



REPUBLIC OF KENYA



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**In re Estate of Abishae Onyango Magwar alias Abishae J. Onyango Magwar (Deceased)
(Succession Cause E007 of 2021) [2023] KEHC 19296 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE E007 OF 2021**

RE ABURILI, J

JUNE 27, 2023

**IN THE MATTER OF THE ESTATE OF ABISHAE ONYANGO
MAGWAR ALIAS ABISHAE J. ONYANGO MAGWAR (DECEASED)**

AND

**IN THE MATTER OF APPLICATION BY ROSE MIKAL ADHIAMBO
ONYANGO AND MILLICENT ADHIAMBO ONYANGO**

IN THE MATTER OF

**ERIC CHARLES ODUOR 1ST APPLICANT
LINET AKINYI ONYANGO 2ND APPLICANT
DUNCAN OCHIENG ONYANGO 3RD APPLICANT
CHRISTOPHER OMONDI ONYANGO 4TH APPLICANT**

RULING

1. This Succession Cause was initiated on February 24, 2021 by Rose Mikal Adhiambo Onyango as Petitioner, seeking for a grant of representation intestate to administer the estate of the deceased Abishae Onyango Magwar who died on October 27, 2019.
2. In the Petition and Affidavit in support, which is P&A 5, the Petitioner listed herself and one Millicent Adhiambo Onyango as being widows to the deceased and only surviving beneficiaries of the estate of the deceased.
3. The sole asset of the estate was listed as Land Parcel No Kisumu/108 although the certificate of official search as annexed obtained on December 30, 2019 describes the land as Kisumu/Songhor/108 registered in the name of Abishae J. Onyango Magwar on March 15, 1991 and the title deed issued on March 21, 1991. The land measures 14.3 Hectares and the nature of the title is absolute. The Chief's letter introducing 11 beneficiaries of the estate was filed with the petition.



4. On February 26, 2021, the Petitioner was gazetted vide Gazette Notice No 1869. On April 27, 2021, exactly 60 days later, a grant was issued to the Petitioner. On July 13, 2021, the Petitioner filed summons for confirmation of grant and in the schedule of distribution, several beneficiaries were named, besides the 2 widows. These are Christabel Atieno, Cyprinne Akinyi, Vincent Omollo, Moses Bikala, Joseph Mukhobe, Erick G. Oduor Onyango, Linet Akinyi, Duncan Ochieng Onyango and Christopher Omondi Onyango.
5. In support of the summons for confirmation of grant was an affidavit of Rose Mikal Adhiambo Onyango sworn on July 12, 2021 seeking for waiver of six (6) months period on account that she was of ill health and wanted to travel back to the United Kingdom where she also ordinarily resided. No consents on the mode of distribution of the estate were signed by any of the beneficiaries except Millicent Adhiambo Onyango who is a co petitioner.
6. She deposed that the deceased was survived by 4 wives and 8 children and that one widow, Eunice Atieno Onyango died without any children.
7. It was then that on August 16, 2021, under certificate of urgency, some of the beneficiaries namely, Erick Charles Oduor, Linet Akinyi Onyango, Duncan Ochieng Onyango and Christopher Omondi Onyango filed summons for revocation of grant issued on April 27, 2021 setting out grounds which are stipulated in Section 76 of the *Law of Succession Act*.
8. The supporting affidavit sworn by Erick Charles Oduor lists persons at paragraph 4, to be beneficiaries of the estate and claiming that Rose Mikal Adhiambo is not the rightful widow to the deceased Abishae Onyango Magwar hence she was not entitled to the estate of the deceased; since she had been separated from the deceased almost 45 years earlier then she travelled to the UK where she lived and worked until her retirement.
9. That when the 1st Petitioner's daughter Florence Akinyi died, the deceased Abishae Onyango tried to pursue her benefits from Kenya Airways but he was dismissed on account that his deceased daughter had only listed the 1st Petitioner herein, her mother as the sole beneficiary of her estate.
10. That upon separating from the deceased, the 1st Petitioner got married to a Ugandan citizen Joseph Wamaghale and they sired two sons, Joseph Mukhobeh and Moses Bikala who had been wrongly listed as beneficiaries. That the 1st Petitioner only returned to Kenya to inherit the sole asset which was acquired in 1974 after she had separated from the deceased.
11. That in her British Passport, she had her names reading Wamaghale but only obtained Kenyan Identity Card on 6th February 2020 for purposes of grabbing the sole asset; and that this fact is reflected in her medical treatment documents which she has filed into court.
12. That her intention was to acquire title to the land and return to the UK where her husband resided. Further, that no consent Form 38 was obtained from other beneficiaries and that the Petitioner had not come to court with clean hands.
13. Opposing the summons for revocation of grant, the 1st Petitioner filed a Replying affidavit sworn on September 21, 2021 deposing that she got married to the deceased on August 13, 1962 under the *African Christian Marriage Act*, a marriage conducted by ACK Church, Nyakoko Parish and that thereafter, the deceased married three other wives. She denied ever separating from the deceased. That although she worked in the UK until retirement, she maintained contact with the deceased and travelled to Kenya as and whenever she got a chance.



