In re Estate of Amos Kiteria Madeda-Deceased (Probate & Administration E004 of 2021) [2022] KEHC 12950 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEHC 12950 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

PROBATE & ADMINISTRATION E004 OF 2021

JM MATIVO, J

SEPTEMBER 21, 2022

IN RE ESTATE OF AMOS KITERIA MADEDA- DECEASED

BETWEEN

GIBSON NYANGE KITERIA ..... 1ST APPLICANT

REGINA MANGA MINYAMBO ..... 2ND APPLICANT

AND

PHILEMON MADEDA KITERIA ..... RESPONDENT

RULING

1. *Vide* a Summons for Revocation of Grant dated June 7, 2021, Gibson Nyange Kiteria and Regina Manga Mnyambo, (the applicants) seek to revoke the Grant of Letters of Administration made to Philemon Madeda Kiteria on April 18, 2018(*sic*- the grant was issued on April 10, 2018) and confirmed on March 25, 2019in the Senior Principal Magistrates Court at Voi in Succession Cause No. 40 of 2017. They also pray for costs of the application. Prayers (1) and (2) of the application are spent.

2. The grounds in support of the application are that: - (a) the proceedings to obtain the grant were defective in substance; (b) the grant was obtained fraudulently by making a false statement and by concealment from the court of some material facts; (c) the grant was obtained by means of untrue allegations of facts essential in points of law to justify the grant; (d) some beneficiaries were left out; (e) the applicants stand to suffer irreparable loss and damage unless the grant is revoked.

3. The above grounds are explicated in the supporting affidavit of the 1st applicant dated June 7, 2021. The salient points are that:- (a) that he is a son to the deceased.; (b) the deceased owned title number Werugha/Werugha/335; (c) the deceased had had 4 wives, namely Naomi Kiteria-1stwife, Grace Saghe Kilaghanyo- 2ndwife, Fridah Malemba Mchana-3rdwife and Fridah David Fete-4thwife-deceased; (c) the 1st wife had 6 girls and one son, namely Happines Wakio-deceased, Hope Chao-deceased, Joley Kiteria, Octavia Kiteria, Peris Kiteria, Trizah Kiteria and Philemon Kiteria; (d) the 2nd wife had one child,

Gillafton Madeda Kiteria-deceased who married the 2nd applicant and they have three children; (e) the 3rd wife had only one son, the 1st applicant herein. (f) the 4th wife is deceased and had one son Nixon Madeda Kiteria and one daughter Mercy Kiteria-deceased.

4. He averred that after the deceased's death, the Respondent petitioned for letters of administration and falsely indicated that that all persons having an equal right to a grant of representation had consented to the Petition yet both applicants were not involved. He averred that the letter from the Chief, Werugha Location dated October 11, 2017 falsely indicated that the deceased had two 2 wives and 5 children yet he had 4 wives and 11 children. He averred that the said letter was contradicted by another letter from the same office dated April 26, 2021 which gave the correct number of wives and their children.

5. He averred that using the grant, the Respondent distributed and transferred the only asset owned by the deceased, namely, Werugha/Werugha/335 between himself and Nixon Madeda Kiteria without the knowledge of the other beneficiaries. Lastly, he averred that the 1st Respondent obtained the grant through concealment, misrepresentation and fraud with intention of disinheriting the other beneficiaries.

6. Also in support of the application is the affidavit sworn by the 2nd applicant dated June 7, 2021. Its key highlights are that: - (a) she is the deceased's daughter in law being the widow of the late Giliafton Madeda Kiteria who died on December 16, 2017; (b) she had 3 children with her late husband; and that (c) the deceased was her father-in-law and the proprietor of the subject land. The other averments are substantially a replication of the 1st applicant's affidavit. It will add no utilitarian value to reproduce them here.

7. The application is opposed. The Respondent filed a Replying affidavit on June 28, 2021. The nub of the affidavit is that :- (i) the application is unmeritorious, inept and an abuse of the court process, and it is filed in bad faith; (ii) the deceased had only 2 wives and 5 children; (ii) the applicants are raising their claim 14 years after the deceased's death and they never raised any claim during his lifetime nor were they seen at his home during his lifetime; (iii) they are strangers; (iv) the deceased was sick for a long time and they never visited him; (v) the deceased gave him and his brother the property in 1994 and they demarcated equally and planted trees; (v) the applicant trespassed into the land after the deceased's death and he sued him for trespass in Voi ELC No E 26 of 2021; (vi) it's inconceivable that the office of the chief could issue two contradictory letters; (vii) the applicant's birth certificate is suspect having been obtained 4 years prior to the deceased's death.

