In re Mukoyani Toli & (Deceased) (Succession Cause 98 of 2000)
[2022] KEHC 14535 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

SUCCESSION CAUSE 98 OF 2000

DK KEMEI, J

OCTOBER 27, 2022

IN THE MATTER OF MUKOYANI TOLI (DECEASED)

BETWEEN

ERASMUS SASAKA WACHILONGA ..... PETITIONER (DECEASED)

AND

SIMION WACHILONGA TOLI ..... OBJECTOR

AND

SASAKA HENRY MAKOKHA ..... RESPONDENT

JUDGMENT

Background

1. This matter relates to the intestate estate of the late Mikoyani Toli, who died on 26th July, 1994, as per the certificate of death on record, serial number 322628, dated 16th September, 1994.

2. According to a letter, dated 18th September, 1994, from the Assistant Chief of Naitiri sub-Location, the deceased was survived by Erasmus Sasaka Wachilonga (deceased) who was the petitioner herein.

3. Vide a petition lodged herein, grants of letters of administration intestate over the estate of the deceased Mukoyani Toli were confirmed on 26th November, 1999 and a certificate of confirmation of grant was issued on 22nd May 2002 to the said Erasmus Sasaka Wachilonga.

4. Vide summons for revocation or annulment of grant dated 23rd April, 1996 in the Resident Magistrate Court at Webuye Succession Cause No. 24 of 1994-In the matter of the estate of Mukoyani Toli (Deceased) the Applicant, one Makonjoo Toli Murisi, in his affidavit in support of the summons deposed that the said grant had been obtained fraudulently by the making of a false statement or by

concealment from court of the fact that he was the brother of the deceased and that the Respondent, Erasmus Sasaka Wachilonga, was just a nephew to the deceased. He further deponed that there were other nephews of the deceased who were not listed as beneficiaries of the deceased and that Erasmus Sasaka Wachilonga had listed himself as sole beneficiary yet the deceased had other siblings who were entitled to benefit from the estate.

5. It was further claimed that the deceased administrator had approached the court and filed this cause without the consent of the other beneficiaries. He deponed that the court does revoke or annul the grant issued and have the same issued to Makonjoo Toli Murisi.

6. It was also contended that the cause was later transferred from Webuye to Bungoma High Court in 1998 for purposes of hearing the application for revocation dated 23rd April, 1996 and that the same was later dismissed by Ringera J (as he then was). I have perused the file herein and I note that the alleged ruling is not available and that the court record does not allude to any such ruling.

7. Vide summons dated 13th March, 2017 and filed in court on 15th March, 2017 the Objector/Applicant herein sought orders that the Respondent be substituted in place of the deceased Petitioner, Erasmus Sasaka Wachilonga and that the court revokes the grant of letters of administration intestate issued to the deceased Petitioner on 21st day March, 1996. The application was grounded on the fact that: the deceased Petitioner died on 25th October, 2016 and that the Respondent who is his biological son has obtained grant of letters of administration Ad Litem over his estate and who now wants to take over land parcel Bungoma/Naitiri/153 to the exclusion of the Objector/applicant yet the said deceased petitioner had been occupying the land together with the objector/applicant; that the deceased Petitioner had fraudulently mis-represented to the court that he was the only person who survived the deceased Mukoyani Toli yet the truth of the matter is that the objector/applicant was also a beneficiary.

8. The Applicant, Simon Wachilonga Toli, in his affidavit in support of the summons, deposed that the Resident Magistrate's court at Webuye vide Succession Cause No. 24 of 1994 did issue a grant of letters of administration intestate over the estate of the deceased Mukoyani Toli to Erasmus Sasaka Wachilonga (now deceased) on 21st March, 1996. He deponed that the said grant was confirmed by the court on 22nd March, 2002 wherein L.R No. Bungoma/Naitiri/153 belonging to the deceased Mukoyani Toli was distributed to Erasmus Sasaka Wachilonga (now deceased).

