**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 273 OF 2014**

**IN THE MATTER OF THE ESTATE OF TOM MAISIBA (DECEASED)**

**JUDGMENT**

1. The deceased herein, Tom Maisiba, died on 25th June 2013. According to the Assistant Chief of Laiser Hill Sub-Location, the heirs to his estate were his widow, Jane Nyambura Ngunjiri, and children: John Ngunjiri, Annbritta Mogoi Maisiba, Bethsheba Wangare Maisiba and Jeremiah Gisoni Maisiba.

2. Representation to his intestate estate was sought by Jane Nyambura Ngunjiri and Jeremiah Gisoni Maisiba, in their capacities as widow and son, respectively, in a petition that was filed herein on 9th April 2014. From the file of papers before me, the petition was not accompanied by an affidavit, and so I am not able to tell who were listed as the survivors of the deceased, nor the assets that he died possessed of. Letters of administration intestate were made to the petitioners on 26th September 2014, and a grant was duly issued, dated 2nd October 2014. I shall hereafter refer to them collectively as the administrators, but to Jane Nyambura Ngunjiri as administratrix and to Jeremiah Gisoni Maisiba as administrator. The said grant was confirmed on 28th March 2017, on an application dated 5th June 2015. The estate was distributed jointly between Jane Nyambura Ngunjiri, John Ngunjiri, Annbritta Mogoi Maisiba, Bethsheba Wangare Maisiba and Jeremiah Gisoni Maisiba. A certificate of confirmation in those terms was dully issued, dated 21st November 2017.

3. John Ngunjiri, hereafter referred to as the applicant, filed an application on 18th July 2017, dated 26th June 2019, seeking revocation of the grant made on 26th September 2014, and confirmed on 28th March 2017, on grounds that the said grant had been obtained by means of an untrue allegation of fact essential in point of law to justify the making of the grant; the administrators had failed to diligently administer the estate; it had become useless and inoperative through subsequent circumstances; among others. The applicant seeks that a fresh grant be made after all the assets have been accounted for, and proper accounts filed in court.

4. In the affidavit in support, the applicant alleges that the administrators left out some assets. He identified the ones allegedly left out to include a house that the deceased had bought at Ongata Rongai, gratuity benefits that were shared out amongst all the survivors save for himself and Annbritta Mogoi Maisiba, rental income collected by the administratrix and not accounted for, and rental income collected by a brother of the deceased called Moses Begi from a property at Kitengela was not accounted for.

5. The applicant filed another application on 4th June 2019, dated 4th June 2019, seeking a variety of orders. There is a prayer for accounts of the estate to be rendered by the administrators; the bank manager, Barclays' Bank, to file bank statements on account numbers 070xxxxx, 022xxxxxx, 203xxxxxxx and 861xxxx; an order directed at Kenya Commercial Bank to file bank statements relating to account number 111xxxxxx; an order directed at Kenya Commercial Bank and Barclays Bank authorising them to deposit any moneys in court to effectuate the certificate of confirmation of grant dated 21st November 2017; an order directed at the administrators to surrender title deeds with the relevant land registrars to effectuate joint registration of the immovable assets as per the terms of the certificate of confirmation of grant; a similar order with respect to immovable property with letters of allotment, for surrender of the said letters of allotment to the relevant authorities for effectuation of the confirmation orders; a similar order with respect to logbook of motor vehicle registration number and mark KBP 913R; an order directed at Country Director of the United Nations Environment Programme (UNEP) to file a statement of account relating to the gratuity entitlement of the deceased; and any order that the court shall deem fit for the purpose of effectuating the certificate of confirmation of grant.

6. In the affidavit sworn in support of the application, on 4th June 2019, the applicant avers that he had been forced, by the administrators, out of the property where he was previously residing to another dated by the deceased. He accuses them of mismanaging the estate. He says they collect rent, which they ought to account for. He accuses them of surviving on the rental income collected, to his own exclusion. He cites acrimony between him and the other survivors, which culminated criminal proceedings against the administratrix. He avers that the deceased worked for UNEP, and had accrued gratuity and other benefits, which the administrators were bound to account for. He states that the funds held in the bank accounts ought to be deposited in court to facilitate distribution. He further avers that the administrators ought to file an inventory of the assets and to render accounts of their dealings with the estate prior to the confirmation of the grant. He avers to be shaken by the impasse in the distribution of the estate.