8. The 1st applicant filed a further affidavit dated 23rd July 2021 essentially replicating the contents of his supporting affidavit and denying the contents of the Respondent's Replying affidavit. Additionally, he averred that the deceased showed him the land and how he demarcated it and he gave him a heifer when he told him his plan to marry.

9. Mr. Nixon Kiteria Madeda, also a son of the deceased swore the supplementary affidavit dated October 4, 2021disputing the contents of the 1stapplicant's further affidavit and reiterating that the distribution was fair.

10. Mr. Madeda Masaka, a nephew to the deceased swore the supplementary affidavit dated October 5, 2021in support of the applicant's case. He deposed that he was present in 1999 when the 1st applicant visited the deceased and informed him, he was planning to get married, that the deceased gave him a heifer, after which the deceased in the company of his 4th wife, Nixon Madeda Kiteria, the 1st applicant and himself went to the land and the deceased showed them how he had planned to share out the land among his 4 sons.

11. In addition to the affidavit evidence, the parties also gave oral evidence in court. PW1, (the 1st applicant) essentially adopted his affidavits. It will add no value to replicate his evidence here. On cross examination he stated that he was born on May 25, 1977, that he left the deceased's home together with his mother and she went back to her parents. He said he obtained his birth certificate when he was obtaining his identity card. His birth certificate was issued on October 30, 2003. He said that his initial birth certificate got lost so he was issued with another one. He insisted that the government issues another original birth certificate if the original is lost. In re-examination, he said that he was not asked to provide police abstract when he obtained the birth certificate after he lost the original.

12. PW2, Boniface Rashid Maganga, Senior Chief, Weruga Location, Wundanyi Division, Taita Sub-County, said that he wrote the letter dated October 11, 2017marked as GWK 5 to introduce the deceased family members. He confirmed the contents. He said that the letter dated April 26, 2021marked GNK 6 was written while he was on leave, and that he asked the assistant chief to recall the earlier letter because other family members had emerged. He said the author of the second letter is the area assistant chief where the deceased hailed from, so he knew the family. He said the earlier letter as an oversight. He said he only got to know the 1st applicant after he complained because he does not live on the said land. On cross-examination he said he only knew two wives. He said the 2nd letter was written after 3 years. He also said he did not know when the 2nd applicant separated with her deceased husband. He also said he attended the deceased's burial but he could not recall seeing the 1st applicant.

13. PW3 Ronald Madeda Masaka, a cousin to the deceased's children adopted his supplementary affidavit dated October 5, 2020. It will add no value to rehash its contents, save to mention that he said that the deceased had 4 wives. He admitted that at the family level, the issues relating to this case were not discussed.

14. PW4 Regina Manga Mnyambu who is the 2nd applicant adopted her affidavit dated June 7, 2021. It will add no utilitarian purpose to rehash her evidence. It will suffice to say that she said she never used to go to the deceased's home, and that her husband told her he had land at his father's home. She said she went back to her parents and she wanted to be helped so that her children can get their father's share of land. She also said her mother-in-law was not staying with the deceased and she had other children with other men. On cross examination, she said her husband had not paid dowry, and that she did not attend the deceased's funeral. She also said her deceased husband as not living in the land.

15. The Respondent, Mr. Philemon Madeda Kiteria adopted his affidavit dated June 28, 2021. He said his father had married his mother who had 6 girls and himself, that his mother died in 1979 and his father married a 2nd wife who had one child with him. He said prior to Petitioning the grant, they sat as a family and there was no objection, and they obtained a letter from the chief who knew the family. He said after obtaining the grant he obtained the title, and, that, the deceased divided the land when he was well long before he became blind in 1996. He said he only saw the 1st applicant when he invaded the land, and that the 1st applicant has never come to their home. He said under the Taita custom, every wife must have a house, and he has never seen a house for the 1st applicant's mother. He denied ever seeing Regina Mangha. He said he saw her for the first time in court. He said the second letter by the assistant chief was a plan by the 1st applicant to claim the land. He noted that it was issued while the chief was on leave and he was never called to give his version. He said they applied for the grant based on what their father had planned when he was alive. On cross-examination he said his father was not polygamous because he married another wife after his mother's death.

