



REPUBLIC OF KENYA



**In re Estate of George Francis Waita (Deceased) (Succession Cause
76 of 2012) [2022] KEHC 15966 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 76 OF 2012
JN ONYIEGO, J
NOVEMBER 17, 2022**

RULING

1. The deceased herein died intestate at Consolata hospital on 4th February 2010. On 5th March 2012, Edith Wangari Waita and Agnes Wamaitha in their capacity as widows petitioned the court for a grant of representation. According to form P& A 5, the deceased was survived by the following beneficiaries;
 - a. Edith Wangari Waita(widow)
 - b. Kevin Francis Waita(son)
 - c. Allan Kenyeki Waita(son)
 - d. Maureen Chao Waita(daughter)
 - e. Agnes Wamaitha Waita(widow)
 - f. Lillian Chao Waita(daughter)
 - g. Brian Waita Waita(son)
 - h. Evan Kibuchi Waita(son)
2. The only asset then listed as constituting the estate was plot number 627/VI/MN. However, there was no liability indicated. The estate was gazetted on 15th May 2012 and subsequently a grant of letters of administration intestate made on 26th July 2012 and issued on 15th August 2012. The same was consequently confirmed on 30th August 2013.
3. Later, by a summons dated 28th July 2014, Agnes Wangari (the 2nd petitioner) sought for rectification of the certificate of confirmation of grant so as to include plot Number 4A Sagana Town together with the building thereon. It was alleged that the said property was erroneously left out due to lack of knowledge of its existence. That having discovered that the deceased was a beneficiary of the said property from his late father's estate in succession case number 92 Of 1997 in the estate of Francis Waita Mbaki in Which Getrude Chao mother to the deceased herein and Stephen Mbaki brother to



the deceased were the petitioners, it was necessary to include and distribute the property as part of the deceased's estate. The application then was granted on 25th August 2014.

4. Vide a summons for revocation and annulment of confirmation of a grant dated 20th September 2014, Getrude Chao Waita mother to the deceased sought revocation of the said grant on grounds that; plot LR no. 627/VI/MN listed in the estate herein was registered in the name of the deceased as a trustee to hold for the benefit of the family of Francis Waita her late husband; the grant was obtained without her being informed nor made aware hence a scheme by the petitioners to disinherit her together with the deceased's siblings; the grant was obtained fraudulently by the making of a false statement and or concealment from the court of something material to the case and; the grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
5. The application is supported by grounds set out on the face of it and averments contained in the affidavit in support sworn on 20th September 2014 by the applicant in which she listed her children as beneficiaries of the plot in question. According to her, the said plot is for the benefit of her children namely; George Francis (deceased herein); Mary Waruguru, Esther Mukumbo (deceased), Stephen Mbaki, Jane Wandia (deceased), Grace Njeri (deceased), Allan Gerishon (deceased) and Lucy Msigo. She averred that if the orders sought are not granted, she and her children who by law are entitled to a share of the said plot will suffer.
6. Subsequently, Angeline Wakio Waita alleging to be a daughter of the deceased also filed summons for revocation of a grant dated 4th March 2021 seeking orders among others that; the grant herein issued to the petitioners be revoked; pending hearing of the revocation application the subject grant be suspended; an injunction to issue against the petitioners restraining them from undertaking any dealings and or disposing LR No. 627/VI/MN and plot No.4A Sagana pending hearing and determination of the application ; forms 5,12, 38 & 80 of the P&A rules used in acquiring the grant herein be expunged from the court record; pending hearing and determination of the application, the petitioners be restrained from withdrawing any funds from the bank accounts of the deceased; registration of plot number 4A Sagana in the names of the petitioners be cancelled; the petitioners be ordered to deposit in court annual rent of Kshs. 640,000 collected from plot number Sagana 4A and Kshs. 4,471,200 paid to them as compensation by the National Land Commission for the house without land on plot number 293/VI/MN for distribution to all beneficiaries.; an order to issue directing DCI to investigate the petitioners for money received from Barclays Bank held in the name of the deceased but not accounted for and; a fresh grant to issue to Angeline and Getrude Chao.
7. The application is supported by grounds stated on the face of it and an affidavit sworn by the applicant on 4th March 2021. It is the applicant's case that she was a daughter to the deceased hence entitled to a share of her father's estate. That she is well known by her grand-mother Getrude, uncles and aunties. She attached a letter from the local chief being annexure AWW2 confirming that she was a daughter to the deceased. That after instructing her lawyer to peruse the court file, she realized that her grandmother had engaged a private investigator and later the document examiner who discovered that the petitioners had not sought consent from all beneficiaries and that the consents attached to secure the confirmed and later rectified grant were not signed by the purported beneficiaries hence forgery and false statements to the court.
8. She basically adopted the grounds cited by Getrude in seeking to revoke the grant. She went further to allege that failure to file form 57 for guarantee of sureties renders the proceedings herein defective. That Agnes Wamaitha did not sign a consent to the mode of distribution hence rendering the said consent defective. She also raised concern that the consent for confirmation of the grant had introduced a stranger by the name of Allan Manyeki waita with no known ID card. She deposed that plot number



627/VI/MN was for all beneficiaries as per the confirmed grant but the petitioners had shared it between themselves.