7. The applicant filed another application on 23rd May 2019, which is undated. It is not clear what the application seeks, since it makes no prayers. The grounds on the face of it indicate that the administratrix was mentally unstable and was not taking medication; that the other survivors had forced him out of his residence; the money held in the bank accounts of the estate be deposited in court for distribution purposes; among others. The affidavit sworn in support of the application, on 23rd May 2019, indicates that he had been forced out of the estate and was living in a location that he did not wish to disclose. He accuses the administrators of mismanaging the estate, and of collecting income from it, which they should account for. He further avers that the other survivors of the deceased were catered for out of the estate, to his exclusion. He discloses that there was acrimony between him and the administratrix, culminating in criminal proceedings against her at the Chief magistrate's court and before the office of the area Assistant Chief. He states that the administrators ought to account for the terminal benefits that accrued in favour of the deceased from his employer, the UNEP. He submits that the proceedings in the matter were based on forged documents, most of which were signed in his absence, although he was always available. He complains that there was an impasse in the administration of the estate, and he prays that accounts be rendered by the administrators of their administration of the estate, and an inventory of the assets be filed. He avers that the administratrix, who is also his mother, suffered from a mental condition, and was attending clinics in Nairobi, and he would like the court to authorize him to take charge of the management of her treatment and medication, as he feared that she was heavily dependent on drugs and her condition might have deteriorated. He expresses fear that his siblings were taking advantage of her condition, which was likely to compromise her health further. He accused, the administratrix of assaulting him, and, jointly with the administrator, of causing him to be arrested and detained at the Kakamega Police Station, from where he was released without charge, after being warned to leave Kakamega lest his mother killed him. He asserts that he was the eldest son of the deceased, who had left him with instructions to take care of the family in the event of his decease. He avers that he neglected his businesses in Nairobi, so that he could take care of the deceased during his hospitalization in Nairobi. He complains that the home at Ongata Rongai and at Kisii were not listed in the schedule of assets. He also complains that a car that the deceased had bought from Mr. Aming'a Mang'erere, advocate, had not been listed in the petition. He asserts that the administrators were wasting the estate, and that he wanted to restore order and bring unity and peace, which prevailed during the lifetime of the deceased. He would like the estate managed jointly, hence representation ought to be granted to him.

8. The administrators responded to the revocation application through an affidavit that the administratrix swore on 25th June 2018. She avers that the applicant was not a son of the deceased, and he, therefore, did not have the *locus standi* to bring a revocation application. She avers that after she got married to the deceased, the deceased sent the applicant away, as he was extremely stubborn, truant and incompatible with the other children. She further avers that the property in question was obtained through her sweat, jointly with the deceased, and there was no basis for the applicant to call upon her to account for her own property. On the Ongata Rongai property, she avers that the deceased had no such property, and calls upon the applicant to provide evidence of what he alleges. On the Kitengela property, and the accounts for the rents collected by Moses Begi, she submits that the applicant should follow up with Moses Begi on that issue. She further avers that the applicant was not the administrator of the estate, and he, therefore, had not been given control of any property of the estate. She avers that he had been included in the succession by mistake, and his name ought to be removed as an heir of the estate. She explains that the rents collected from the income generating assets had been applied in payment of the bills of the estate, food and medical care. She states that the applicant had become violent, and had attacked and assaulted her, and expresses surprise that the applicant still, even then, expected her to cook for him and pay his bills. She complains that the applicant was taking advantage of the absence of the deceased to harass her and his siblings, despite not being an heir of the deceased. She avers that the grant ought to be corrected to have the name of the applicant removed as he did not deserve anything from the estate. She avers that the grant ought to be corrected so that all the assets are transmitted to her.

9. The administratrix filed a further affidavit on 4th November 2019, sworn on 22nd October 2019, which was prompted by the filing of the application dated 26th June 2018. She complains that the applicant was tormenting her, by getting the police to charge her in court with all manner of criminal offences. She complains that she had been severally summoned by police detectives over charges trumped up by the applicant, with an intent to gain sympathy and to push the instant case through. She avers that the applicant has embarked on raising complaints against public officers within the police force and the judiciary whenever things do not go his way, all in an effort to circumvent the succession cause.