16. DW 2 Nixon Madeda Kiteria, a son to the deceased, denied knowing the 2nd applicant. He said his mother was married by the deceased in 1980 as his 2nd wife. He denied ever seeing the 1st applicant. He

said he lives in his father's home since his birth in 1980 and he never saw the 1st applicant being given land by the deceased and he only saw him when he came to invade the land.

17. Both parties filed written submissions. In his submissions, the applicant's counsel cited section 76 of *Law of Succession Act*[1] and argued that making a false statement or concealment of material facts is a ground for invalidating a grant. He argued that the Respondent never obtained consent of all the beneficiaries among them the applicants. He referred to the applicant' birth certificate and argued that he is a son to the deceased. He argued that the 2nd applicant was married to a son of the deceased. He referred to GNK 11, a letter from the Chief which he argued cancelled the earlier letter. He argued that the applicant had established grounds for revoking the grant and cited *Re Estate of Jiseph Kilonzo Musyoka-deceased*[2] which followed *Jamleck Maina Njoroge v Mary Wanjiru Mwangi*[3] which held that the circumstances for revoking a grant include making a false statement, concealment of material facts and making untrue allegations. He argued that the 1st applicant has proved that he is a son to the deceased using the birth certificate. He argued that the 2nd applicant has proved that she was married to the deceased's son. He also relied on the evidence of PW3 and the letter from the Chief and argued that both applicants have proved that they are beneficiaries of the deceased, yet the 1st Respondent never notified them at the time he Petitioned for the grant.

18. The Respondent's counsel argued that a birth certificate is not evidence of paternity nor is it proof of kinship. Counsel cited *Re estate of Philis Wairuri Maina-deceased*[4] which followed *Wilfred Koinange Gathiomi v Joyce Wambui Mutura & another*[5] in support of the proposition that when paternity is in issue, the true test is DNA. Counsel also cited *Re Estate of Fredrick Marangu Ragwa-deceased*[6] which held that a party who obtained a birth certificate to foster or strengthen his claim on the estate of the deceased person is normally treated with suspicion particularly where the only documentary evidence linking him with the deceased person is the birth certificate and, in such circumstances, the probative value of the birth certificate is low. Counsel noted that the 1st applicant obtained the birth certificate long after he had obtained his national identity card and wondered which birth certificate, he used to obtain the identity card. Also, counsel submitted that the 1st applicant did not prove that he is a beneficiary of the deceased, and no evidence was tendered to support the allegation that the deceased had 4 wives.

19. Further, counsel argued that the two letters from the chief are contradictory and unreliable. He also pointed out that the 2nd Respondent admitted that she never met the deceased and that she only met him after he lost his sight nor did she prove that she was married to the deceased's son.

20. I start this determination by stating that the following issue distils itself for determination, namely: - (a) whether the applicants have demonstrated sufficient grounds for court to revoke the grant as provided for under Section 76 of the *Law of Succession Act* which provides : -

> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-

1 Cap 160, Laws of Kenya.

2 [2028] e KLR.

3 [2015] e KLR.

4 [2021] e KLR.

5 [206] e KLR.

6 [2020] e KLR.

a. that the proceedings to obtain the grant were defective in substance;

b. that the grant was obtained fraudulently by 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 untrue allegation of a fact essential in point of law to justify the grant not withstanding 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.

21. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. A reading of Section 76 shows that the grounds can be divided into the following categories: - (a) the propriety of the grant making process; (b) mal-administration or (c) where the grant has become inoperative due to subsequent circumstances.

22. A reading of the applicants' application leave no doubt the grounds cited fall under section 76 (a), (b) & (c). As we construe these provisions, it is proper to bear in mind the guiding principles. The Court of Appeal in *Matheka and Another v Matheka*[7] stated :-

i. A grant may be revoked either by application by an interested party or by the court on its own motion.

ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

23. "Defective in substance" as set out in Paragraph (a) of section 76 must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. Section 76 (a) properly construed means that nothing shall prevent the court from reopening the proceedings in accordance with the law and procedure, if there has been a fundamental defect in the previous proceedings.

24. If a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation

7 {2005} 2KLR 455.

of fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.