9. In response, Agnes Wamaitha filed her replying affidavit sworn on 29th April 2021 opposing the application for revocation of the grant. She denied the claim by Angeline that she was a daughter to the deceased and challenged her to produce a birth certificate with the deceased as the father. She averred that the late Mariam Mwamburi mother to Angeline was buried in Taita and not Sagana hence sufficient evidence that the mother was not married to the deceased. She dismissed the private investigator's report and urged the court to disregard it as it was initiated while this matter was still pending in court so as to suit the objector's interests.
10. It was further deponed that the petitioners did follow all necessary procedures in acquiring the grant with the approval of the court. Regarding the identity of Allan Willie Kanyeki, she attached a birth certificate marked annexure AWW2 showing that he was a son to George Waita and Edith Wangari. Concerning the sale of part of the estate, she denied the claim and dismissed it as unfounded. In answer to the allegation that there were no consents obtained and that the signatures of the beneficiaries were forged, she attached a declaration from Kevin, Allan, Lilian, Brian and Evans all children of the deceased confirming that they did give their consent (see Annexure) and that Angeline, Keziah, Linda are strangers to them.
11. On the other hand, Linda Wanjiku Waita also filed her summons for revocation dated 4th March 2022 through one Charles Kuria Muthandi who claimed to be acting on the power of attorney donated by her to act on her behalf. Basically, the prayers sought are a replica to Angeline's application for revocation. The application is based on grounds set out on the face of it and an affidavit sworn by the said Charles Kuria who claimed that Linda was a daughter to the deceased and Kesia Njeri as the mother. The content of the affidavit in support is also a photocopy of what Angeline deponed in the affidavit in support of her application for revocation.
12. In response to Linda's application, Agnes with authority from Edith filed a replying affidavit sworn on 29th April 2021 denying that Linda was a daughter to the deceased. She further stated that Charles who is purporting to represent Linda a resident of the USA should be investigated on how as a stranger he managed to access court documents. She accused her mother in-law Getrude and brother in-law Stephen of trying to collude with strangers to take what is rightfully theirs.
13. Equally, Kesia claiming to be a widow to the deceased also filed a summons dated 4th March 2021 seeking revocation of the grant through Charles Muthandi as an attorney. The grounds for revocation are also similar to those of Angeline and Linda. It was averred that after Agnes parted ways with the deceased, Kesia started staying with the deceased while in Kisumu. That it was during Kesia's cohabitation with the deceased that the deceased disclosed to him of the house in plot number 2-27-1 Migosi and a plot at Mamboleo Kisumu. That she fully participated in the burial of the deceased hence recognised by the family members.
14. In response to Kesia's application, Agnes filed a replying affidavit sworn on 29th April 2021 dismissing the claim that Kesia had a relationship with the deceased. She denied the allegation that she had parted ways with the deceased. As proof of her closeness with the deceased, she attached hospital medical bills cleared by her employer through her medical card as a wife to the deceased. She stated that Kesia's name did not appear in the deceased's obituary where she and Edith were recognized as the deceased's wives (annexture AWW-4). She also attached family meeting minutes chaired by the local chief where only Agnes and Edith were recognized as the deceased's wives.
15. In support of the applicant's case, Mr. Stephen Mbaki swore an affidavit on 1st July 2021 claiming that he has an interest in plot number 627 which was registered in the name of the deceased as a trustee



for the family of their late father Francis Waita. He claimed that all along he had been operating a club known as Magongo on the said property. He further averred that the deceased was statutorily married to one Edith whom he separated with and later befriended Agnes (2nd petitioner), Kesia Njeri mother to Linda and Mariam Juma mother to Angeline. He deposed that the deceased had many women who could stay with him and go hence he nicknamed himself as “Bingwa”. According to him, Linda and Angeline were children to the deceased.