9. The objector further contended that his grandfather, Kasavuli Toli was the father to the following sons listed in order of birth: Lunalo Toli; Wachilonga Toli; Makanjoo Toli and Mukoyani Toli. He stated that Kasavuli Toli had settled at Lutacho area within the then Ndivisi Location in the sub-county of Webuye East while Wachilonga Toli migrated and settled in Misango area within Tongaren sub-county and that Mukoyani Toli (deceased) herein settled in Naitiri area within Tongaren sub-county. He added that Lunalo Toli and Makonjoo Toli remained in the home of their father.

10. He contended that Wachilonga Toli was the father to: Francis Toli (deceased); Erasmus Sasaka Wachilonga (deceased Petitioner); Joel Munialo Wachilonga; Simon Wachilonga Toli (objector/Applicant herein) and Richard Werunga Wachilonga. It was also deponed that the deceased Mukoyani Toli established his residence on L.R No. Bungoma/Naitiri/153 and died intestate on 26th July, 1994 and that at the time of his demise, he did not have a wife or any children.

11. He deponed that prior to the death of Mukoyani Toli, the deceased had invited both the deceased Petitioner Erasmus Sasaka Wachilonga and himself to reside with him on L.R No. Bungoma/Naitiri/153 from the year 1995 and since he had no family of his own it was his wish that both the deceased Petitioner and himself were to share the estate equally.

12. He finally contended that he has resided with his family on L.R No. Bungoma/Naitiri/153 from the year 1995 and that the deceased Mukoyani Toli was the registered proprietor of L.R No. Bungoma/Naitiri/153. He dismissed the averments that at the point of his demise the deceased Mukoyani Toli was only survived by the deceased Petitioner Erasmus Sasaka Wachilonga.

13. In response to the summons, a replying affidavit was sworn on 1st November, 2017 by the respondent who averred that he was never appointed as an administrator of the estate of the deceased Mukoyani Toli which had been administered and concluded more than15 years and that the deceased Mukoyani Toli never invited the deceased petitioner Erasmus Sasaka Wachilonga to live with him on the parcel land known as L.R No. Bungoma/Naitiri/153 as the deceased Mukoyani Toli had bought land in a group but was defrauded and had to live with the deceased petitioner Erasmus Sasaka Wachilonga till his demise and that it was his father (Erasmus Sasaka Wachilonga) who managed to conclude the loan repayments and was eventually given the land by the Settlement Land Fund Trustee.

14. He averred that the objector/applicant was not entitled to half of the land parcel L.R No. Bungoma/Naitiri/153 as the deceased petitioner Erasmus Sasaka Wachilonga was the owner of the same as he paid all the loan to the Settlement Land Trustees. That the deceased Mukoyani Toli had initially given money to book the plot on behalf of the deceased Petitioner Erasmus Sasaka Wachilonga and that deceased Mukoyani Toli had his own money to buy land. That the deceased Mukoyani Toli had teamed up with five others to purchase land in Trans-Nzoia but they were defrauded and that the matter proceeded to court in Eldoret High Court Civil Case No. 39 of 1984.

15. He deposed that the objector/applicant colluded with Makonjoo Toli Murisi to annul or revoke the grant of letters of administration dated 23rd April, 1996. He averred that the cause was transferred from Webuye to Bungoma High Court in 1998 for purposes of hearing the application for revocation and that the same was dismissed. (I have perused the file herein and I wish to note that I have not seen the said ruling).

16. He deposed that the court dismissed the claim of Makonjoo Toli Murisi of being the beneficiary of the deceased Mukoyani Toli and that the objector/applicant has not lived on the subject L.R No. Bungoma/Naitiri/153 since 1965 but only came to live with Erasmus Sasaka Wachilonga (deceased petitioner) in 1977 when he enrolled at a local primary school and on dropping out went back to his ancestral land in 1980 only to return to assist Erasmus Sasaka Wachilonga (deceased petitioner) with farm work.