14. That it was her daughter's sole prerogative to nominate the 1st Petitioner as her sole beneficiary of her estate. She denied being married to Joseph Wamaghale as alleged and maintained that she was the 1st wife of the deceased and the property in issue, of the estate, was acquired by her and the deceased before he married other wives and even before the Objector herein was born.
15. That she obtained consents of all the widows who rank in priority to the children and that as the 1st and legal wife, she was entitled to a bigger share of the estate because her and the deceased are the ones who acquired the property.
16. In a supplementary affidavit sworn by Charles Oduor, one of the Objectors, it was deposed annexing a burial funeral programme for one James Wamaghale wherein the 1st Petitioner is seen in the pictures and being described as the sole widow to the said deceased who was buried in Uganda on February 12, 2022 having died on January 1, 2022.
17. The deponent also annexed copy of Gazette Notice where the 1st Petitioner used the name Wamaghale to petition for grant of letters of administration intestate in respect of the estate of her deceased daughter, Florence Akinyi Onyango. It is dated 19th January 2007. He also annexed a letter from the employer of Florence Akinyi, forwarding her death benefits to the District Commissioner, Kisumu, in view of the competing claims by the deceased's father and 1st Petitioner mother herein who were said to be separated.
18. Vincent Omollo Onyango too swore another affidavit on March 30, 2022, who claims to be the biological son to the 1st Petitioner and who deposed that the 1st Petitioner left his father the deceased in 1972 when the deponent was still young and travelled to and lived and worked in the UK and that later she got married to a Ugandan James Wamaghale. That she only came to Kenya to bury the deceased Abishae Onyango and returned to live with Wamaghale in the UK. That she also buried the said Wamaghale in Uganda on 12th February 2022 and that she was only returning to the land to cultivate and get produce. He annexed copy of an SMS showing how the 1st Petitioner and her sons from the Ugandan husband were threatening to evict the objectors from the land. Further, that Luo customs prohibit a woman from having two husbands.
19. The Objection was canvassed by way of written submissions. Only the Objectors filed their submissions on 27th October 2022, which submissions I have considered in this Ruling alongside the stated facts, judicial pronouncements and statutory enactments.
20. I must however mention that the grant issued was never confirmed by this court despite the filing of the summons for confirmation of grant and on February 7, 2022. This court directed for status quo prevailing to be maintained until further orders and that no dealings of any kind with the estate of the deceased were to take place.

Determination

21. I have carefully considered the summons for revocation of grant, the grounds and affidavits in support thereof and in opposition, as well as the written submissions filed by the Applicant.
22. A grant of representation or probate is an authority given to a person called legal representative by a court of law competent to do so, to act in respect of the deceased's estate and once issued, a grant will be confirmed to enable distributions of the estate of the deceased in favour of all eligible beneficiaries. That distribution is carried out by the duty bearers who are the administrators or legal representatives of the estate of the deceased as appointed by the court.