16. In his further affidavit sworn on 30th June 2021 in response to Agnes’ replying affidavit, Charles Muthandi acting on behalf of Linda and Kesia restated that Linda was a daughter to the deceased. He exhibited photos allegedly taken by Linda and her uncle Stephen. He stated that Linda Chao is named after her grandmother Getrude Chao.
17. Getrude Chao also swore a further affidavit on 1st July 2021 claiming that Edith had failed to respond to serious allegations of fraud in obtaining the grant hence cannot hide behind Agnes. She emphasized the fact that Angeline and Linda were children to the deceased hence her grand-children. That Angeline lived with the deceased at Sagana and that at all times she schooled in schools around Sagana while staying with the father. She claimed that Edith was the only official wife to the deceased and that Agnes, Kesia and Mariam mother to Linda were friends.
18. Angeline Wakio filed a further affidavit sworn on 25th June 2021 attaching a school living certificate from preparatory high crest preparatory and Thumaita secondary school reflecting the deceased as her father. That when her mother died she was not married to the deceased.

Hearing

19. When the matter came for hearing, Pw1 Linda Wanjiku gave evidence online while in USA. She adopted her witness statement recorded on 30th June 2021. She claimed that she was a daughter to the deceased and that she did not know the nature of the marriage between her mother Kesia and her late father. She claimed that she was not informed of these proceedings nor was her consent sought. She demanded to be given a share out of her father’s estate. On cross examination by Mr. Wamwayi on whether she knew Angeline she denied having knowledge of her. On further cross examination by Mr. Adhoch for the petitioner, she stated that she knew Lilian, Brian, Kevin, Allan and Evans as siblings.
20. Pw2 Kesia Njeri told the court that she stayed with the deceased as husband and wife since 1991 up to 2000 when they parted. That they were blessed with one child known as Linda Wanjiku Muthandi. She basically adopted her witness statement recorded on 30th June 2020 which is a replica of the content of her affidavit in support of her application for revocation. She however stated that she was aware that the deceased had Edith, Agnes and Mariam as wives.
21. Pw3 Emanuel Karisa Kenga a private document examiner testified that he was instructed by DG. Wachira and Company Advocates asking him to examine various questioned documents against known signatures of Edith Wangari, Maurine Chao, Lilian and Brian. The questioned documents herein referred to signatures of the named persons appearing in various forms among them form 38 which the said persons purportedly signed as consent. That after comparing those signatures with their known signatures obtained from their id cards they were at variance and therefore not made by the same hand.
22. Pw4 Getrude Chao mother to the deceased adopted her witness statement recorded on 1st July 2021. She claimed that she was a dependant to the deceased hence needs a share from the estate. She recognized Angeline and Linda as her grandchildren sired by the deceased. On cross examination by Mr. Adhoch for the petitioner, she stated that Edith was the only official wife to the deceased. That Agnes and Kesia were also George’s wives although she did not know when Kesia was married.



23. Pw5 Stephen Waita brother to the deceased adopted his witness statement dated 2nd July 2021. He told the court that the deceased had Edith as the only wife. He also recognized the children of the deceased as recorded in form P&5 of the petition filed by the petitioners besides Angeline and Linda whom he also recognized as children to the deceased. On cross examination by Adhoch, he referred to Agnes, Kesia and Mariam as having been friends to the deceased.
24. Dw1 Agnes Wamaitha also relied on her affidavit in reply sworn on 29 April 2021 and her witness statement plus documents in support. She denied forging any signatures in seeking for a grant of representation. She stated that all the properties listed belonged to the deceased and that there was material disclosure of all beneficiaries and assets. Regarding the property in Migosi Kisumu, she claimed the same as hers but sold long before the deceased died. She claimed that the chief Kabinga gave an introductory letter to her in 2011 without Angeline's name yet the same chief was approached later by the applicant to sneak in yet another letter with Angeline as a beneficiary to the estate.
25. On cross examination by D.G.wachira, she told the court that plot 4A Sagana was given to her husband as his share from his late father's estate in succession Case no.92 of 97 hence lawfully transferred to her and Edith. Regarding the question of signing consents by the beneficiaries who are residing in USA, she stated that the subject forms were sent to America for their signatures and later commissioned before an advocate in Kisumu. She denied the suggestion that Linda and Angeline were children to the deceased hence the reason why their names were omitted from the deceased's obituary. She claimed that Angeline has a father who is living in Wundanyi.
26. After close of the hearing, parties agreed to file submissions.