17. He deponed that the objector/applicant has his own family land in Misanga Town area of Tongaren which he is entitled to but has refused to settle there. That, recently through Bungoma ELC case No. 30 of 2014 the court found that the objector/applicant and other persons had no lawful claim to the land parcel L.R No. Bungoma/Naitiri/153(which they claimed it was held in trust for them) and that they were found to have been unlawfully occupying the land. The court ordered that they vacate the land and proceeded to dismiss their pleadings as they had been filed in bad faith.

18. He finally deponed that the application for annulment has been overtaken by events as the person to whom the grant was issued passed away and thus no grant is available for revocation.

19. The record reveals that at one time the Respondent filed a notice of intention to raise a Preliminary Objection dated 24th May, 2019 and filed in court on 24th May, 2019 before the hearing of the summons by the objector/applicant dated 13th March, 2017. The same was canvassed by way of written submissions. The court in a ruling delivered by Riechi J on 11th March, 2020 dismissed the Preliminary Objection in which it pointed out that the matter was not res-judicata and directed the application dated 13th March, 2017 do proceed by way of viva voce evidence before the said judge. Hearing of

the application was scheduled for 27th July, 2020 and that parties were directed to file their witness statements. On 27th July, 2020 the court issued a fresh date for the hearing namely 17th December, 2020 only for the same to be rescheduled to 3rd March, 2021. On 3rd March, 2021 the Applicant was not present in court whereupon the court proceeded to issue another date namely 2nd June, 2021. The file was finally allocated to this court and placed before me on 17th November, 2021 and by consent parties agreed to set the cause down for mention on 18th January, 2022 for purposes of confirming if the Petitioner had served their witness statements upon the Objector.

20. On 23rd March, 2022 the Objector/Applicant sought leave to amend the summons for revocation of grant vide an application dated 24th February, 2022. Learned counsel for the objector confirmed that the same was served and that there was no response from the Respondent. The court directed that the latest application by the Objector/Applicant be put on hold and that parties should proceed for hearing as scheduled.

21. On 23rd March, 2022 the matter proceeded to hearing in earnest.

Evidence

22. According to OB. W1, Simon Wachilonga Toli, he adopted his witness statement as his evidence in chief. On cross-examination, he told the court that the deceased, Mukoyani Toli, herein died in 1994 and was not aware of when the succession cause was lodged. He stated that Erasmus Sasaka Wachilonga (deceased petitioner) died around 2015 and that he learnt that the late Erasmus Sasaka Wachilonga petitioned for letters of grant in the estate of the deceased Mukoyani Toli. He told the court that Wachilonga Toli is his father who sired him and four others but two have since died. His father owned plot 416 Tongaren and that succession was instituted in which his elder brothers Joel Wachilonga, Richard Wachilonga and Toli Wachilonga Francis shared it. He saw the certificate of succession showing that plot 416 was distributed to Richard Werunga, Simeon Baruti and Francis Toli and he agreed with it. At that time there was no issue on parcel 416 and that the deceased Erasmus Sasaka Wachilonga (deceased petitioner) was not allocated any portion. He confirmed that Erasmus Sasaka Wachilonga (deceased petitioner) had been staying with Mikoyani Toli (deceased) on parcel 153 and that he is not aware of when exactly parcel 153 was registered in the name of the late Erasmus Sasaka Wachilonga. He told the court that he litigated against the late Erasmus Sasaka Wachilonga and won in Webuye Court and on appeal the land was given back to the late Erasmus Sasaka Wachilonga. He lodged his appeal through succession and that he is aware of the judgement in Bungoma ELC No. 38 of 2014 where the court rejected the applicant's application. The parcel 153 is registered in the name of the late Erasmus Sasaka Wachilonga. On re-examination, he told the court that the late Erasmus Sasaka Wachilonga was his brother and that he did not involve him and his other brothers in the succession cause and that he is objecting his ownership of plot 153.

