrated fraud on the part of the Administrator/Petitioner, Counsel submitted that the Objector failed to do so, that the Objector did not specifically point out and/or particularize the fraud other than merely throwing assertions to that effect. On the allegation that the Objector's signature was forged, Counsel submitted that the Objector had a duty to prove the allegation, such as by way of expert opinion or evidence of a handwriting expert.
48. Counsel also contended that once a Succession Court has confirmed a Grant, it becomes functus officio and that in that sense, the prayers sought are untenable. He cited the cases of *In re Estate of the late Kipngeny Arap Chepkwony (Deceased)* [2021] eKLR, the case of *In re Ernest Kerry Komo (Deceased)* [2016] eKLR and also the case of *In re Estate of Juma Shitseswa Linani (Deceased)* [2021] eKLR. According to Counsel therefore, the Objector ought to have appealed the said decision, or at the very least sought a Review thereof but not to seek Revocation of the Grant.

### Determination

49. The issue for determination herein is "whether the Objector has established sufficient basis for revocation of the Grant issued herein or setting aside or review of the mode of distribution adopted therein".



50. Review of orders in a Succession Cause is governed by Rule 63(1) of the *Probate and Administration Rules*, which provides as follows:

“63. Application of *Civil Procedure Rules* and High Court (Practice and Procedure) Rules

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

51. It is therefore evident from the foregoing that the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are those listed above and which includes Order 45 of the *Civil Procedure Rules* which relates to Review (see *John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR).

52. It is also true that any party seeking review of orders in any proceedings, including probate or Succession matters as herein, must meet the requirements set under Order 45(1). The same provides as follows:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

53. From the foregoing, it is clear that Order 45 therefore recognized 3 circumstances under which Review can be ordered. The first one is where there has been “discovery of new and important matter or evidence”. The second is where there has been “a mistake or error apparent on the face of the record” and the third ground is “for any other sufficient reason”. The Objector has come under the ground of “mistake or error apparent on the face of the record” insofar as he alleges that the acreage allocated to him was erroneous or was less than what he was entitled to. He has also cited the ground of “discovery of new and important matter or evidence”.

54. On Revocation of a Grant, the Objector has, in his Application, cited Section 73 of the *Law of Succession Act* which appears to have been a typographical error. This is because it is Section 76, not 73, of the *Act* which provides for Revocation of Grants. The said Section 76 of the *Law of Succession Act* provides as follows:

“76. Revocation or annulment of grant



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.”

55. Evidently, the grounds relied upon by the Applicants are those falling within sub-Sections (a), (b) and (c) above.

56. On the issue of revocation of Grants, Section 76 was expounded upon by Hon. Justice W. Musyoka in the case of *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR in which he stated as follows:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to



apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

57. In this case, although there are conflicting particulars from the two sides on the exact details of the matters herein as advanced by either side, it is basically agreed that the Objector’s family and the family of the deceased entered into an agreement whereof the two families exchanged parcels of land situate in Uasin Gishu and in Kakamega, respectively, with each other. While the Administrator and his witnesses claim that the exchange was for 12 acres, respectively, and that it was between the Objector’s father and the family of the deceased, on his part, the Objector claims that the exchange was for 5 acres, respectively, and was between himself (not his father) and the family of the deceased. Further, while the Administrator claims that upon the exchange of the 12 acres, the Objector’s father, Job Maritim, distributed the property amongst his children and whereof the Objector inherited 5 acres, the Objector maintains that the 5 acres was not an inheritance from his father but that the same was acquired by him directly from the family of the deceased when he exchanged his own separate 5 acres with the family of the deceased.
58. The full version advanced by the Administrator and his witnesses is that the Objector’s father, the late Job Lelei Maritim, owned the property known as Uasin Gishu/Ndalat Scheme/454 measuring 15.6 acres situated in Uasin Gishu and that the Administrator’s father, the late Akala Litali Mukhasi (deceased herein) owned a separate property measuring 13 acres situated in Mautumo, Lugari in Kakamega. The Administrator and his witnesses claim that as a result of the infamous 1992 land clashes that engulfed parts of the North Rift region, the two land owners, with the intention of each one returning to his respective home of origin, agreed to and did exchange the two properties with each other and each then relocated “back home”. They further alleged that the respective acreages exchanged was 12 acres for each of the properties and which therefore meant that since the two properties were not equal in acreage, the additional 3.6 acres of Uasin Gishu/Ndalat Scheme/454 was not exchanged but remained under ownership of the deceased, Akala Litali Mukhasi. They further claim that by time of his death, the deceased had not yet transferred the said property Uasin Gishu/Ndalat Scheme/454 to the name of the Objector’s father and that the same remained in the name of the deceased hence the need for the commencement of this Succession proceedings.
59. What is not in dispute is that 15 years after the deceased had long passed away in the year 1981, his son Francis Liyali Akala (also now deceased), instituted this Succession proceedings in the year 1996 seeking Letters of Administration which was given to him on 20/01/1997 and subsequently confirmed on 20/06/2016. The motivation for filing this Succession proceedings 15 years after the deceased had long died was clearly a result of the pressure applied by several purchasers or “transferees” of several portions of the only asset of the estate, namely, Uasin Gishu/Ndalat Scheme/454. It is my assumption that these purchasers/ “transferees” were demanding for their respective title deeds for their portions. As already stated, the confirmation and/or distribution was in respect of the estate’s only property, Uasin Gishu/Ndalat Scheme/454 and in the Certificate of Confirmation of the Grant issued, it was stipulated that the property would first be transmitted to the Petitioner as a whole, and who would then transfer it in the following manner:



Simeon Kiptoo Metto	8.6 acres
John Kipserem Maritim (2 <sup>nd</sup> Objector)	5.0 acres
Winfred Jepkoech Barsula (2 <sup>nd</sup> Respondent)	2. acres

60. It is this mode of distribution that the Objector now challenges by claiming that he acquired 5 acres which he had exchanged with the family of the deceased and that later, he purchased an additional 3.1 acres thereof from the family of the deceased but which was not included in the Certificate of Confirmation of Grant.
61. The Objector claims that he only learnt of these proceedings in August 2016 when he was served with Court documents by the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula, and that his alleged signature on the consent for confirmation was forged. According to the Objector therefore, the proceedings were defective in substance as it did not indicate the Objector's correct share and that therefore, the process was tainted with irregularities, misrepresentations and concealment of material facts. He has also taken issue with the 2 acres allocated to the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula which I assume is the same portion claimed by the Objector.
62. Regarding his alleged acquisition of the additional 3.1 acres, the Objector testified that he purchased the same from the family of the deceased in the year 1994, that the family of the deceased first agreed to sell to him 2 acres at a sum of Kshs 80,000/-, that he was with his brother, Jonah Kipkemboi Tarus and they agreed to purchase the same together, that on 10/02/1994, he paid Kshs 60,000/- for 1 ½ acres and his said brother was then given 14 days to pay the balance of Kshs 20,000/- for the remaining ½ acres. He claimed that there were witnesses including his said brother and also the Chief who is the one who wrote the Agreement and that other witnesses are now deceased. He then insisted that he later, in 1995, purchased a further 1.6 acres.
63. My observation is that the conflicting accounts advanced by both parties and their witnesses revealed substantial contradictions, absence of forthrightness, hearsay evidence and bare allegations not supported by any documentary evidence. I could not but believe that most of the witnesses had simply been "coached" to come and state what their benefactors wanted them to state. As aforesaid, the fact that most of the matters alleged herein by both sides were not supported by documentary evidence, seems to have created the opportunity for the witnesses to "manufacture facts".
64. To this extent this, I agree with the Objector's Counsel's submission which he put as follows:
- “1. The nature of this dispute paints the true nature historical puzzle, lies, falsehood and dishonesty over events that happen in the past. The possibility of resolving these issues and the complexity arising therein can best be captured in the wise words of Murdoch in Socrates thus:
- “In a way, goodness and truth seem to come out of the depths of the soul, and when we really know something we feel we've always known it. Yet also it's terribly distant, farther than any star ... beyond the world, not in the clouds or in heaven, but a light that shows the world, this world, as it really is ... In spite of all wickedness, and in all misery, we are certain that there really is goodness and that it matters absolutely.”



2. Your Lordship, the truth in this matter is shrouded in wickedness and misery that seems to very far yet near, it appears straight forward yet convoluted with half-truths and lies. It is prudent to lay a background of the genesis of the issues to resolve by this court.”