10. There is also an affidavit filed by the other administrator, Jeremiah Gisoni Maisiba, sworn on 19th February 2020. He has listed the survivors of the deceased to be four individuals, who exclude the applicant. He has also listed the assets that make up the estate. He avers that they had sat in 2014 and agreed on the filing of the instant cause, where he and the administratrix were settled on as the administrators. According to him, they agreed that the property should be devolved upon the surviving widow, the administratrix herein, who would eventually transfer the property to the other survivors. He explains that they were guided through the process at the court registry, by an officer of the court, at a fee. They signed various documents that were required in court, inclusive of the confirmation application, and they attended court for confirmation, where they answered in the affirmative to a query by the court as to whether they were agreed on the mode of distribution proposed. He avers that it was only after the confirmation orders were made, and essentially after the certificate of confirmation of grant was generated, that they realized that the court had ordered for equal distribution of the assets. According to him, equal distribution was not possible since some of the assets were single unit houses. He asserts that the applicant was not a son of the deceased, he never stayed with them, and he was never dependent on the deceased. He avers that he saw him for the first time at the burial of the deceased, which he had attended in the company of a maternal relative. It was that occasion, he avers, that the applicant was introduced to them as their stepbrother, being a son of their mother. The applicant is said to have then left with the maternal relative. At the time of the filing of the succession cause, the administratrix is said to have had requested the three biological children of the deceased to allow her gift the applicant with the property known as Ngong/Ngong/32906, to which request they agreed. They also agreed to include him in the succession proceedings based on that request. He expresses shock that the applicant was then laying claim to the estate as an heir, yet he was not one and he had never been dependent on the deceased. He denies the allegation that the administrators had wasted the estate, explaining that the little money collected from the estate was plied to meet medicals bills and utilities. He avers that it is not possible to share out the estate as per the confirmed grant, and pleads to have the certificate of confirmed grant rectified so as to redistribute the estate so as to allocate the assets to individual beneficiaries. It is proposed that the administratrix should get Kajiado/Kaputiei/19744, motor vehicle registration mark and number KPB 913 and half of the money held in the accounts at Barclays Bank. It is proposed that Jeremiah Gisoni Maisiba should get Kakamega/Jua Kali/46 and Kakamega Residential Plot Number J. it is proposed that Bethsheba Wangare Maisiba should be given Kajiado/Kaputiei/19738, and Annbritta Mogoi Maisiba Kakamega/Amalemba/Block/House 13. It further proposed that the applicant, John Ngunjiri, should get Ngong/Ngong/32906. The three biological children of the deceased, that is to say Bethsheba Wangare Maisiba, Annbritta Mogoi Maisiba and Jeremiah Gisoni Maisiba, are to divide the balance in the bank accounts held by the deceased in the Barclays Bank after the administratrix took her half share. The moneys in the bank account with the Kenya Commercial Bank are proposed to be shared equally between John Ngunjiri, Bethsheba Wangare Maisiba, Annabritta Mogoi Maisiba and Jeremiah Gisoni Maisiba. He avers that

no asset of the deceased had been left out. As for the terminal benefits from UNEP, he avers that the same were distributed by the employer as directed by the deceased himself, and that applicant was not one of the persons that the deceased had listed as beneficiaries.

11. Bethsheba Wangare Maisiba filed an affidavit on 19th February 2020, sworn on 12th February 2020, which is a replica, to that sworn by the administrator on 19th February 2020. I need not recite its contents, save for the information that the administratrix had informed them, meaning the biological children of the deceased, that she had a son whom she bore when she was still in college, and before she got married.

12. The last affidavit was filed on 10th September 2020, sworn on 8th September 2020, by Edwin Wawire Wafula, advocate. The purpose of the affidavit is to disown a Form 37, which was lodged herein, dated 27th March 2017, purported to have ben attested by him. He avers that the stamp imprints and the signature on the said consent form were not his. He avers further that he did not know the parties in the matter, for he had never met them. He states that as at the date when it is alleged that he attested the signatures in the subject Form 37 he was bedridden.