23. OB. W2, Macray Peter Kasavuli Wachilonga, adopted his witness statement as his evidence in chief. He told the court that he knew the late Erasmus Sasaka Wachilonga as he was his brother. He is aware that plot 153 belonged to the late Mikoyani Toli who did not have a wife and that they were not alerted of the succession cause. On cross-examination, he told the court that they are five sons in his family and that parcel 416 was given to Joel Munialo as administrator with beneficiaries Francis Toli, Erasmus Sasaka, Simeon Wachilonga Toli and Richard Wachilonga. He noted that he has seen the certificate of succession and that the same is erroneous and that clan members had mandated Charles to take charge of parcel 416. He told the court that late Erasmus Sasaka Wachilonga used to stay with the late Mikoyani Toli and that he is aware of the judgement of Bungoma ELC case number 19 of 2018. On re-examination, he told the court that all beneficiaries are entitled to a portion of the parcel 153 since they used to farm there. The objector then closed his case.

24. PET.W1, Sasaka Henry Makokha, adopted his replying affidavit and witness statement as his evidence in chief. On cross examination, he told the court that the objector herein lodged a case in Webuye Court in 1996. He stated that he is the son to the late Erasmus Sasaka Wachilonga who is the brother to the objector. He told the court that the objectors were allocated land in parcel 416 and that his father the late Erasmus Sasaka Wachilonga was the sole owner of parcel 153. He added that they were not listed as they were settled in parcel 416 and that they were aware of what was going on. That the objector used to reside in parcel 153 but that his father ordered him to go back to 416. On re-examination, he told the court that the objector only farmed on parcel 153 and nothing more.

25. PET. W2, Priscila Sitawa Sasaka, adopted her witness statement as his evidence in chief. She told the court that the deceased petitioner, Erasmus Sasaka Wachilonga, was her husband and that the petitioner/respondent is her son. On cross-examination, she told the court that parcel 153 was occupied by the late Erasmus Sasaka Wachilonga, and Mikoyani Toli and that the objector/applicant resided there temporarily until he was required to move to parcel 416. The petitioner closed his case.

26. The court directed both parties to file and exchange submissions. The objector/applicant submitted that under section 66 of the *Law of Succession Act*, the same lists the identities of persons in order of preference entitled to apply to be considered as Administrators of the estate of the deceased person with a caveat of Rule 26 of the Probate and Administration Rules that such an applicant must obtain consent of and /or issue his intention to apply as such, to all persons entitled in the same degree. He submitted that on the demise of Mikoyani Toli he had no wife and children and was the proprietor of parcel No. Bungoma/Naitiri/153. The late Erasmus Sasaka Wachilonga was appointed the Administrator of the Estate of the late Mikoyani Toli after indicating that he was the only surviving relative which was not the case as the late Mikoyani Toli had a brother and other numerous nephews and nieces. The late Erasmus Sasaka Wachilonga was a nephew. No evidence was furnished to show that the late Erasmus Sasaka Wachilonga did seek the requisite consent from other beneficiaries. He urged this court to revoke the grant and issue a fresh one in the name of the applicant and respondent herein after taking into consideration the interest of the objector herein.

27. The respondent submitted that the evidence before court clearly indicated that the deceased Mukoyani Toli was not the owner of the subject property but he only booked the parcel from the late Erasmus Sasaka Wachilonga who paid all the money for purchasing the plot and that the same was transferred from the Settlement Fund Trustees to the late Erasmus Sasaka Wachilonga and this was affirmed by the Bungoma ELC. Hence, the said Erasmus Sasaka Wachilonga was not required to involve the applicant/objector. It was submitted that there was nothing outstanding under the estate as at 26th October, 2016 as the administration of the estate of the deceased Mukoyani Toli was concluded in 2004 when the only property for succession was transferred to the late petitioner Erasmus Sasaka Wachilonga and the administrator was functus officio at the time he died and the Court became functus officio with respect to that estate. Counsel placed reliance on the case of Re Estate of Juma Shitseswa Linani (Deceased) (2021) eKLR. It was further submitted that the estate has already been administered and that the revocation sought without seeking for cancellation of title issued to the deceased petitioner is an abuse of the court process as there is no estate left of the late Mikoyani Toli as the only estate at the moment is that of Erasmus Sasaka Wachilonga. It was further submitted that the deceased Mukoyani Toli had only booked the land and that the subject property was transferred by the Settlement Fund Trustee to the late Erasmus Sasaka Wachilonga and that the objector's attempt to raise a claim that the said deceased petitioner had held the land in trust was dismissed by the ELC court. Counsel placed reliance in the cases of Re Estate of Joel Rukwaro Thuku (Deceased) (2018) eKLR. He urged this court to dismiss the application with costs.