23. However, the issuance and confirmation of a grant is not necessarily final in matters succession. That grant can be revoked or annulled by courts for sufficient reasons.
24. Under Section 76 of the *Law of Succession Act*, the law sets out grounds under which a grant can be annulled or revoked, whether or not it has been confirmed. As to who can apply for revocation of the grant, any interested party such as a beneficiary of the estate can apply for revocation of the grant. The court can also revoke the grant on its own motion.
25. To succeed in an application for revocation of grant which is by way of summons for revocation of grant, the Applicant must establish that the following grounds exist: -
- i. That the proceedings to obtain the grant were defective in substance for example, in the case of the will, that the grant is invalid or where there are certain procedural defects in the application or petition for the making of the grant.
 - ii. A grant can also be revoked if it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
 - iii. A grant may also be revoked if it was obtained by means of an untrue allegation of fact essential in point of law to justify the grant, notwithstanding that the allegations was made in ignorance or inadvertently.
 - iv. A grant may also be revoked where the personal representative has failed, after due notice and without reasonable cause either; to apply for confirmation of the grant within one year from the date thereof or such longer period as the court order allows; or to proceed diligently with the administration of the estate; or to produce to court, within the time prescribed, any such inventory or account of administration or had produced any such inventory or account which is false in any material particular.
 - v. A grant may equally be revoked by the court where it has become useless and inoperative through subsequent circumstances. For example, while the sole administrator dies, the person seeking to replace the deceased administrator can seek for revocation of the initial grant and include a prayer for substitution. Upon revoking of a grant, the court may issue directions on the appointment of an administrator or application of a fresh grant.
 - vi. Finally, administrators are expected to have the interest of the beneficiaries at heart although this is not always the case.
26. The court may revoke a grant if any of the grounds listed above are disclosed and established either on the court's own motion or on application of an interested party. See *Re estate of Prisca Ong'ayo Nande (Deceased)* [2020] e KLR.
27. The question is whether any of the grounds set out in Section 76 of the *Law of Succession Act* are present in this case to warrant revocation of the grant issued to Rose Mikal Adhiambo Onyango and Millicent Adhiambo.
28. First things first. The Objectors claim that the Administrator Rose Mikal Adhiambo Onyango is not the widow of the deceased because she left him/separated in 1974 and left for the UK where she worked and retired and that while away, she got married to a Ugandan, a Mr. James Wamaghale who also subsequently died and was buried in Uganda and that during the said burial ceremony, the 1st administratrix herein was introduced as the sole widow of James Wamaghale with whom she bore 2 children namely, Joseph Mukhobe and Moses Bikala.



29. Secondly, that the 1st Administratrix did not allow the deceased to pursue benefits of their late daughter Florence Akinyi.
30. Third, is that the administratrixes did not obtain consent of all the beneficiaries before petitioning for grant and that they were including in the distribution of the estate, the two children of Mr Wamaghale who are not beneficiaries of the estate.
31. The 1st Administratrix has countered the above allegations by swearing an affidavit that she was married under Cap 151, The *African Christian and Marriage Act* vide a wedding conducted on August 13, 1962 at Nyakoko Parish ACK Church and contended that she never remarried nor divorced the deceased despite her relocation to work and live in the UK.
32. On the matter of the death benefits of her daughter Florence Akinyi, she was emphatic that it was in her daughter's prerogative to nominate her as her next of kin and that she had no hand in it.
33. the 1st administratrix did not deny that Moses Bikala and Joseph Mukhobe are children of James Wamaghale and neither did she deny that she was the person named in the funeral programme for the late James Wamaghale where she is listed as the sole widow and her two children Moses Bikala and Joseph Mukhobe are named as the deceased's children. These two are also listed as beneficiaries of the estate of the late Abishae.
34. There is no contrary evidence that the 1st administrator herein was lawfully married to the deceased under Cap 151 Laws of Kenya and that there is no evidence of divorce between the two prior to the deceased's demise hence any allegations that hinges on the 1st administratrix not being a widow of the deceased is only but wishful thinking. I say so because for reasons of ignorance, people tend to divorce couples who live apart prior to the demise of one of them by presuming a divorce.
35. Regrettably, in the absence of any evidence of divorce decree absolute, the deceased was at the time of demise, though surrounded by the warmth of three other women, was still legally married to the administrator herein who, regrettably, had left his side for over four decades and relocated to the United Kingdom where she met James Wamaghale and cohabited with him and bore two sons.
36. In addition, albeit there is overwhelming evidence that the 1st administratrix lived and worked in the UK and cohabited with James Wamaghale with whom they had 2 issues and that she even buried him in Uganda in February 2022 upon his demise, she was no more than a partner for the said James Wamaghale as she had no capacity to legally get married to another man before she was dislodged from the deceased Abishae Onyango Magwar. Furthermore, the annexed statutory Declaration by Millicent and the deceased jointly, annexure EC06 though not dated, it does not mention divorce. The deceased only says that he was separated from the 1st administratrix herein.
37. Therefore, whereas I agree that a woman may not have two husbands, there is no evidence that the 1st administratrix contracted another legal marriage, despite her use of the other man's name in the British Passport. If she had contracted another marriage while her marriage to Abishae was still subsisting and while he was alive, that subsequent marriage would be void and contrary to the law. It is also an offence to contract a marriage within a marriage where parties are married under Cap 150 or 151 Laws of Kenya (*Marriage Act* and the *African Christian Marriage and Divorce Act* – now repealed)
38. Accordingly, I find no merit in the claim that the 1st administratrix1 is not a widow of the deceased Abishae in as much as the two may have informally been separated by distance and the 1st administratrix got entangled in an extra marital affair with James Wamaghale [not Joseph. See the burial programme for 12/2/2022 annexure ECO3] which is not denied by the respondent herein, thereby bearing him 2 children. In law, what the administrator did was committing of adultery and nothing else. Further,