Getrude's Submissions

27. Through the firm of D.G Wachira, Getrude filed her submissions on 4th March 2022. It is the applicant's submission that the grant was obtained through fraudulent means. This argument was based on the ground that the consents from beneficiaries were forged as evidenced by pw3 the document examiner. This allegation was further solidified by the submission that Agnes had admitted that those consents were commissioned by an advocate in Kisumu in the absence of the deponents who at the material times were residents of USA. That in any event, the said beneficiaries were not call as witnesses to confirm that they indeed had signed the consents.
28. On the question of concealment of material information, it was submitted that the petitioners had failed to disclose all beneficiaries among them Angeline and Linda who were daughters to the deceased and Getrude Charo as a dependant being the mother to the deceased. Regarding plot No. 4A Sagana, it was submitted that the grant upon which it was distributed under succession case No.92 of 1997 has since been revoked hence the property has to revert back to its original owner in this case Francis Waita the father to the deceased herein. That under Section 3(2) of the *law of succession Act*, Angeline was a daughter to the deceased regardless whether her mother was married to the deceased or not. It was further contended that Agnes was not lawfully married to the deceased considering that the deceased's marriage to Edith was still subsisting as there was no divorce between the two
29. Concerning defective proceedings, it was submitted that the summons for confirmation of the grant dated 30th August 2013 and filed on 30th July 2014 were defective as the same were applied for by Agnes alone minus Edith's signature yet her name was indicated. That the 2nd applicant did not sign the consent for the mode of distribution. It was further contended that the said consent form has the name of a stranger one Allan Manyeki Waita.



30. According to counsel, the petitioners are in breach of court orders restraining them from interfering or charging the estate assets yet they have gone ahead to receive compensation from the National land commission on plot number 2519 Magongo. Further, it was contended that the petitioners had failed to disclose plot number Kwale/Kilimani/ 347 and 135, cash held in Barclays bank and shares in blue shield insurance.
31. In conclusion, counsel made reference to case law to support the position that a grant obtained without a properly executed consent by beneficiaries is null and void hence liable to revocation. In that regard, the court was referred to the case of *Samuel Wafula Wasike v Hudson Simiyu Wafula* CA No. 161 of 1993 and *in the matter of Ngari Gatumbi alias James Ngari Gatumbi*(deceased Nairobi High court succession cause number 783 of 1993. On the question of failure by the petitioner in disclosing all beneficiaries, counsel relied on the case of *in the matter of the estate of Agwang Wasiro alias Achwang Wasino (deceased)* Kakamega Succession case number 859 of 2015 where the court held that a court can on its own motion revoke a grant if found that a petitioner had failed to disclose other beneficiaries.

Angeline's Submissions

32. Through the firm of Mjeni Mwatsama Advocates, Angeline claiming to be a daughter to the deceased and a beneficiary to the estate filed her submissions on 4th March 2022. Counsel literally adopted the content of the grounds and affidavit in support of the application for revocation of the grant. Reliance was based on a copy of the applicant's ID card bearing the deceased's name and her birth certificate. Counsel submitted that Angeline was recognized by Getrude her grand- mother and Stephen her uncle hence a beneficiary of the estate. Counsel also relied on the chief's introductory letter recognizing Angeline as a beneficiary.
33. On Angeline's failure to testify, counsel contended that her affidavit was sufficient and that the court can strike it out only if the information is not useful or is scandalous. In that regard, reliance was placed in the case of *In the Environment and Land Court No. 623 of 2013 Mary Bakira Ndika v the Salvation Army*

Linda's and Kesia's Submissions

34. The firm of Moka and company Advocates appearing for Linda and Kesia filed their submissions on 4th March 2022 thus submitting that as beneficiaries, they were not consulted before petitioning for the grant. Counsel basically reiterated the content of the affidavit in support of the application for revocation of the grant. That Kesia Njeri who was a girl friend to the deceased just like Agnes should have been included as a beneficiary of the estate of the deceased. It was further submitted that Linda being a daughter to the deceased is entitled to a share of the estate.
35. Counsel contended that failure to secure consent from beneficiaries entitled to a share of the estate is a ground under section 76 of the *law of succession Act* to nullify a grant. To that extent, the court was referred to the case of *Mathbeka & Another vs Mathbeka* (2005) 2KLR455 and *In re Prisca Ong'ayo Nande(deceased)*(2020) e KLR.

Petitioners' submissions

36. The firm of Ameli Inyangu and advocates filed their submissions on 4th March 2022 submitting on four grounds itemised as follows; whether the grant should be revoked; who are the lawful beneficiaries or dependants of the estate under section 29 of the *law of Succession Act*; which assets constitute the estate of the deceased and whether the applicants are entitled to the prayers sought. Counsel submitted that allegations of forged signatures for consent were unfounded as the affected beneficiaries swore affidavits