65. As aforesaid, the absence of documentary evidence on most of the matters alleged herein by both sides appears to have created an opportunity for the witnesses to engage in speculation and advance unsubstantiated statements. Further, the land transactions alleged herein having been undertaken after the death of the deceased and before confirmation of the Grant, raised the question of the validity thereof in light of the law against intermeddling with the estate of a deceased person set out to Section 45 of the *Law of Succession Act*.

66. However, having heard and seen the witnesses, and keenly observed and studied their demeanour, I formed the view that the 2<sup>nd</sup> Respondent, Winfred Jepkoech Barsula, who testified as DW2 was quite truthful and was the most believable amongst all the witnesses. The witness who struck me as most doubtful, in my humble view, was the Objector, John Kipkerem Maritim who testified as PW1. My above conclusion was based on several observations, inter alia, the following:

- i. First, although the Objector claimed that he directly acquired 5 acres of the property Uasin Gishu/Ndalat Scheme/454 pursuant to an exchange that he made directly between himself and the family of the deceased, he could not explain in what capacity he did so. This is because he has never been a registered owner of the property. Not being the owner therefore, under what capacity and under whose authority would he have exchanged the 5 acres?
- ii. Secondly, the Objector did not produce a single document to prove the alleged exchange for 5 acres. For an exchange of acreage of land of that magnitude, ordinarily, one would expect a purchaser to have some kind of documentation.
- iii. For the alleged additional 3.1 acres that the Objector claims to have subsequently also purchased from the family of the deceased, he also did not produce any supporting document whatsoever.
- iv. Although the Objector claims that there were many witnesses to the transaction for the 5 acres and the subsequent one for 3.1 acres, he failed to bring a single one of them. When challenged on this, he simply alleged that all the witnesses were deceased.
- v. The Objector’s explanation on how he made payments for the alleged additional 3.1 acres was inconsistent and full of conflicts. While in some instances, he claimed that he paid in 2 instalments, in others he stated that he paid in several instalments. He also does not clearly disclose the identity of the person within the family of the deceased to whom he made the payments and/or whether such person even had authority of the rest to receive the payments on behalf of the family.
- vi. PW2, Mark Liyali Mareja, a son of the initial Petitioner/Administrator, Francis Liyali Akala (who has since died and substituted), and therefore a grandson of the deceased, and whom the Objector himself called as his only witness, contradicted the Objector when he denied that any additional land was sold by the family of the deceased after the exchange of the 12 acres. This therefore weakens the Objector’s claims that he purchased the additional 3.1 acres from the family.
- vii. The Administrator and DW3 both disowned the exhibited copies of some Affidavits allegedly sworn by them and which purported to acknowledge that the Objector was entitled to the



additional 3.1 acres. According to the Administrator and DW3, the alleged Affidavits were forgeries. In light of this denials, and as the party claiming, the Objector had the liberty to seek the services of a document examiner or a handwriting expert to prove the authenticity or lack of it, of the Affidavits. However, no attempt was made to do so.

- viii. The Objector's own brother, Jonah Kipkemboi Tarus (DW4) who broke ranks with the Objector and testified on behalf of the Administrator, contradicted the Objector and described the Objector's claims as outright falsehoods and disowned the matters alleged by the Objector.
- ix. PW2, as aforesaid, a son of the initial Administrator, was the only witness called by the Objector. To say the least, his testimony, was of very minimal value. He appeared to me to be "a gun for hire". His testimony was pure hearsay and speculation. His motivation appears to have been his own separate attempt to reclaim 7 ½ acres of the land which he alleged, without any basis whatsoever, should revert to the family of the deceased. It is his clear from his testimony that he played zero role in the transactions herein which were conducted by his grandfather, father and uncles, to his complete exclusion. Without any evidence whatsoever, he made the incredible claim that about 30 other members of the family also do not agree with the distribution adopted in the Grant. He never mentioned who these 30 members of the family were. In my mind, I immediately dismissed him as a busybody who added no value in the quest to resolve the dispute herein.
- x. The 2 sons of the deceased who testified as DW1 (Athunatos Musomi Akala), the current Administrator, and DW3 (Adrian Mutsotso Akala) having no further claims over the land or for any share thereof their family having long distributed the land to third parties, I could not find any vested interest still subsisting that would motivate them to deny the Objector his rightful entitlement, if any. I find no reason why they would unfairly support the 2<sup>nd</sup> Respondent against the Objector. For this reason, they were now more of neutral witnesses and compared to the Objector, I choose to go by their testimony.
- xi. According to the witnesses, and this was not disputed by the Objector, the 2<sup>nd</sup> Respondent and her sister had been in occupation of the disputed land for almost 15 years before the Objector chased her away. It is also not denied that when the 2<sup>nd</sup> Respondent's said sister died, she was buried on the same parcel of land yet no protest was received from the Objector. Why then would the Objector suddenly start questioning the 2<sup>nd</sup> Respondent's occupation if not an afterthought.
- xii. There was also no explanation by the Objector on why her never raised the present issues, objections, or challenges when his own father, Job Lelei Maritim, who is said to have been the one who acquired the 12 acres of the land from the family of the deceased, was still alive. The fact that the Objector only waited for his father to die before beginning to "rock the boat" is a pointer towards his dishonesty and unlawful intentions.
- xiii. Although he claims that the signature appearing on the consent to the mode of distribution was not his and that it was forged, there is no evidence that he reported the alleged forgery to the police for investigations.
- xiv. There is evidence that the Objector and his children have consistently harassed and employed violent, criminal and extra-judicial actions with the intention of forcing the 2<sup>nd</sup> Respondent out of the property. When this did not work, they eventually violently chased away the 2<sup>nd</sup> Respondent from the land. There is ample evidence that the Objector and his children demolished and vandalised the 2<sup>nd</sup> Respondent's house, on several occasions threatened her