28. I have considered the summons, the affidavits in support and in opposition to the application dated 13th March, 2017, viva voce evidence of the witnesses and the written submissions by counsels. The key issue for the court's determination is whether the application meets the threshold for revocation or annulment of grant under section 76 of the *Law of Succession Act*.

Section 76 of the Succession Act provides that;

> 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.
>
> It is upon any party seeking the revocation or annulment of a grant to demonstrate the existence of any, some, or all of the grounds set out in Section 76 as outlined above.

29. Section 76 was clearly expounded on by the court in the Case of *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where Justice Musyoka stated that:

> " 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." The same was reiterated in the case of Re Estate of Agwang Wasiro (Deceased) [2020] eKLR by Justice Kariuki.

30. The grounds under which a grant of representation may be revoked are provided for under section 76 (a) - (e) of the *Law of Succession Act* Cap 160 of the Laws of Kenya. It is clear therefore, that the grounds upon which a grant may be revoked or annulled are 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. However, the court is bestowed with the powers to revoke the grant on its own motion so long as there is evidence of the existence of any of the conditions provided under section 76. (See Matheka and Another –vs- Matheka [2005] 2 KLR 455).

31. The objector/applicant invited this court to revoke the grant of letters of administration intestate made to the late Erasmus Sasaka Wachilonga stating that the proceedings to obtain the grant were defective and were based on concealment of material facts.

32. As I have already stated elsewhere in this judgement, this court has the jurisdiction to revoke a grant suo moto. However, even where the court can revoke a grant suo moto 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. (See Matheka and Another –vs- Matheka (supra)).

33. Rule 44 of the Probate and Administration Rules made under the *Law of Succession Act* provide as follows:

> Revocation or annulment of grant
>
> (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.
>
> (2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—
>
> (a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.

(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.

(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annual a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct

34. Section 66 of the *Law of Succession Act* sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

These provisions state as follows:

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

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;

(c) the Public Trustee; and

(d) creditors ..." and

"7

(7). Where a person who is not a person in the order of preference set out in section 66 of the Act

seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant."

18. Rule 26 of the Probate and Administration Rules is also relevant. it states as follows:

"26

(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

19. This court is also guided by section 39 of the *Law of Succession Act* which deals with the situation where the deceased has left no surviving spouse or children. It is provided under the section –

(1) "Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund."

35. The parties have stated their relationship with the deceased in their respective affidavits. This court will therefore exercise its discretion provided under section 66 of the *Law of Succession Act* based on the evidence before it as deponed in the affidavits. Under section 39 of the *Law of Succession Act*, the order of priority where the deceased has left no spouse or children is set out. For the court to determine who among the applicant and the protestor is the closest to the deceased, the consideration is based on the degree of consanguinity and affinity. The kindred under section 39)1) (a)- (d) of the *Law of Succession Act* does not present any difficulties. Under (e) the court has discretion to determine the relatives based on the nearest degree of consanguinity and affinity. In the case of *Immaculate Wangari Munyaga -v- Zachary Waweru Ireri* (2016) eKLR Justice Mativo stated while dealing with a similar issue- "An examination of consanguinity and affinity chart below will help in determining the issue."