- confirming that the impugned signatures were indeed theirs hence no forgery nor fraud committed as alleged by the forensic expert(pw3). Counsel urged the court to disregard the document examiner's report on account that where the author of a document confirms that the impugned signature is his, then, the document examiner's report has no room. To buttress that fact, reliance was placed in the case of *Re estate of Gitau Njoroge 'B'*(deceased)(2018) e KLR and *Rose Kaiza versus Angelo Mpanju Kaiza*(2009) e KLR.
37. On the question of concealment of material facts by failing to disclose all beneficiaries and assets comprising the estate, counsel contended that the claim by Getrude chao as a dependant was not founded on any law as she was not being maintained by the deceased immediately prior to his death pursuant to section 29 of the *law of succession Act*. That in the absence of proof of such dependency, Getrude cannot purport to seek revocation of the grant. Counsel contended that a mere relationship to a deceased person does no confer dependency. To that extent, the court was referred to the case of *Sarah Kanini Thigunku vs Elizabeth Njuki Thigunku* (2016) e KLR.
38. Concerning revocation of the grant on account of fraud, counsel contended that the applicants have not discharged their burden of proof by establishing the ingredients under Section 76 of the *Law of succession Act*. The court was referred to the case of *Christopher Ndaru Kagina versus Esther Mbandi Kagina & another* (2016) e KLR to prove the point that he who alleges fraud must prove the same.
39. Regarding Angeline, it was submitted that, Angela refused to come to court to testify so as to prove her case hence no order can issue to revoke the grant on unproven evidence. The court was urged to find that Angeline's affidavit is of little probative value. That even without producing her evidence, counsel contended that the birth certificate produced by Angeline was acquired the year 2015 for a hidden agenda yet the deceased died 2010. In that respect, the court was referred to the case of *Re estate of John Muiruri* (2017) e KLR where the court cast doubt on a birth certificate processed after the death of the deceased. Counsel wondered why Angeline could not produce the death certificate used to acquire a passport which she used to travel to USA. That there was no evidence to prove that the deceased was ever involved in supporting her during his life time.
40. Concerning Linda, counsel asserted that, reliance on a baptismal card allegedly bearing the name of the deceased is not sufficient proof of paternity. To support that position, reliance was placed in the case of *Re estate of ENN (Deceased)* (2019) e KLR where the court held that a baptismal card is not an official record to determine the identity of a person. That both Kesia and her daughter Linda did not prove that the deceased used to support them during his life time. Regarding Linda' name, counsel contended that there was no proof that the deceased was involved.
41. On the question of delay in filing the revocation application, counsel submitted that equity aids the vigilant. He urged the court to find that the delay in the applicants lodging the application is questionable yet they were aware of their rights as children to the deceased. The court was referred to the case of ENN (deceased) (*supra*) where the court questioned the delay of 11years since confirmation of the grant.
42. Touching on plot 4A Sagana, it was submitted that the same can only be recall and the title cancelled under Succession Case No. 92 of 1997 through which file ownership was acquired. That the transfer of the subject plot to the petitioners was done after a family meeting. Touching on plot number 627, it was submitted that it belonged to the deceased and anybody claiming ownership should go to ELC. That in any event, an ELC case no 84 of 2013 filed by Getrude and Stephen seeking ownership of the said property was dismissed by the court.
43. Regarding the marriage of Agnes to the deceased, counsel referred the court to an affidavit which the deceased swore that he had married her. That she was with the deceased until he died in her hands.



That together they got three children whom the entire family recognizes. As to defective proceedings, it was asserted that every procedure was followed.

Determination.

44. I have considered the four applications for revocation of the grant herein, respective responses, testimonies by the parties and rival submissions by counsel. Issues that emerge for determination are;
- a. Whether the applicants have met the threshold for revocation of the grant herein
 - b. Who are the beneficiaries/ dependants of the estate
 - c. Which properties constitute the estate
 - d. Which reliefs can the court issue
45. The crux of the revocation application herein is that; the petitioners petitioned for a grant of representation without involving or seeking consent of all beneficiaries entitled to a share of the estate; failure to disclose the names of all beneficiaries hence concealment of all relevant material facts from the court; submitting false consent signatures hence obtaining the grant through fraud and; failure to disclose all assets for distribution.
46. The law governing revocation of a grant is clearly set out under Section 76 of the *Law of Succession Act* which 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 has ordered or allowed; 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”.