13. The pending applications were disposed of simultaneously, by way of *viva voce* evidence, following directions that had been given on 7th November 2018. The hearing happened on 6th November 2019. The applicant, John Ngunjiri, was the first to take the stand. He stated that he was relying entirely on his affidavits. During cross-examination, he confirmed that the grant was confirmed in his presence. He stated that on the date for the hearing of the confirmation application, he disagreed with the mode of distribution proposed, and he informed the court accordingly of the same, and an amendment was effected. He said that he was asked what he wanted, and he presented what he wanted. The Form 37 was amended. He asserted that he was a biological child of the deceased because the deceased had educated him. He said that he was involved in the process of obtaining letters from the Chief, but all the documents were signed in his absence. He made a report of the same with the Directorate of Criminal Investigations (DCI), and the matter was ongoing. He stated that the administratrix had left out some of the assets, but he conceded that he had not attached documents relating to the same, since the documents were with the administrators. He said the criminal investigations under the DCI arose after he came home after being chased away from Ongata Rongai. The administratrix had been charged with threats to kill, but had been acquitted. He stated that there was another criminal case which was still pending. He complained that the administrators had completely failed to implement the grant. He stated that he was not comfortable with the way the estate was distributed, saying that it was impossible to implement the grant as confirmed, and that was why he had sought revocation of the grant. He stated that the grant needed to be amended, as he had not been fully involved as the eldest son in the family and as a close friend of the deceased. He stated that although he was present at confirmation of the grant, he was not fully clear on the purposes of the application. He stated that the administratrix was medically unstable, and was under constant treatment. He said that he did not know whether she had been attending the clinics, as he had stopped escorting her to her appointments. He said that the name of the deceased was not reflected in his national identity card. He said that it was the deceased who was paying his school fees when he was undergoing vocational training on Mfangano Island, but he was staying with a maternal uncle who was working there. He stated that he had left secondary school at Form 2, went for the vocational training, and then went back to college. He thereafter went to university for a diploma. He asserted that it was the deceased who was paying for his education all through. He said that he stayed with the deceased in Nairobi.

14. The administratrix took to the witness stand next. She was the widow of the deceased and the mother of the applicant. She stated that the deceased was not the father of the applicant. She explained that she gave birth to the applicant before she married the deceased. She stated that the applicant was involved in the succession cause, and attended court at the confirmation of the grant, where he did not raise any objections. She stated that the confirmation orders could not be executed, since the property could not be distributed equally since it comprised of houses. She had desired that each of the beneficiaries get a house each. She would have wanted to move the court for review, but then the applicant filed his application for revocation of grant before she could lodge her application. She stated that she was assisted by a court official at the registry to do the application for confirmation of grant, and he did not draft the application in the terms that she wanted. She stated that the applicant never lived with the deceased, and the deceased had never treated him as his son, and that it was her who paid his school fees. She stated that the applicant and the deceased did not get on well, and that they never stayed in the same house at either Kitengela or Nairobi. She said that she paid his school fees up to Jomo Kenyatta University, but the applicant abandoned the studies. She described the applicant as troublesome. She stated that she was the one who had included him in the succession proceedings as he was her son. She denied that she had left out some assets. She then detailed how she proposed to have the property distributed. Annbritta Mogoi lived at Amalemba property, and she should get the house; the two assets at Kajiado, Kaputiei to herself and Bethsheba Wangari Maisiba; Ngong/Ngong/32906 to the applicant; Plot J Kakamega and Plot 46 Jua Kali to the administrator; KBP 913R to all the survivors; the money at Kenya Commercial Bank to all the four children; and the money at Barclays Bank half to herself and the other half to the three biological children. She stated that there was some money from UNEP, which was shared out between herself, the other administrators, and Bethsheba Wangari; in accordance with the nomination by the deceased. She said that she could not explain why the applicant and Annbritta Mogoi were left out of that sharing by the deceased. She stated that she did not collect much money as rent, saying that only the Otiende house had a tenant, who was paying Kshs. 19, 000.00 per month, which she used to settle her medical bills. She stated that she lived with the applicant up to when he reached Form 2 before he left, and since then he never lived with her.

15. During cross-examination, she stated that after she had him, while she was still in college, she took him to his maternal grandmother, so that she could care for him, to enable her finish college. She stated that his personal documents did not bear the name of the deceased, and denied that she had disagreed with the deceased over the use of his name. She said that she was the one who settled his fees for high school and university studies. She said that while he was in Nairobi, the applicant lived in a rented house. She asserted that she had involved the applicant in the process of obtaining representation to the estate. She stated that they were assisted at the initial stages by a court clerk, and the applicant's name had been included in the papers. She said that they had met as a family and had agreed on everything. She explained that when the deceased returned to Kenya while ill, she advised him to go to Nairobi Hospital for treatment, and while being treated, he used to reside at the Ngong property. She denied that he stayed there with the applicant, adding that the applicant only used to visit. .