since the deceased Abishae did not find it necessary to divorce her, although annexure ECO 6 no person not even this court can make a declaration upon the death of Abishae, that the administrator was not his wife and therefore not a widow.

39. My view is that there is this well unfounded fear that the children born of the escapade might interfere with the deceased's estate but as and when that happens, the law exists to protect bonafide beneficiaries over any interlopers and impostors.
40. On the issue of death benefits of Florence Akinyi, I find no substance in the allegation that the 1st administratrix excluded the deceased from benefiting as it was in the prerogative of the deceased to nominate the person she wished to claim her death benefits from her employer. For that reason, I find that the insinuation against the 1st administrator is devoid of any substance.
41. However, as enumerated in the initial paragraphs of this Ruling giving the history of this matter from its initiation, and the grounds upon which a court of law can revoke or annul a grant, it is clear that the 1st administratrix and her co-wife Millicent Adhiambo Onyango begun on a wrong footing and first, although they petitioned for grant as widows and that indeed they had a priority right to petition for grant, they failed to disclose material facts to the court. They did not list in the P&A 5 form the names of all persons who were beneficially entitled to benefit from the estate of the deceased, despite the chief's letter clearly giving a comprehensive list which even included the two sons of the 1st administratrix whose beneficial interest in the estate is doubtful in that it is not indicated whether they are sons of the deceased Abishae or not, unlike other beneficiaries whose relationship with the deceased is indicated. P&A 5 is an Affidavit in support of the Petition for grant.
42. The administratrices did not even disclose all the wives of the deceased and named themselves as the only surviving beneficiaries in the P&A 5 form yet in paragraph 4 of the Replying Affidavit, the 1st Administratrix acknowledges that the deceased married 3 other wives and mentions the chief's letter.
43. On the basis of the above, and upon gazettelement of the Petition, on April 27, 2021, a grant was issued to the 2 petitioners as administrators. Surprisingly, in the Summons for Confirmation of grant, a schedule proposing the mode of distribution of the estate was annexed and therein, the sole property listed as Kisumu/Songhor/108 was proposed to be distributed to several other people, including the children of the 1st administrator borne of her Ugandan lover in the UK and who were not the deceased's children or dependants. There is no consent from all the adult beneficiaries filed in court on the mode of distribution of the estate.
44. Rule 7 of the [Probate and Administration Rules](#) is on Application for grant: general provisions and provides as follows:
 - “(1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars—
 - (a) the full names of the deceased;
 - (b) the date and place of his death, his last known place of residence, and his domicile at date of death;



- (c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;
- (d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;
- (e) in cases of total or partial intestacy—
 - (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act;
 - (ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;
 - (iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;
- (f) the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;
- (g) if the deceased died testate leaving a written will, the names and present addresses of any executors named therein; and
- (h) the postal and residential addresses of the applicant.”