25. The first question is who can apply for revocation of a grant. The answer to this question is found in the nomenclature deployed in section 76. The section reads: - A grant may be revoked either by application by an interested party or by the court on its own motion. The first question is whether the applicant(s) is "an interested party" within the meaning of section 76 and if so, whether they have the legal capacity to bring the application now under determination. It is important to bear in mind the provisions of section 47 of the *Law of Succession Act* which enjoins the High Court to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient. Further under Rule 73 of the *Probate and Administration Rules* it is provided that "Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

26. The real question is whether there is any just cause for revocation within the meaning of section 76 and whether, such "just cause" notwithstanding, an order for revocation of the grant should be refused in this case. I shall proceed to elucidate this statement. Section 76 deals with revocation or annulment of grants. Under this section "a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides..." The section also lays down and explains what would be just cause within its meaning and enumerates the circumstances which would make out a just cause under the section or, in other words, the grounds for revocation admissible in law. It is almost beyond controversy now that such enumeration is exhaustive and not merely illustrative. I, accordingly, proceed upon that view.

27. In the above view the applicant for revocation must, in order to succeed, bring his case within one or other of the different clauses of section 76. Otherwise, his application would fail. It is clear, however, on a reading of the section, that, even if just cause be established, the applicant would not be entitled to an order for revocation as matter of course. The matter seems to be pretty clear. The section says that the grant may be revoked which prima facie leaves a discretion to the court.

28. The net position then is that an applicant for revocation must, in order to succeed, establish just cause within the meaning of section 76 (a) to (e) thereof, but, even if just cause be established, revocation may still be refused by the court in the exercise of its discretion under that section, if the facts and circumstances of the particular case would warrant such refusal. In this view I shall consider first whether the applicants have succeeded in proving any just cause for revocation in the present case and if I hold in the affirmative on that question, I shall consider next whether, in the circumstances of the present case, an order for revocation should be made in the exercise of this court's discretion under the section.

29. It is well settled that an application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the court but also binds all other persons in all proceedings arising out of the will or claims under or connected to the estate. Being a judgement in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. However, talking about an aggrieved person, it is important to bear in mind the language of section 76. Under this section, it is a requirement that a party to a probate claim must have an "interest" in the estate. The foundation of title to be a party to a probate or administration action is "interest" - so that whenever it can be shown that it is competent to the court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect

the interest or possible interest of any person[8] such person has a right to be a party to such a suit in the character either of plaintiff, defendant, protestor or intervener.[9]

30. An "Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual or a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. The *Blacks' Law Dictionary*[10] defines "interested party" as a party who has a recognizable stake (and therefore standing) in a matter.

31. Talking about an Interested Party, the 2nd applicant claims that she was married to a son of the deceased. It was her evidence that her "husband" Gilifton Madeda Kiteri died on December 16, 2017. It was also her evidence that her husband used to tell her that his late father gave him land. In a nutshell, she is seeking to inherit her husband's share to the deceased's estate. To use her own words, she wants to be assisted so that her children can inherit a share of their father's land.

32. It is trite law that any person intending to institute proceedings must have the necessary locus standi in law to do so. The general rule is that the onus of establishing that issue rests upon the applicant. It must accordingly appear *ex facie* the particulars of claim (founding affidavit/pleadings) that the parties thereof have the necessary *locus standi in iudicio*. When it comes to deceased estates, the general rule is that an executor is the only person who can represent the estate of a deceased person.[11] In *Wille's Principles of South African Law*[12] under the heading "Title of Beneficiaries" the following is said: -

> "However, in light of the modern system of administration of estates that replaced the common law system of universal succession, the right of beneficiaries to inherit is no longer absolute nor an assured one. If the deceased estate, after confirmation of liquidation and distribution account, is found to be insolvent, none of the beneficiaries will obtain any property or assets at all ... in any event, an heir cannot vindicate from a third person property which the heir alleges forms part of the deceased estate; only the executor has that power... The modern position is therefore that a beneficiary has merely a personal right, jus in personam ad rem acquirendam, against the executor and does not acquire ownership by virtue of a will."

33. In regard to the legal status of both the deceased estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purpose of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has locus standi to sue or to be sued.[13] In my view, it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have locus standi to do so. Other than a death certificate,

8 See Kipping and Barlow v. Ash, 1 Roberts. 270; 4 N. Cas. 11; Crispin v. Doglioni, 2 S. & T. 17; 29 L.J. 130

9 Dr Tristram, "The Contentious Practice of the High Court of Justice in respect of Probates & Administrations" (1st ed 1881), at p 80:

10 Eight Edition, Thomson West

11 *Ohlssan's; Cape Breweries's v Hermsburg* 1908 TS 134; *Gatrell v Southern Life Association* 1909 Th 57; *Estate Hughes v Fouche 1930 TPP 41*, *Horwood v Horwood 1936 PHF 74*.