36. The law requires that a person claiming to be entitled to the estate be related to the deceased from one common relative starting from the parents to the particular relative who is traced from the parent of that deceased. This will inform the court on the degree of consanguinity and affinity the claimant has to the deceased.

37. From the above chart, it is clear that Makonjoo Toli Murisi ranks in priority over the deceased petitioner Erasmus Sasaka Wachilonga for purposes of applying for letters of administration intestate.

38. In light of the foregoing, did the late Erasmus Sasaka Wachilonga seek and obtain consent of persons who rank in priority to him before filing for the grant of letters of administration intestate?The objector/applicant argued that the same was filed secretly and without the consent of the other beneficiaries and from the record it is elaborate that the brother to the late Mukoyani Toli, Makonjoo Toli Murisi did try to have the same grant of letters of administration intestate revoked (there is nothing much mentioned in the court record with regards to the status of this application) and that the letter from the assistant chief indicated that the late Erasmus Sasaka Wachilonga was the rightful person to assist in allocating the estate of the deceased.In an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

39. From the circumstances of this case, I am satisfied that the objector/applicant has proved on a balance of probability that the Grant of Letter of Administration intestate issued on 21st day of March, 1996 was obtained secretly or without the consent of other beneficiaries or had omitted some of the deceased's dependants. Rule 26 of the Probate and Administration Rules 1980 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

40. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him. These grounds ought to be proved with evidence.

41. I have perused the court record and I note that consent to the making of a grant of letters of administration intestate was not filed and that the form P & A 5 does not bear all the beneficiaries of the estate of the deceased, in this case the brother and his consent. Further, I did not see any filed form 38 or 39 in accompaniment to the petition for letters of administration intestate application.

42. In *Antony Karukenya Njeru –vs- Thomas M. Njeru* [2014] eKLR, a grant of letters of administration was revoked as persons with equal priority did not consent to the petitioners therein applying for grant of letters of administration. (See also In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi

H.C. Succ. Cause No. 890 of 2003). Also, In the case of Albert Imbuga Kisigwa –vs- Recho Kavai Kisigwa, Succession Cause No.158 of 2000, Mwita J. noted thus:

> "(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

43. It was submitted by the respondent that there was nothing outstanding under the estate of the deceased Mukoyani Toli as administration was concluded in 2004 when the only property for succession was transferred to the late petitioner Erasmus Sasaka Wachilonga and that the administrator was functus officio at the time he died and that this court became functus officio with respect to that estate. Counsel placed reliance on the case of Re Estate of Juma Shitseswa Linani (Deceased) (2021) eKLR. It was further submitted that the estate has already been administered and that the revocation sought without seeking for cancellation of title issued to the deceased petitioner is an abuse of the court process as there is no estate left of the late Mikoyani Toli as the only estate at the moment is that of Erasmus Sasaka Wachilonga.

44. In the case of Re Estate of Juma Shitseswa Linani (Deceased) (2021) eKLR relied upon by the respondent, the facts in this case and prayers in this matter were focused on revocation or annulment of the certificate of confirmation of grant and for directions to be taken on distribution of the estate. It does not seek revocation of the grant of letters of administration intestate that was made to the administrator on 4th May 1999 as is the case in this instant cause and this court finds that the same was not appropriate in this circumstance as the provision under section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya is not about revocation of certificates of confirmation of such grants. The court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review. The court further noted thatafter a grant has been confirmed, the processes that follow, that is to say with respect to the implementation or execution of the confirmation orders as encapsulated in the certificate of confirmation of grant, have nothing to do with the *Law of Succession Act*, for the said law or the rules made under it, the Probate and Administration Rules, do not provide for what should happen after the certificate of confirmation of grant has been generated from the confirmation orders. The process of the carrying into effect of the confirmation orders is regulated by land legislation through a process known as transmission, which is not provided for under the *Law of Succession Act*.In our instant cause this court still has the jurisdiction to handle this succession matter as the same was in regard to the revocation of the grant of letters of administration intestate that was made to the administrator based on what he had presented to court and not the certificate of confirmation of grant.