with dangerous weapons and constantly invaded the 2<sup>nd</sup> Respondent's land. Most disturbing is the allegation, which was not seriously disputed, that the Objector and his children even proceeded to commit an abomination by desecrating the 2<sup>nd</sup> Respondent's sister's grave by destroying it and to make matters worse, blocking the 2<sup>nd</sup> Respondent from repairing and/or restoring the grave. The acts of the Objector is pure thuggery which cannot be allowed in a civilized society. Indeed, it was quite heartbreaking for the Court to listen to the 2<sup>nd</sup> respondent recounting, with so much pain and tears, the agony and untold tribulations that she has had to undergo under the hands of the Objector and his children. The Objector must now stop such criminal acts.

- xv. Until evidence of his conviction was produced, the Objector had vehemently denied that he had been prosecuted and convicted for the said criminal offences. This again, demonstrates the Objector's dishonesty.
  - xvi. There are also copies of the letters dated 29/07/2011 and 25/04/2012 written by the area Chief in which he confirmed that a meeting was convened to resolve the dispute and which resolved that the 2<sup>nd</sup> Respondent was the genuine owner of the said 2 acre-portion of the land. The Chief wrote that among the portions of Uasin Gishu/Ndalat Scheme/454 sold by the family of the deceased making up the remainder of the 3.6 acres, 1 acre was sold to the Objector, 1 acre to the 2<sup>nd</sup> Respondent's late sister and 1.6 acres to other respective purchasers. He then wrote that subsequently, the Objector's 1 acre which he had bought, he sold it to the 2<sup>nd</sup> Respondent. The above account tallies with what the Administrators and his witnesses told the Court. The Chief also wrote that when the 2<sup>nd</sup> Respondent's sister died, she was buried on the same portion, that the 2<sup>nd</sup> Respondent had been cultivating the land peacefully for about 15 years and that the sisters had built a house thereon. The Chief also confirmed the violent acts and harassment unleashed on the 2<sup>nd</sup> Respondent by the Objector aimed at forcing the 2<sup>nd</sup> Respondent to vacate the portion.
  - xvii. A copy of the Judgment in an earlier suit, namely, Eldoret Chief Magistrate's Court Environment & Land Court (ELC) Case No. 92 of 2018 was produced in evidence. In that case the 2<sup>nd</sup> Respondent sued the Objector claiming that the Objector had encroached into the same portion of land in Uasin Gishu/Ndalat Scheme/454 belonging to her, the same subject hereof. She therefore sought an order that the Objector be compelled to vacate the said portion. By its Judgment delivered on 16/01/2019, the Court declared the 2<sup>nd</sup> Respondent as the owner of the said portion and restrained the Objector from entering the same. The issue of ownership of the said portion by the 2<sup>nd</sup> Respondent having been determined by a Court of competent jurisdiction, is therefore, technically, now Res Judicata and should be re-litigated upon again.
  - xviii. The Objector conceded that he never appealed against the said decision. Despite all this, the testimony given is that the Objector has ignored that Judgment and is still cultivating the said portion. This, if true, is pure disobedience of a Court order and a brazen act of contempt of Court
67. In view of the above, I find the Objector's "story" to be full of doubts, inconsistencies, and contradictions. He was obviously not forthright and was evidently selective in disclosing facts. In the circumstances, I find it unsafe to rely on the Objector's testimony.
68. Even assuming that my findings above are incorrect, and even though the Administrator's witnesses, too, were not sufficiently convincing, did not substantiate their allegations and did not also produce documentary evidence, the provisions of Section 107, 108 and 109 of the Evidence still mitigate against