12 9th Edition, at par 673.

13 See *Booysen and Others v Booysen and Others*, (29558-10) 2012 (2) SA (GSJ) (25 March 2011).

the 2nd applicant provided nothing to show that she is the legal representative of her deceased husband. In absence of a grant of letters of administration properly issued to her by a court of competent jurisdiction, the 2nd applicant, lacks capacity to lay a claim to the estate of her deceased husband.

34. Her claim is weakened by her own evidence. She said she went back to her parents. She said no dowry was paid to her family, casting doubts as to whether a valid marriage existed between her and her deceased husband. She never said under what system of law she was married, whether customary, or statutory or cohabitation. It was her evidence that she went back to her parents and she only saw the deceased after he had lost sight. More ought to have been said to demonstrate that she was lawfully married as alleged. This is because she is claiming in her capacity as a widow of her "deceased husband," so it was paramount for her to tender cogent evidence to demonstrate the existence of a valid marriage.

35. The 1st applicant claims that he is a son to the deceased. He relied on a Birth Certificate issued to him on June 21, 1977. He is on record saying he obtained the Birth Certificate after he lost the original. Ordinarily, a person who loses or misplaces a Birth Certificate reports to the police. He is issued with a Police Abstract Report as evidence for the loss. Using the abstract, the Registration Officer issues a duplicate Birth Certificate. The 1st applicant said he was issued with another "original" Birth Certificate. This is unusual. Even in absence of a police abstract, he ought to have sworn an affidavit is support of the alleged loss and use it to be issued with a replacement. The probative value of this piece of evidence is seriously eroded.

36. At issue here are an array of difficulties. The first is that the 1st applicant obtained his Birth Certificate almost 14 years after the death of the deceased. The probability of the said Certificate having been procured to lodge the claim is real. This diminishes its probative value. Second, a Birth Certificate alone is not conclusive evidence of paternity. If the intention was to support his claim that he was sired by the deceased, then much more was needed. A DNA (abbreviation for deoxyribonucleic acid) could have served this goal. Third, on record are highly contradictory letters from the office of the area Chief. The area Chief admitted issuing the letter dated 1October 1, 2017 confirming the deceased rightful heirs. Subsequently, while the chief was on leave, his own assistant chief issued a letter dated April 26, 2021 "purporting to correct the earlier letter." I listened to the Chief and the assistant chief tendering their evidence. I observed their demeanor. The second letter, viewed in totality with the entire evidence appears is incredible. Its probative value is insignificant. It smacks of a well calculated move to support the applicant's claim from the estate of the deceased.

37. Several reasons support my above view. One, the deceased was ailing for many years. Both applicants' unexplained absence during the deceased's great hour of need is truly worrying. Two, none of the appellants claimed or even suggested they offered any kind of support to the deceased, at least during his last days when he was aged and ailing. Three, the practice of persons claiming interest in a deceased estate showing up after the deceased death should be abhorred. If a person was nowhere near the deceased when he was sick and in need, then showing up after the person is dead and seeking to be recognized as a beneficiary should be treated with contempt and suspicion. Four, none of the applicants lived in the homestead or anywhere near the deceased or on the land now being claimed. Five, the 1st applicant claims he came home to inform the deceased that he intended to marry and the deceased gave him heifer. He never said how he assisted him as a son during his long illness. Curiously, none of his other sons who lived with the deceased were present when the alleged heifer was given to him. He said the deceased took him to the land in the company of his cousin (his witness) and he was shown the land. Again, all this was being done in the absence of any of the other immediate family members, especially his sons, or at least one of them. There was no mention why all this was being done to the exclusion of the other son(s) who were living with the deceased. The foregoing questions erode the probative value of the applicant's evidence

38. The judgment in *Randall v Randal*[14] makes it clear that the courts will adopt a very broad approach in assessing whether a person claiming interest has an interest in a deceased's estate, particularly where the person may have no other form of recourse to explore. It is a common law requirement for persons claiming interest to show they have an interest in the deceased's estate, an interest that is capable of being recognized by the law or an interest that gives them legal standing to bring the probate claim.