45. With regard to the case of *Re Estate of Joel Rukwaro Thuku (Deceased)* [2018] eKLR,a grant of letters of administration intestate in relation to the estate of Joel Rukwaro Thuku who died on 21/2/2003 was made and issued to Rhoda Rukwaro, Rebecca Waguthi Rukwaro and Hosea Kanyogoro Rukwaro as joint administrators on the 19th September 2011. The grant was subsequently confirmed on the 19th September 2011. Before completion of the administration of the estate, the three administrators died.Vide a summons for substitution of administrator application dated 19th March 2018 pursuant to rule 49 of the P & A rules, one Monica Rukwaro a beneficiary (heir) of the estate moved the court seeking to substitute the three deceased administrators as the sole administrator. The application was

premised on grounds on the face of it and affidavit in support sworn on 19th March 2018 by the applicant in person. The court held that:

> " .... In such a scenario, Section 76 (e) of the Law of Succession comes to play on account that following the death of the sole administrator/executor or all administrators or executors, the grant becomes inoperative through subsequent circumstances. Subsequently, a limited grant of letters of administration de Bonis non would then issue to any of the heirs or beneficiaries with the consent of the rest. In that regard I am guided by the reasoning in the case of (In the matter of the estate of Hannah Njuki (deceased) Nairobi High Court Succession Cause No. 463 of 1997) where Ang'awa J held that:
>
> > "where an administrator dies before completion of administration, the next cause of action should be to apply for a grant of letters of administration de Bonis non, which is limited to the completion of the administration of the estate".
>
> An application of this nature ought to have been filed under Section 76 (e) of the Law of Succession and paragraph 16 of the 5th Schedule."

46. From the above matter, it is clear that the administration of the estate of the deceased was still ongoing and thus the grant of letters of administration de bonis non. In our instant matter, the administration was concluded and a transfer of title was effected.

47. Under section 76 of the *Law of Succession Act*, a grant of representation is liable to revocation where the process of obtaining it was attended by glaring irregularities, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant, which was the case in this instant succession cause.

48. I wish to further highlight that, on my perusal of the record before me the form P & A 5, which was sworn by the deceased petitioner Erasmus Sasaka Wachilonga on 5th October, 1994 indicated the assets of the deceased Mukoyani Toli as Bungoma/Naitiri/153 which was his last known place of residence. It is quite elaborate from the submissions of the objector/applicant that the late petitioner Erasmus Sasaka Wachilonga on acquiring the grant of letters of administration intestate, through misrepresentation or concealment of important information, proceeded to have the property that was initially under the late Mukoyani Toli's estate transferred to his name thus forming part of the estate of the deceased. In Re Estate of Julius Ndubi Javan (2018) eKLR (Deceased) Gikonyo J emphasised on the importance of parties bringing forth truthful information to court. This simply means that the title registered under the name of the late Erasmus Sasaka Wachilonga is null and void since the title to the suit property was acquired by a defective Grant of Letters of Administration intestate. That means the suit property reverts back to the above-mentioned deceased Mukoyani Toli.

49. In *Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR, the court made pronouncements on the importance of disclosing all material facts before a court of law while seeking letters of administration and confirmation thereof. It observed;

> " I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court

in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant."

50. I also wish to echo the sentiments of my brother Gikonyo J in *Re Estate of Julius Ndubi Javan* (2018) eKLR (Deceased) when he said: -

> "...in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases.
>
> ...non-disclosure of material facts undermines justices and introduces festering waters into pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law."