the Objector since he is the party seeking judgment in his favour. The said provisions stipulate as follows:

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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

69. In view of the foregoing, it is clear that the general rule is that the burden of proof always lies on a Claimant. In view thereof, it is the Objector who will fail in this case if the Court is left in a position where it is unable to conclusively resolve which of the two conflicting set of facts presented is the true position. For that reason, I find that the Claimant has failed to demonstrate to the required standard, that he is entitled to the additional 3.1 acres of the parcel of land known as Uasin Gishu/Ndalat Scheme/454. Accordingly, it is him who must fail herein.
70. For the said reasons, my conclusion is that the Objector has failed to meet the threshold set under Section 76 of the *Law of Succession Act* for Revocation or annulment of Grant. In respect to Order 45 of the *Civil Procedure Rules*, I also find that the Objector has similarly failed to satisfy the conditions required to warrant Review of the mode of distribution adopted in the Certificate of Confirmation of Grant herein.
71. Having heard and seen the witnesses, I have no reason to disbelieve the account given by the Administrator and his witnesses. This is that Uasin Gishu/Ndalat Scheme/454 was 15.6 acres out of which the family of the deceased exchanged 12 acres thereof with the family of the Objector and thus remained with 3.6 acres. I also have no reason disbelieve the account that out of this remaining 3.6 acres, the family of the deceased sold 1 acre to the Objector and another 1 acre to the Objector’s brother, Jonah Kipkemboi Tarus (DW4) thus leaving a remainder of 1.6 acres. I also believe the account that out of this 1.6-acre remainder, the family sold 0.6 acres to one Jackson Kisorio thus leaving a remainder of 1 acre which they also later sold to the 2<sup>nd</sup> Respondent (DW2), Winfred Barsula. I also believe the account that the 1 acre purchased by the Objector, he later sold it to the 2<sup>nd</sup> Respondent’s late sister, Pauline Koitie, upon whose death, the 2<sup>nd</sup> Respondent took it over.
72. Regarding the other persons (beneficiaries and/or purchasers) appearing in the Certificate of Confirmation of Grant, although it would be improper for this Court to purport to make determinations on matters touching on persons not parties to this action and who have not been heard herein, I would say that, prima facie, I also have no reason to disbelieve the account that the 1 acre purchased by the said William Kisorio, he later sold it to one Simeon Metto who also purchased the other 1 acre sold to the Objector’s brother, Jonah Kipkemboi Tarus. Similarly, I also have no reason



to disbelieve the account that all other third parties appearing in the Certificate of Confirmation of Grant are persons who purchased respective portions of the property from the family of the Objector after the family of the deceased had already given out the land to the Objector's family and sold other portions to other purchasers.

73. In the circumstances, I decline to interfere with the distribution adopted and reflected in the Certificate of Confirmation of Grant given herein on 20/06/2016 and amended on 26/10/2020.

### **Final Orders**

74. In the end, I order as follows

- i. Both the Summons for Revocation or Annulment of Grant, dated 16/09/2016 and the subsequent Summons for Review of Certificate of Confirmation of Grant, dated 22/02/2023, both filed by the Objector - John Kipserem Maritim - are hereby dismissed.
- ii. I award the costs of these proceedings to the Administrator –Athunatos Musiom Akala - and the 2<sup>nd</sup> Respondent - Winfred Barsula - to be borne by the Objector.
- iii. The Administrator is now at liberty to implement the transmission of the property, Uasin Gishu/Ndalat Scheme/454, to the 3 beneficiaries, as contained in the Certificate of Confirmation of Grant given herein on 20/06/2016 and amended on 26/10/2020.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Koskey for Objector

Songok for Administrator-Respondent

Court Assistant: Brian Kimathi