16. The other administrator testified next. He stated that the applicant was not his brother, and that it was the administratrix who had requested them to include him in the papers as he was her son. He said that they did not know him until the time of the burial of the deceased. He attended the funeral, but did not stand with the members of the family. He stated that the administratrix had informed them that she had had a son before she married the deceased, and that the son lived with a maternal uncle. She had requested that he be given the Ngong property and they were agreeable, as that was where he was staying. He moved into the house after the deceased died, and upon the direction of the administratrix. He averred that a clerk at the court registry assisted them with the paperwork, but the confirmation application did not exactly reflect their wishes, that the estate devolve initially to the administrators, and thereafter to the children. He stated that it was not

possible to share out the property equally, as the assets were immovable. He said that one of the houses attracted rent, which was utilized to settle the administratrix's medical bills. During cross-examination, he denied schooling with the applicant, and denied growing up together with him. He denied ever living together with him at Milimani, Kakamega. He said that it was in 2007/2008 when the administratrix mentioned to them about the applicant, but before then he did not know about him. He stated that the applicant was not at the family meeting where it was agreed that he and the administratrix petition for representation. On Form 37, he conceded that the matter was before Njagi J, and they agreed on an amendment of some item on it.

17. The last witness, was Bethsheba Wangare Maisiba. She asserted that the applicant was not her brother. She said that the administrator had informed them that she had had another son before she married the deceased, but he never lived with them, and she met him for the first time at the funeral of the deceased. She explained that it was the administratrix who had requested them to include him in the succession proceedings, having allowed him to reside in one of the houses of the estate. She conceded that the applicant was her stepbrother, although he was not a son of the deceased. She said that she was not opposed to him getting the Ngong property. She said that the assets were immovable, and could not be split physically. She stated that the distribution came out different from what they had suggested. At cross-examination, she stated that she had met the applicant only four times. The first was at the burial of the deceased, and thereafter in court when the instant matter came up. She stated that the applicant never stayed with them. She said she had no memory of any Christmas ceremony at Kitengela. She said that the Kisii property was not listed in the petition, and she could not tell why. She said that the deceased had a house at Kisii, standing on property belonging to his father. She said that she was not aware of any Umoja property. She also said that she was only aware of the car listed in the papers. .

18. At the close of the oral hearing, the parties agreed to file and exchange written submissions. There has been compliance. Both sides did file detailed written submissions, supported by case law.

19. In his written submissions, the applicant raised the matters that he was a dependant of the deceased, was entitled to a share in the estate even though he was illegitimate, he was entitled to seek intervention of the court to ensure proper administration of the estate, he was entitled to accounts of the administration of the estate, he was also entitled to ask the court to compel the administrators to distribute the estate as per the terms of the certificate of confirmation of grant, and to compel the banks to provide statements of the amounts of money sitting in the accounts held in them by the deceased. He has cited the decisions in *In the Matter of the Estate of Jonathan Mutua Misi (Deceased)* Machakos HCP&A No. 95 of 1995 (Mwera J), *In the Matter of the Estate of David Murage Muchina (Deceased)* Nairobi HCSC No. 2077 of 2002 (Kamau AJ), *In re Estate of Onyango Ogutu alias Benedict Onyango (Deceased)* [2018] eKLR (Musyoka J) and *In re Estate of Edward Abondo Kisero (Deceased)* [2019] eKLR (Odunga J). he also filed copies of decisions in *In re Estate of Onyango Ogutu (Deceased)* [2014] eKLR (Musyoka J), *In re Estate of Onyango Ogutu alias Benedict Onyango (Deceased)* [2018] eKLR (Musyoka J), *In re Estate of David Murage Muchina (Deceased)* [2017) eKLR (Musyoka J), *Nthenya Musembi & another vs. Misi Mutua & another* [2017] eKLR (Nyamweya J), *Jane Sella Wanja Amos vs. Mary Igandu Njagi* [2016] eKLR (Ougo J) and *In re Estate of Edward Abondo Kisero (Deceased)* [2019] eKLR (Odunga J).

20. On their part the administrators submitted on applications for revocation under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya; on the impracticability of the distribution ordered by the court; and on the applicant not being a son of the deceased. They cited decisions in *In re Estate of Serah Wanjiku Njenga (Deceased)* [2017] (Muigai J) and *In re Estate of Samuel Maina Mbora (Deceased)* [2019] eKLR (MT Matheka J), and attached copies of the decisions.

21. What I am called upon to determine is a summons for revocation of grant. Revocation of grant is provided for under section 76 of the Law of Succession Act Cap 160, Laws of Kenya. Under that provision a grant may be revoked on account three general grounds. One, where there were improprieties in the process of obtaining the grant, occasioned by defects in the process or fraud and misrepresentation, or concealment of matter from court. Two, where the grant was obtained properly, but the personal representatives face challenges with administration, either by failing to apply for confirmation of their grant within the given timelines; or failed to proceed diligently with administration, or failed to render accounts as and when required. Three, where circumstances have rendered the grant inoperative or useless, such as where a sole administrator dies, or is adjudged bankrupt, or is incapacitated by mental or physical infirmity.