47. It is incumbent upon the applicant seeking the court to exercise its discretion in his or her favour to prove the ingredients set out under Section 76 aforesaid. In the case of *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR while dealing with the issue of revocation, the court had this to say;
- “In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 OF 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated;
- “[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.”
48. It is trite that obtaining a grant through fraudulent means is not only illegal and irregular but also a criminal offence proof of which would give rise to revocation of a grant. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court held that a grant can be revoked on account of giving false information.
49. Courts have also time and again emphasized on the importance of disclosure of all material facts when applying for a grant. In the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR the court had to revoke a grant due to exclusion of two beneficiaries from the list of beneficiaries. Similarly, the court in the case of *Re Estate of Moses Kimotho (Deceased)* [2009] eKLR laid emphasis on the importance of disclosure of all material facts when applying for a grant.
50. Indeed, under Rule 26(1) of the *probate and administration rules*, all beneficiaries entitled to or who have an interest or right to an estate ought to be notified of the intended petition so as to give their consent or renounce their interest. This position was succinctly elucidated in the case of *In re Estate of Festo Lugadiru Abukira (Deceased)* [2019] eKLR where the court expressed itself on the need for a petitioner to notify all persons with equal rights who have not petitioned to signify the same by either renunciation of their right to administration or by signing consent forms 38 or 39 depending on whether the deceased died testate or intestate.
51. Having set the legal foundation upon which a grant of representation can be revoked, I would like to address the specific concerns raised by the applicants. According to the petitioners, the deceased was survived by two widows (Edith and Agnes the petitioners herein) and their children namely; Kevin, Allan and Maureen for the 1st house and Lilian, Brian, and Evans for the second house. However, the applicants/objectors argued that Kesia was the 4th widow and therefore a beneficiary with her daughter Linda. Equally, Angeline claiming to be a daughter to Mariam (deceased) also said to have been the 3rd widow to the deceased claimed beneficial interest. Lastly, Getrude Chao the mother to the deceased claimed a share on account of dependency.
52. In view of this varied claims, this court would have to do individual assessment as who amongst all claimants is indeed a beneficiary of the estate. To start with, parties are in agreement that Edith as the first wife (1st petitioner) is a beneficiary. Equally, there is no dispute that the six children listed in the petition were children to the deceased hence beneficiaries. These are Kevin, Allan, Mauren, Lilian, Brian and Evans.
53. Was Getrude chao a beneficiary hence entitled to a share of the estate? In her revocation application, Getrude referred to the petitioners as wives to the deceased. Going by her pronouncement, then, one



would conclude that the deceased died a polygamous man to which Section 40 of the [law of succession Act](#) would apply with the estate being shared amongst the children and the surviving spouse/s as additional unit/s. Even if the court found that the deceased died leaving one spouse with children, Section 35 of the [law of succession Act](#) would apply with children sharing the estate equally and the spouse taking personal effects and holding a life interest.

54. Getrude is seeking to be recognized as a dependant under section 29 of the [law of succession Act](#) which defines a dependant as;
- a. Wife, or wives, or former wives, and the children of the deceased whether or not maintained by the deceased immediately or prior to his death;
 - b. Such of the deceased's parents, step parents, grandparents, grandchildren, step grandchildren, children who the deceased had taken into his family as his own, brothers and sisters, and half brothers and half-sisters, as were being maintained by the deceased immediately prior to his death and Where the deceased was, her husband if he was being maintained by her immediately prior to the date of her death.
55. From the above provision, a parent is not an automatic dependant but one who must prove that he or she was being maintained by the deceased immediately prior to his death. See [In re estate of the late Annelies Anna Graff](#) (2019) e KLR where the court stated that;
- “Section 29 (a) creates a special category of dependants who are dependants due to their relationship to the deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death”
56. In the case of [Sarah Kanini Thigunku vs Elizabeth Njuki Thigunku](#) (*supra*), the court held that for one to claim dependency, he or she must prove to what extent he or she was dependent upon the deceased and that mere relationship does not confer automatic dependency. Equally, in the case of [In Re the Estate of Joshua Orwa Ojodehb-\(deceased\)](#) (2014) e KLR the court had this to say;
- “Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child...”
57. In this case, Getrude has not established dependency on the deceased who had retired by the time he died. In any event, Getrude having inherited her late husband's estate in Succession case number 92 of 1997 is not a person of straw. In a nut shell, Getrude' claim and that of Stephen Mbaki a brother to the deceased are founded on quick sand hence disallowed. To that extent, they were not entitled to be consulted nor were they under Section 66 of the [law of succession Act](#) entitled to take out a grant of representation while the spouse/s is or are there with their children who rank higher in priority.
58. Regarding Kesia, she claimed that she cohabited with the deceased from 1991 up to the year 2000 when they parted. That out of their relationship a child known as Linda was born. She did not claim any specific form of marriage. In fact, in her submissions at paragraph 3, she admitted that she was a girlfriend to the deceased. On that admission alone, a girlfriend has no right to be consulted nor her consent sought hence her application has no basis to warrant revocation of the grant.