51. I am satisfied that there is ample evidence that the late petitionerErasmus Sasaka Wachilonga did more than just conceal material facts. He went further and misrepresented facts to the court in order to defraud the other beneficiaries of their rights to the estate of the deceased. The objector/applicant has demonstrated within the purview of Section 76 that the grant was fraudulently obtained and there was concealment of material facts and misrepresentation. The respondent sought to deflect attention on the deceased administrator Erasmus Sasaka Wachilonga by claiming that the said administrator had paid for the purchase of parcel number Bungoma/Naitiri/153 from the Settlement Fund Trustee which later transferred the land to him. However, as noted above, the said Erasmus Sasaka Wachilonga clearly indicated in the P & A forms 5 while petitioning for letters of grant that the said property belonged to the deceased herein Mukoyani Toli. Indeed, the said administrator upon obtaining the confirmed grant presented himself before the Settlement Fund Trustee as the sole beneficiary of the deceased's estate and managed to have himself registered as proprietor of the suit property. If indeed the land had been his, then nothing prevented him from engaging the Settlement Fund Trustee to issue title to him directly without having to file a succession cause. There is a high possibility that the property in question belonged to the deceased prior to his death. Even though the deceased administrator is claimed to have made payments to the Settlement Fund Trustee, no witness was called from that entity to shed light on whether the deceased or the administrator owned the land in question. The land was subsequently transferred to the deceased administrator by the Settlement Trustee after he presented a certificate of confirmed grant which indicated him as the sole beneficiary. It is clear that the deceased administrator had devised a stratagem with the sole aim of elbowing any other relative from benefiting from the suit land and that the petition forms showing that the deceased was the owner of the land gave him away and that the said land must now be shared by the family members in terms of how they rank within the family tree. I find that the deceased administrator held the land in question in trust for the deceased and his family members. Even though it is claimed that the decease administrator had paid some monies to the Settlement Fund Trustee, the contribution, if any, was to be taken into consideration during the distribution of the property among the beneficiaries. As the title to parcel Bungoma/Naitiri/153 was issued after the demise of the deceased herein, the same ought to have been registered in favour of the deceased before the same could be distributed to his heirs. However, as the deceased administrator interfered with the process, the only recourse is to order the title to be registered in the name of the deceased herein Mukoyani Toli so that the family can embark on a fresh confirmation exercise. It is instructive that the process of obtaining the grant by the deceased administrator was flawed and ought to be revoked so that the family can begin afresh with the process of confirmation. The certificate of confirmation of grant issued herein to the deceased administrator must be cancelled

as well. As the administrator has since passed on, the objector's request that the respondent herein Sasaka Henry Makokha who is a son to the deceased administrator be made an administrator is merited as there is need to preserve the estate even as the issue of distribution is being addressed by the family members.

52. In the result, it is my finding that the objector's application dated 13th March, 2017 has merit. The same is allowed in the following terms ; -

i. That the grant of letters of grant of administration intestate issued to the deceased administrator Erasmus Sasaka Wachilonga on the 21st March, 1996 and confirmed on the 23rd May, 2002 is hereby revoked.

ii. That the certificate of confirmation of grant dated 22nd May, 2002 is hereby cancelled.

iii. That Sasaka Henry Makokha is hereby appointed as the administrator of the estate of the deceased herein and that a fresh grant of letters of administration intestate shall issue to him accordingly.

iv. The registration of the deceased administrator Erasmus Sasaka Wachilonga as proprietor of LR. NO. Bungoma/Naitiri/153 is hereby cancelled and the same be registered the name ofMukoyani Toli (deceased).

v. That upon the issuance of the fresh grant, the administrator is directed to comply with all the requirements of section 71 of the *Law of Succession Act* and Rule 40 of the Probate and Administration Rules by filing a fresh summons of confirmation of grant within thirty (30) days and cause the same to be served on all the beneficiaries of the deceased who shall be at liberty to file affidavits of protests if dissatisfied.

vi. That the matter shall be mentioned on the 28th November, 2022 to confirm compliance and for further directions.

vii. This being a succession matter involving close family members, there will be no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF OCTOBER, 2022.

D.Kemei

Judge

In the presence of:

Miss Nfuye for Wesutsa for Objector/Applicant

Mrs. Khayo for proposed Petitioner/Respondent

Kizito Court Assistant