22. From the pleadings and his oral testimony, the applicant appears to anchor his revocation application on two general grounds. He appears to say that he was not involved in the whole process, leading up to the confirmation of the grant. Secondly, he appears to say that the administrators have failed in administration. He decries the delay in distribution following confirmation of the grant, and the fact that he calls for accounts is also suggestive of that.

23. Let me deal with the first issue, whether the applicant was involved in the process. The provisions of the Law of Succession Act, and the Probate and Administration Rules, apply democratic principles in these processes. They endorse disclosure of everyone with interest in the estate, and the obtaining of their consents. That is what sections 51 and 66 of the Law of Succession Act, and Rules 7, 17 and 26 of the Probate and Administration Rules, are about. It is envisaged by Rules 7(7), 17 and 26 that, where the petitioners did not have prior right or entitlement to administration, they needed to issue citations to the persons with prior right, or obtained the renunciation or waiver of their right to apply, or obtained their consents allowing them to petition. The applicant claims as a son of the deceased. Under section 66, he had an inferior right to administration to that of the administratrix, and, therefore, there was no need for her to issue citations to him, or to obtain his consent or to get him to renounce his right. Under the same provision, he had equal right or entitlement to administration with the administrator. To that extent, citations ought to have issued to him, or his consent or renunciation should have been obtained. This was a mixed application, by a person with prior right and another with equal right. In such a scenario, it would be prudent that the consents of those with equal right be obtained, to cover the petitioner without prior right or entitlement. Those whose consents should have been sought include the two daughters, and the applicant, although his position or status is contested.

24. The file before me is not complete. I say so because upon perusing it I have noted that the petition on record is not supported by an affidavit. I doubt that the petition was lodged in that way. I heard the administrators talk about including the name of the applicant in the petition, and, therefore, I suspect that one was placed on record, but somehow got misplaced. I have not seen a consent in Form 38, but I cannot tell whether or not there was such a consent duly executed by the three, who did not petition for representation. I cannot, therefore, determine whether Rules 7(7) and 26(2) were complied with or not.

25. Be that as it may, a grant was made, and an application for confirmation of grant was mounted. There is an overlap between what is sought in a confirmation application and a revocation application, to the extent that at confirmation, the court has a chance of auditing the process of appointment of the administrators. That is what is envisaged by section 71(2) (a) of the Law of Succession Act. The court has to confirm the administrators, and to facilitate such confirmation, it has to be satisfied that the grant was rightly made. To that extent, section 71(2)(a) must be read together with section 76(a)(b)(c) of the Law of Succession Act, which provide for revocation of grants where the process of obtaining it was defective, or the grant was obtained through fraud or misrepresentation or concealment of matter from court. The court has to be satisfied that the grant was made properly. The court can do so by looking through the file, or the parties, who feel that the process was not proper, could raise it through an affidavit of protest, filed under Rule 40(6).

26. The effect of the above is that where a summons for confirmation of grant is filed, a party, who was minded to file a summons for revocation of grant, need not wait for the confirmation process to be completed, only for him to file his summons for revocation immediately thereafter, for the issues that can be raised under section 76(a) (b) (c), are the same as those envisaged in section 71(2) (a) of the Act. Such a person should take advantage of the confirmation process, and raise those issues through a protest affidavit, saying that the process of the making of the grant was improper for whatever reason. It would be duplicitous for a party who participates in a confirmation application, and does not challenge the process of the making of the grant, to thereafter mount an application for revocation of the grant alleging that the grant was not obtained properly, yet he had opportunity at confirmation to raise those matters. The court ought not to take kindly of such manoeuvres.

27. The applicant in this matter conceded that he was privy to the confirmation process. He said that he attended court, and made representations and the court even attended to them. That was confirmed by the other witnesses. He had an opportunity to file an affidavit of protest, to raise the issue that the administrators herein ought not to be confirmed as such, for they had been appointed through a flawed process. He should not have sat through the confirmation process only to raise the issue after the administrators had been confirmed by the court. He should not be entertained. It leads to a wastage time for everybody. He should not have passed up that opportunity. I shall not allow him to revisit the issue. He squandered his chance.