39. The law is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist. 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. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. The standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In *Miller v Minister of Pensions*,[15] Lord Denning said: -

> " The ...standard of proof...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not."

40. The reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

41. An assessment of probabilities is not possible without analyzing the facts of the case which are contained in oral and documentary evidence. A court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [16] must be carefully distinguished from conjecture or speculation: -

> " There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjucture."

42. The burden placed upon the applicants by the law was to establish a prima facie case. In civil cases, the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions

[14] {2016} EWCA Civ 494.

[15] {1947} 2ALL ER 372.

[16] {1939} 3 All ER 722 (HL) at 733,

of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.

43. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*[17] the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:-

> " To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

44. From the above dicta, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth. Guided by the above tests of credibility, reliability and probability, I find and hold that the testimony tendered by both applicants does not meet the required standard on a balance of probabilities. On the contrary, the Respondent gave clear evidence that he shared the land in accordance with the deceased's wishes.

45. Notwithstanding my above finding, I now address the question whether the applicants have established any of the grounds under section 76 (a) to (c). The Supreme Court of India in *Anil Behari Ghosh v SMT. Latika Bla Dassi & Others*[18] interpreting their equivalent of Section 76 of the *Law of Succession Act*[19] had this to say: -

> " the expression "defective in substance" ...means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings."

17 2003 (1) SA 11 (SCA) at para 5.

18 {1955} AIR 566, [1955} SCR (2) 270.

19 Supra.

46. From the material presented before me, I am not inclined to hold that the proceedings leading to the issuance of the grant were "defective in substance." As stated earlier, “defective in substance" must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. The alleged failure to procure the applicant’s consent would not have rendered the proceedings "defective in substance" because there is nothing to show they had interest in the deceased’s estate. If anything, there alleged interest has not been proved, or its too remote to be recognized by the law. The right to claim property of a deceased person is not an absolute right irrespective of other considerations arising from the proved facts of a case.

47. As alluded to earlier, the law has vested a judicial discretion in the court to decline to revoke a grant where the court may have prima facie reasons to believe that it is not just to revoke. I Am not satisfied in all the circumstances of the case that just cause within the meaning of section 76 has been made out to revoke the grant. The circumstances of this case do not justify finding that the proceedings were defective in substance to support revocation of the grant.

48. 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 as was held in *Samuel Wafula Wasike v Hudson Simiyu Wafula*.[20] A grant obtained fraudulently by the making of a false statement can also be revoked by the court as was held *in the matter of the Estate of Robert Napunyi Wangila.*[21] *In the matter of the Estate of Murathe Mwaria-deceased*[22] the court 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.

FOOTNOTE 22

49. A grant whether confirmed or not can be revoked on the grounds enumerated under Section 76 of the Act. It is a well-settled proposition of law that it is the duty of a person invoking the jurisdiction of a court to make a full and true disclosure of all relevant facts. He should not suppress any facts. An applicant for a grant of letters of administration must come in the manner prescribed and must be perfectly frank and open with the court. It he makes a statement which is false or conceals something which is relevant from the court the court will revoke the grant.

50. If the court comes to the conclusion that the affidavit in support of the application was not candid and did not fully state the facts, but either suppressed the material facts or stated them in such a way as to mislead the court as to the true facts, the court ought, for its own protection and to prevent an abuse of its process, will revoke the grant. The reason for the adoption of this rule is not to arm the applicant’s opponent with a weapon of technicality against the former, but to provide an essential safeguard against abuse of the process of the court. Where the petitioner is clearly found to have suppressed material and relevant facts which, if brought to the notice of the court when applying for a grant, should certainly have influenced the court in deciding one way or the other, and such suppression was certainly calculated to deceive the court into granting the order of the grant, the grant should on that short ground be revoked.

20 CA No 161 of 1993

21 HC SUCC No 2203 OF 1999

22 (content missing)

51. From my analysis of the issues discussed earlier, I find and hold that there is nothing before me to suggest that the Respondent withheld crucial material from the court or obtained the grant my misrepresentation of facts. The up shot is that the applicants have failed to establish any of the grounds stipulated under section 76 of the Act. Accordingly, I dismiss the Summons for Revocation Grant dated June 7, 2021 with costs to the Respondent.

Right of appeal 30 days

SIGNED AND DATED AT VOI THIS 21ST DAY OF SEPTEMBER, 2022.

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED AT VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2022

OLGA SEWE

JUDGE