45. Rule 7 (e) (i) above provides that an applicant seeking a grant of representation to the estate of a deceased person is required to declare the names, addresses, marital state and description of all legitimate beneficiaries. This was not done by the administrators in this case. Thus, by omitting the names of all the other beneficiaries, the respondents contravened the statutory requirement to disclose all legitimate survivors of the deceased.
46. At the time of seeking to have the grant confirmed, the administrators neither obtained nor filed consents from adult beneficiaries of the estate on the mode of distribution of the estate.
47. The administrators unilaterally filed a mode of distribution of the estate and summons for confirmation under certificate of urgency on account that the 1st administratrix was to travel out of the country for further treatment hence the prayer for waiver of the six (6) months period.
48. Mativo J (as he then was) in *In re Estate of Wabome Mwenje Ngonoro Deceased* [2016] eKLR had this to say in a matter which was in *pari materia* with this cause where in the P & A 5 filed in court on June



8, 2005, the Respondent did not disclose all the beneficiaries of the deceased nor did he include the surviving widow of the deceased who was the first applicant therein:

“The evidently deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant. The applicant did not disclose that the deceased's widow lives in the same land, hence she was not only a lawful beneficiary but a person interested and entitled to benefit from the deceased estate. Further, the omission to disclose her presence and interests was bound to adversely affect her interests. I am persuaded that the Respondent concealed crucial information to the court, information which could have influenced the court in issuing the grant to him.

In *Al-Amin Abdulrehman Hatimy v Mobamed Abdulrehman Mobamed & another*[2013]eKLR where the court held that the law of succession by virtue of Rule 26 requires that any application for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate.

It is also important for the court to address the question whether or not the above omission is an abuse of the court process. Abuse of court process connotes that the process of the court must be used properly, honestly and in good faith and the court will not allow its process to be used for oppression or a means of vexation. Due to the fact that all beneficiaries were not informed of the filing of this petition, and in view of the fact that the Respondent misrepresented to the court that he was the sole beneficiary, I find and hold that the grant herein was indeed obtained by concealment of material facts, namely the existence of other beneficiaries. The petitioner did not act in good faith an act which amounts to abuse of court process.

It is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*[1917] 1 KB 486 by Viscount Reading, Chief Justice of the Divisional Court.

The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the judge to know in dealing with the issues before the court. The duty of disclosure therefore applied not only to material facts known to him but also to any additional facts which he would have known if he had made inquiries. The question that inevitably follows is whether the non-disclosure was innocent, in the sense that the fact was not known to the Respondent or that its relevance was not perceived. Though innocence or relevance has not been cited by the Respondent, I find that the non disclosure in this case was not innocent at all but deliberate.



In the matter of the state of Mwaaura Mutungi alias Mwaaura Gichichio Mbura alias Mwaaura Mbura-deceased [NBI HC Succ No 935 of 2003] a grant was revoked because the applicant had failed to notify the applicant of the petition and obtain his consent. In the present case, the applicants states that they were never notified when these proceedings were filed nor was their consent sought. Similarly, In the matter of the Estate of Karanja Gikonyo Mwaniki-deceased[Nakuru Mic 245 of 1988] the proceedings were declared to be defective and the grant was revoked under similar circumstances.

The expression "defective in substance"has judicially been defined to mean a defect of such a character as to substantially affect the regularity and correctness of the previous proceeding. [Behari Ghosh vs SMT. Latika Bla Dassi & Others {1955} AIR 566, [1955} SCR (2) 270].

49. The leaned Judge further added that:

“ A grant can also be revoked on account of false statements and concealment of vital matters or on grounds that the applicant deceived the court. [Samuel Wafula Wasike vs Hudson Simiyu Wafula, CA No 161 of 1993]. As stated above, I find that there was deliberate non-disclosure of relevant materials. A grant obtained fraudulently by the making of a false statement can also be revoked by the court. In the matter of the Estate of Robert Napunyi Wangila, HC SUCC No 2203 of 1999] Koome J summarised the grounds for revocation of a grant under Section 76 as follows, when the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate [In the matter of the Estate of Murathe Mwaria-deceased].”