28. I believe the same should apply to his complaint that the administrators did not administer the estate diligently. He alleges that some assets were left out of the confirmation process. He should have raised those issues at confirmation. He wants the banks to produce statements on the amounts standing in the accounts held by the deceased with them, and for the administrators to render accounts. Rendering of accounts is ideal at confirmation of the grant. Indeed, under section 83(e) of the Law of Succession Act, there is a duty to produce an inventory of the assets and to render an account of dealings with the estate within six months, which coincides with the requirement at section 71(1), that the administrator should apply for confirmation upon expiration of six months. It is expected that an administrator applying for confirmation of grant under section 71(1), complies with section 83(e), by filing the inventory of assets and giving an account of his dealing with the estate, simultaneously with, and within the confirmation application. If the administrators herein had not complied with section 83(e), at the time they sought confirmation, then the applicant ought to have raised issue with that through an affidavit of protest. He is engaging in litigation by half measures, or in reverse, by raising these issues at this stage, when he had a chance to raise them at confirmation.

29. The administrators are expected to complete administration of the estate after confirmation of grant within the timelines given in section 83(g), of six months. The grant was confirmed on 27th March 2017. Six months expired on or about 27th September 2017. The revocation application is dated 26th June 2017. It was mounted three months after the grant was confirmed, and three months before the time for execution of the confirmation orders had expired. It cannot, therefore, be said that the administrators had failed to complete administration for they were still within their timelines. It would appear that it is the applicant who appears to be in a hurry. In any case, as stated above, the issues he raises in the revocation application, are issues he should have raised in the confirmation application. Surely, there must be an end to litigation and administration.

30. An issue was raised as to the status of the applicant to bring the application. He asserts to be a son of the deceased, while the other parties say that he is not. Section 76 envisages that a revocation application can be brought by an interested party. The applicant is one such interested party. He claims to be a son of the deceased, in some colour or shade, and that is enough to constitute him an interested party. Whether he is such a son is a matter that ought to be determined in the matter, otherwise his application cannot be struck out on the basis of lack of standing. He claims to be a child of the deceased, he should be entitled to prove that at the disposal of the application.

31. Is he a child of the deceased? He who alleges must prove. That is trite. Has he proved so? I doubt it. It is not contested that he is not a biological child of the deceased. He is a biological child of the administratrix, but it should be underscored that the mere fact that the administratrix married the deceased did not automatically translate into the applicant becoming a child of the deceased. He has no blood connection with the deceased. He could only became child of the deceased through formal or informal adoption. The applicant did not allege nor prove any formal adoption process, nor produce any adoption orders issued by a court of competent jurisdiction. Informal adoption happens where a child is taken in by the man who marries his mother, is accepted by the man to be his own, and the man takes up permanent responsibility over him. That is what section 3(2) of the Law of Succession Act envisages. The Children Act, No. 8 of 2001 also deals with it. The bottom-line is that the man has to take in the child into his home, accept him as his own and assume permanent parental responsibility over him. For the applicant to qualify to be a child of the deceased, these are the things that he should prove.

32. Did he prove them? I do not think so. He led no evidence that pointed at the deceased taking him in as his child, accepting him as his own, and assuming permanent parental responsibility over him. He stated that he lived with the deceased at some point at Ngong. But the record indicates that the deceased worked outside Kenya, and it would appear that the family was based at Kakamega, where I presume he would retreat to once he was in Kenya. The evidence also points to the deceased occupying the property at Ngong for a brief period when he was unwell. The administratrix, the mother of the applicant, has very strenuously contested that allegation. So, on his part, I would hold, he has not furnished material that would suggest that the deceased ever took him in, accepted him as his own and assumed permanent parental responsibility over him.

33. His mother, the administratrix, took a rather ambivalent position with regard to him, despite her strenuously contestation to his claim that the deceased had accepted the applicant as his child. Whereas she asserts that he was not a biological child of the deceased, and never lived with the deceased, bits of what she says in her affidavit, and in her oral testimony in court, appear to be at variance. In her affidavit of 25th

June 2018, she says, at paragraph 7, that after she married the deceased, the applicant was chased away by the deceased because he, the applicant, was extremely stubborn, truant and incompatible with the other children. When she testified in court, she stated that the applicant and the deceased did not get on well, they could not get along. That suggests that there was some interaction which exposed that inability to get on well. She also said that she had lived with the applicant up to the point when he was in Form 2, when he left, and they never lived together again thereafter. The sum total of this testimony is a pointer that the administratrix did retrieve the applicant from her parents, and lived with him up to the point when he left. It would appear that it was during that period that the applicant interacted with the deceased, and when it was established that they did not get along well, and he was chased away.