59. Concerning whether Agnes was a wife to the deceased, she stated that; when she met the deceased, he did not have a wife and that the deceased did not disclose that he had divorced Edith a fact she came to know later when the deceased took Edith's children to her to look after them. She produced an affidavit of marriage between her and the deceased and her medical cover from her employer reflecting the deceased as her husband hence paid all medical bills as her husband. Indeed, they sired three children who are all grown-ups.
60. The obituary and death announcement recognized her and Edith as the deceased's wives. She also produced family meeting minutes attended by the local chief where her and Edith were recognized as wives to the deceased. Besides, in the revocation application of Getrude, she referred to Edith and Agnes as wives to the deceased. From this conduct and presentation before right thinking men and women in society, the deceased and Agnes behaved as husband and wife hence a presumption of marriage would properly be inferred; See *Hortensiah Wanjiku Yawe v The Public Trustee* Court of Appeal Civil Appeal 13 of 1976 Nairobi where the court stated that long cohabitation as husband and wife gives rise to a presumption of marriage to a person asserting it.
61. For purposes of succession under section 3(5) of the *law of succession Act*, Agnes was a wife hence entitled to a share as a beneficiary. For Avoidance of doubt, Section 3(5) provides as follows;
- “Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for purposes of this Act, and in particular section 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”
62. In line with the above cited case law and provisions of the law, Agnes was for all purposes and intents a wife to the deceased who stood by his bed side until he died and buried him.
63. Concerning Linda Wanjiku Muthandi a daughter to Kesia, she claimed to be a daughter to the deceased. This allegation was supported by Getrude Chao who referred to her as a grand-daughter and Stephen an uncle. There is no doubt that Linda's mother was never married to the deceased. Kesia said that while cohabiting with the deceased, they were blessed with Linda as their daughter. However, Linda has no birth certificate indicating the deceased as a father. Her name reflects one Muthandi who was described as a maternal uncle. If indeed Linda who left for USA the year 2006 while the deceased was a live was a daughter, what stopped her from using her father's name to process travel documents.
64. Besides, in the deceased's obituary and death announcement, Linda did not appear as a daughter to the deceased. Further, in a family meeting held before the area chief, Linda was not recognized as a child to the deceased. On the other hand, when Getrude filed her revocation application on 22nd September 2014, she did not mention Linda as one of the beneficiaries. For her to claim later that Linda was her grand-daughter is questionable. There was no evidence tendered to show that the deceased ever interacted with or supported one Linda. Photographs attached showing Linda with Stephen Mbaki is not sufficient proof of Linda's paternity.
65. On the aspect of Linda producing an alleged baptismal card issued in the year 1998, the same cannot be taken to be an official record to confirm paternity. This is just but a church document bearing no signature for the deceased. Anybody can quote to a church minister a name of any person as a father to the child being dedicated. See NN (deceased) (*supra*) where the court stated evidence of a baptismal card is merely persuasive but cannot conclusively determine the identity of a person leave alone paternity of an individual.



66. It is absurd to generate beneficiaries at the eleventh hour for the sole purpose of inheriting the property of a deceased person whom those claiming his wealth now never wanted to associate with. How come since 2014 when Getrude filed her revocation application, the other alleged beneficiaries did not find it fit to challenge the same. Linda's application is an afterthought generated by Getrude and Stephen to access the estate through the back door. To that extent and in the absence of any DNA test, it is my finding that there is no sufficient proof that Linda was a child to the deceased hence not entitled to a share and nor notification of these succession proceedings.
67. Regarding Angeline, she is said to have been born by Mariam a friend to the deceased. She relied on an id card and a birth certificate bearing the name Waita referring to the deceased. Further reliance was placed on the introductory letter from the chief dated 27th January 2021 stating that the said Angeline was a daughter to the deceased and also Getrude's confirmation that she was a grand- daughter and also Stephen confirming that she was a niece. It is curious to note that Kabinga chief was made to issue a second letter including Angeline yet the original letter given to the petitioners earlier on did not have the same name. What happened?
68. To start with, the birth certificate of Angeline was issued on 21st December 2015 yet the deceased died on 4th February 2010. Obviously, the deceased could not have given consent as he was not alive. One would wonder why Angeline did not produce even a birth notification which would have revealed who the father was. The timing in obtaining the birth certificate is questionable. If Angeline obtained her id card on 22nd October 2010, about 8 months after the alleged father died, why didn't she produce the birth certificate she used to process the ID card. Having been born in 1991, she was due for an id by 1989. What a coincidence that both the death certificate and ID card were processed after the deceased had died. The timing is questionable and in my view calculated at gaining a share of the deceased's estate.
69. The claim by Getrude that Angeline is her Grandchild is also questionable. How come that she did not mention in her application for revocation in 2014 that Angeline was a beneficiary? How come Angeline could not join Getrude in 2014 yet waited up 2021. Further, in the obituary and death announcement of the deceased Angeline was not mentioned as a child to the deceased. There was no evidence from an independent person to confirm that the deceased was Angeline's father. Getrude and Stephen are interested persons in the estate hence likely to give a biased stand.
70. During the family meeting held on 12th February 2012 under the chairmanship of their local Ass-chief (annexture AWW-5 in support of Agnes' affidavit of 29th April 2021) the family recognized Edith and Agnes as wives to the deceased hence entitled to the deceased's estate together with their children. In that meeting Getrude and Stephen did not mention Angeline nor Linda as children to the deceased.
71. Unfortunately, Angeline did not testify to produce the documents relied on as evidence. When the content of an affidavit is in question, its probative value and weight is attached to the deponent appearing for cross examination. Mere filing of an affidavit is not sufficient. That is why the court directed for *viva-voce* evidence instead of affidavit evidence.
72. In her submission, Angeline's counsel relied on the case of [Alphonse Munene Mutinda vs Ethics and Ant-corruption Commission](#) Civil Appeal No.266 of 2018 where the court allowed admission of a witness statement of a deceased person in evidence. The scenario here is different and can be distinguished as the maker of the affidavit and witness statement is a live but refused to testify even virtually from wherever situated. For that reason, her evidence is not substantiated hence not reliable as its of little probative value when comparing its weight against the petitioners' evidence. By refusing to testify, several questions were left hanging and the only inescapable inference is that her averments