50. I have extensively cited the above decision because of its relevance to this case. I have no doubt in my mind that the Administratixes herein wanted to steal a match on the beneficiaries of the estate. They failed to disclose and list in P&A 5 all the surviving beneficiaries and neither did they seek and obtain consent of the beneficiaries on the proposed mode of distribution of the estate and yet they knew or ought to have known, because they were ably represented by an advocate, that no distribution of an estate can be done without involving all the beneficiaries in the confirmation process. The 1st administratix also she knew that she was to fly out of the country on an alleged treatment mission, yet she knew that she was a resident of the UK and her return was not guaranteed at all.
51. In addition, the 1st administratix in listing in swearing the affidavit dated July 12, 2021 in support of summons for confirmation of grant and listing therein at paragraph 5 the names of the two children of the 1st administrator not born of or maintained by the deceased as his dependants, knowing very well that the two sons had their father a Ugandan living in the UK, was deceptive and lied to the court that the two were sons of the deceased when they were not and there is no contrary evidence. Even the Chief's letter dated 16/2/2021 did not state their relationship with the deceased.
52. I am not persuaded that the 1st Administratix acted in good faith as there is no evidence that prior to filing the petition for letters of administration, she consulted any of the other beneficiaries, apart from Millicent Adhiambo, her co-wife, who had no child with the deceased and with whom they secretly obtained the grant, prepared a schedule of distribution without consulting other beneficiaries who are adults of sound mind. In addition, the administratixes instead of obtaining consent from all adult legitimate beneficiaries, only the 1st administratix swore an affidavit in support of the summons for confirmation of the grant while the second Administratix purported to give consent. This again I



find to have been very deceptive and intended to sneak in interlopers and disadvantage the legitimate beneficiaries of the estate of the deceased.

53. Under section 71 (2) of the *Law of Succession Act*, in cases of intestacy, the law provides that the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled and when confirmed, the grant shall specify all such persons and their respective shares.
54. From the affidavit evidence on record which is not controverted, this court is not satisfied as to the respective identities of the beneficiaries who are legitimately entitled to a share of the estate of the deceased and until that issue is sorted out, this file will remain a battle ground forever. [see also Rule 40(4) of the *Probate and Administration Rules*.
55. What is also curious about the 1st administratrix is that although there was no proof of her marriage to James Wamaghale, she never denied the fact that she attended his funeral as a widow and even conveniently chose to use the name of Wamaghale in her medical documents –see doctor’s letter dated 8th January, 2021, when processing her deceased daughter’s benefits see annexure ECO7 when she needed to do so but when she wanted to use the deceased’s name, is when she was dealing with his estate.
56. I am in the circumstances of this case, persuaded that the administrators obtained grant fraudulently by making of a false statement by concealment from court of material facts. They claimed in P&A 5 form that they were the only survivors which fact they knew was false.
57. I am equally satisfied that the grant was obtained through proceedings which were defective in substance as the beneficiaries of the estate were never declared on oath in P&A 5 only for these beneficiaries to spring up during the proposed distribution of the estate, contrary to Rule 7 of the Probate and Administration Rules.
58. Although the 1st administrator is the 1st widow to the deceased, her conduct in these proceedings are wanting and not in the best interest of the other beneficiaries and it is therefore essential that apart from herself and her co widows, at least two other children of the deceased should be part of the persons who should be involved in petitioning for a grant to administer the estate of the deceased. This is so in view of the provisions of section 66 of the *Law of Succession Act* which gives this Court the discretion to decide who should be the administrator of an intestate estate, a decision that is to be made in the best interest of all the beneficiaries, notwithstanding the order of priority given to spouses. The section provides that:

“

“66. Preference to be given to certain persons to administer where deceased died intestate

1. When a deceased has died intestate, the court shall, save as otherwise

expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;



- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
.....”

59. From the above section, the spouses do not have absolute priority right to petition for grant. Their priority is only a general guide to the courts which have discretion to issue a grant to any other person other than the spouse.
60. For the above reasons, I find the summons for revocation of grant to be meritorious. I allow the summons and revoke the grant of letters of administration intestate issued on 27th April 2021 to Rose Mikal Adhiambo Onyango and Millicent Adhiambo Onyango.
61. The beneficiaries of the estate of the deceased including the respondents herein to agree to appoint fresh persons to petition for a fresh grant to administer the estate of the deceased Abishae Onyango Magwar alias Abishae J. Onyango Magwar. petition
62. As the grant which has been revoked had not played any useful purpose save to generate a dispute subject of this ruling, the said grant is hereby recalled and annulled.
63. This file is closed. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2023

R. E. ABURILI

JUDGE