34. I, therefore, take with circumspection, or pinch of salt, the story, by the administratrix and the biological children of the deceased, that the applicant never shared a roof with the deceased. It can be read between the lines that the administratrix brought the applicant along with her into her marriage with the deceased, they stayed together for some undisclosed period of time, before the applicant was driven out of the home by the deceased, for the reasons given in paragraph 7 of the affidavit of 25th June 2018. The biological children are, therefore, being economical with the truth, when they say they only got to learn of his existence when they were in high school, and met him for the first time at the burial of their father. They knew him all along, from the mixed narratives of the administratrix, and that would explain why they included him in the Chief's letter, the petition and the confirmation proceedings. Even in these revocation proceedings, they have allocated to him a share in the estate, despite saying that he was not their brother. It would appear that things have turned against the applicant because of his ill-advised tussle with his mother, the administratrix, over something that does not come out clearly from these proceedings. One could conclude that he had been welcomed into the home of the deceased, where he was treated as one of the children of the household, before he was chased away for indiscipline. It would appear that the deceased had assumed parental responsibility before he chased him away. Once parental responsibility is assumed it becomes permanent, one cannot walk away from it. Once a person adopts a child, formally or otherwise, they cannot renounce the adoption, however bad the child turns out to be. All indications point to one thing, that the applicant was a child of the deceased for the purposes of succession.

35. Was he a dependant of the deceased, as he has submitted in his written submissions? The application before me is for revocation of the grant. It is premised on section 76(b) (d) (ii) (e) of the Law of Succession Act. It is not premised on section 26, and it does not seek reasonable provision. Dependency is a concept under Part III of the Law of Succession Act, which provides for dependency for those inadequately provided for. The term "dependant" is defined in section 29, which is also in Part III of the Act. Dependency is of utility only where there is an application under section 26. There is no such application before me, and I, therefore, have no basis or foundation upon which to make a determination as to whether the applicant was a dependant of the deceased or not.

36. Very many issues have come up in the matter, but I shall not address all of them. I shall limit myself to the most pertinent.

37. What has emerged very clearly is that the confirmation orders made on 27th March 2017 are not acceptable to all the parties who filed documents and gave oral testimony in court. The only person who did not testify nor file papers was Annbritta Mogoi Maisiba, but I suppose the rest speak for her.

38. I do not agree with them that the said orders are incapable of implementation. I believe that they are. The immovable assets and the motor vehicle can quite properly be registered in the joint names of all five of them. There is no difficulty with that. The only challenge would be with the money, joint sharing of it would make no sense. Equal distribution can also work, to the extent of the immovable assets and the motor vehicle being registered in the names of all five equally. The money in the bank can also be shared equally. If the co-owners of the property cannot thereafter live together, in terms of not being able to continue co-owning the property, the solution would be to sell the same off, and share the proceeds equally. So, the argument that the said orders cannot be implemented does not hold any water.

39. I would suppose that the parties would be more comfortable if the same was shared out in a manner that would leave each one of the survivors holding on to an asset, instead of sharing the assets in a corporate manner. That is what they have proposed. Three of them appear to agree with that, and the applicant too, but the applicant is not clear on how he would like the actual sharing to happen. It is proposed that he should be given the Ngong property. It would appear that he once occupied the same. The proposal sounds reasonable. I believe that the money should be shared equally amongst all the children, rather than leaving out the applicant in one of the distributions.

40. In the end, I shall dispose of the applications, the subject of this judgment, as follows:

**(a) That the prayer for revocation of the grant made on 26th September 2014, to Jane Nyambura Ngunjiri and Jeremiah Gisoni Maisiba, is hereby disallowed;**

**(b) That I, instead, hereby review the confirmation orders made on 27th March 2017, by setting them aside, and ordering cancellation of the certificate of confirmation of grant, dated 21st November 2017;**

**(c) That the said confirmation orders shall be substituted with a distribution in the terms proposed in paragraph 20 of the affidavit sworn on 19th February 2020, by Jeremiah Gisoni Maisiba, save that the name of the applicant shall be included amongst the children sharing in the proceeds of the bank accounts at Barclays Bank;**

**(d) That a certificate of confirmation of grant shall issue in those terms;**

**(e) That any party, aggrieved by the orders made herein, has leave of twenty-eight (28) days to move the Court of Appeal appropriately, within twenty-eight days; and**

**(f) That each party shall bear their own costs.**

41. It is so ordered.

**DELIVERED, DATED AND SIGNED IN CHAMBERS ELECTRONICALLY AT KAKAMEGA THIS 19TH DAY OF APRIL 2021**

**W MUSYOKA**

**JUDGE**