- were not true. For those reasons, there is no evidence enough to find that Angeline was a child to the deceased hence not entitled to the share of the estate and therefore did not deserve consultation nor was her consent necessary.
73. Having found the correct beneficiaries, the only persons entitled to take out a grant of letters of administration were Edith and Agnes hence beneficiaries with their respective children listed in their petition for a grant. Did they obtain the grant without the consent of their children? Did they forge their children's signatures or consents? Agnes said their children signed their respective consent while in America yet they appear to have signed the same before an advocate in Kisumu. Obviously there is a disagreement hence some degree of dishonesty.
74. Pw3 a forensic examiner Mr. Kenga examined signatures contained in the id cards of those children and compared them with their purported signatures in form 38 and found them to be at variance hence concluded that they were forged. Agnes attached declarations from those children confirming that they indeed signed the consent. It would appear like people whose signatures are said to have been forged are not complaining but instead claiming those signatures to be theirs. It is trite that forensic examination is not conclusive and where the person whose signature is said to have been forged is claiming to be the author, the court cannot force him or her to admit liability on forgery of the same. See *Rose Kaiza versus Angelo Mpanju Kaiza (supra)*
75. The only wrong I can find is the attestation aspect of those signatures in Kisumu while the deponents were in America. Although an irregularity, it is not on its own capable of revoking a grant whose execution is almost at its final stage and not challenged by those entitled to the estate. Regarding the failure by Edith in participating in these proceedings, Agnes has been appearing with her authority. In any event, even if Edith chose to keep off, the co-petitioner was entitled to proceed with the proceedings. Since Edith has not complained being an adult of sound mind, nobody should purport to complain on her behalf. In that regard, I do not see a serious defect capable of revoking the grant.
76. Touching on Agnes's failure to sign the consent form on the mode of distribution, she is the applicant hence that omission is not prejudicial and therefore not a serious defect as alleged. Having arrived at the above conclusion and those entitled in priority under section 66 of the law of Succession having petitioned for a grant, the same is deemed to have been properly issued to them(petitioners).
77. The next question is on the non-disclosure of some assets. To answer this, the petitioners shall be at liberty to apply for inclusion after seeking amendment and or review of the confirmed grant.
78. As concerns inclusion and distribution of plot No, 4A Sagana, parties are in agreement that it was given to the deceased during the distribution of his father's estate in Succession cause No, 92 of 1997. The said property has since changed ownership to the petitioners. However, the grant in succ.no 92 of 1997 has been revoked with no orders yet made on the status of the properties already distributed under Section 83 of the *law of succession Act*. In my view, this property's distribution can only be reversed under file number 92 of 1997. In the circumstances, I will not make orders reversing its distribution in this file for now.
79. As concerns plot number 627, the same was litigated in the ELC case number 84 of 2013 and the suit dismissed. The property is registered in the deceased's name. The applicants claimed that it was registered in the deceased's name in trust for their benefit. This is a probate court and not an ELC court to arbitrate over land ownership dispute based on trust. For those reasons, I do not wish to arrogate myself such powers. This court simply has no jurisdiction to determine a dispute on land ownership on account of trust. Since the property is registered in the deceased's name and the ELC court has dismissed the claim, I will not interfere with the distribution of that property.



80. Regarding plots number 2393 and 2519 where Steven alleged to have been operating a club, the same are in the deceased's name. The applicants have not shown any beneficial interest in terms of ownership. If they had any proprietary interest, they should have directed their concerns or claim to the ELC. In the circumstances, I have no reason to interfere with the mode of distribution in place
81. Having held as above, I am inclined to find that the four applications herein seeking revocation of the grant have no merit hence dismissed with no order as to costs. Consequently, any injunctive orders in place restraining further distribution of the estate are hereby lifted.

Dated signed and delivered virtually this 17th day of November 2022

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J.N. ONYIEGO

JUDGE

