



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO 314 OF 2006

IN THE MATTER OF THE ESTATE OF DANIEL KIBUKU KAMONYA ALIAS KIFUKU KAMONYE ALIAS DANIEL KIFUKU ALIAS KIFUKU KAMONYE (DECEASED)

TERESIA WANGUI MALUKI.....1ST APPLICANT
MARGARET NJERI KIBUKU.....2ND APPLICANT
SUSAN WANGARI KIBUKU.....3RD APPLICANT
CECILIA WANGECI DANIEL.....4TH APPLICANT
LUCY WANJIRU KIBUKU.....5TH APPLICANT
JECINTAH WAIRIMU KIBUKU.....6TH APPLICANT
ROSE NYAMBURA KIBUKU.....7TH APPLICANT

VERSUS

ESTHER WANJIRU KIBUKU.....1ST ADMINISTRATIX/RESPONDENT
JOSEPH KAMAU KIBUKU.....2ND ADMINISTRATIX/RESPONDENT
GRACE WAMBUI KIBUKU.....3RD ADMINISTRATIX/RESPONDENT

JUDGMENT

1. The application herein is dated 3rd February 2020 and it seeks the following orders;

a. Spent

b. THAT pending hearing and determination of the summons herein, a conservatory order be issued restraining the Respondents from subdividing, partitioning, selling, transferring, charging, pledging or in any other manner disposing of any of the properties forming part of the estate of DANIEL KIBUKU KAMONYE (Deceased) as comprised in the Certificate of Confirmation of a Grant dated 18.1.2010.

c. THAT an order of account be issued directing the respondents to produce to court a full and accurate account of the assets and liabilities of the estate of the deceased and a full and accurate of all dealings therewith from the date of grant of letters of administration to the date of the order.

d. THAT the grant of letters of administration made herein on 7.8.2006 and confirmed on 18.1.2010 jointly to Esther Wanjiru Kibuku, Joseph Kamau Kibuku and Grace Wambui Kibuku be revoked.

e. THAT cost of this Application be borne by the Respondents.

2. The Application is supported by an Affidavit of Jecinta Wairimu Kibuku sworn on 3rd February 2020 and it is premised on the grounds that the Applicants are daughters of Daniel Kibuku Kamonye alias Daniel Kifuku alias Kifuku Kamonye (Deceased) hence beneficiaries of

his estate. That the grant of letters of administration in respect of the estate of the deceased was made to the respondents on 7th August 2006 and confirmed on 18th January 2010 and in obtaining the said Grant of Letters of Administration the respondents made untrue allegations and/or representations of the following facts;

(a) That the 4th and 5th applicants CECILIA WANGECI DANIEL and LUCY WANJIRU KIBUKU were involved in the process leading to grant of letters of administration herein and/or had consented to the making of the said grant to the respondents which was not the case.

(b) That the 4th and 5th respondents were involved in the process leading to confirmation of the grant and consented to confirmation of the grant made to the respondents which was not the case.

(c) That the 4th and 5th respondents had consented to the proposed mode of distribution of the properties forming part of the estate of the deceased, which was not the case.

(d) That the inventory of properties forming part of the estate of the deceased as set out in the summons for confirmation of a grant and accompanying documents was exhaustive and that no property had been left out, which was not the case. The respondents left out the deceased's flourishing sawmill at Maji Mazuri registered and/or known as *Daniel Kifuku Sawmill* and a parcel of land at *Kasarani near Kibo Primary School*.

3. THAT without any justifiable cause, the respondents have failed to proceed diligently with the administration of the estate comprising of the shares comprised in Share Certificate Number 154 Lang'ata Development Company Limited, Share Certificate Number 527 Lang'ata Development Company Limited, Share Certificate Number 463 Lang'ata Development Company Limited and Share Certificate Number 626 Lang'ata Development Company Limited.

4. The respondents have failed or refused to **secure dividends or other benefits** on behalf of estate and or recoup the value equivalent of shares held at Barclays Bank and shares held at Old K.C.C some of which are now listed with the unclaimed financial assets fund.

5. That the respondents have failed, neglected and or refused to get in all property of the deceased for purposes of administration pursuant to **section 83 (b) of the Law of Succession Act Cap 160 Laws of Kenya** and the Certificate of Confirmation of Grant or at all. For instance most of the properties comprising the estate, including NAKURU/MUNICIPALITY BLOCK 2/118 and BAHATI/ENGOSHURA BLOCK 4/2 (MWAKI MUGI) are still registered in the name of the deceased over ten (10) years since the grant made to the respondents was confirmed.

6. THAT it is almost fifteen (15) years since the grant herein was made to the respondents yet they continue to fail or refuse to discharge their mandatory obligation to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all the dealings therewith.

7. That the respondents have neglected, misapplied and or subjected /exposed Plot part of L.R 6746/8 Nyathuna Farm Nakuru, Shares held at Kenya Finance Bank, Motor vehicle registration number KNA 956 Land Cruiser, Motor Vehicle registration number KSC 758 Toyota Pick-up, Motor Vehicle registration number KAA 423W Mitsubishi Lorry, Motor Vehicle registration number KUP 481 lorry, Motor Vehicle registration number KXJ 265 Pick Up, Motor Vehicle registration number KQF 087 Volvo and business known as Le Rhino Hotel situate on Nakuru/Municipality Block 10/29 to loss, damage or danger of complete waste to the detriment of the Applicants, other beneficiaries and the entire estate of the deceased.

8. That as trustees, the respondents have misappropriated and continue to misappropriate the assets of the estate of the deceased and continue to proceed with administration in utter disregard of their fiduciary duty to the Applicants and all beneficiaries in general. The respondents have breached their fiduciary duty in leasing out or otherwise obtaining proceeds from the use of parcel of land known as Dandora Undeveloped Plot L.R. 209/10406 without sharing the proceeds with the applicants and/or beneficiaries equally or at all, charging Nakuru/Municipality Block 2/263 in favour of Family Bank Limited to secure a loan of Kshs. 15,200,000/= without the involvement, approval or knowledge of the applicants and or other beneficiaries and disposing of various properties/assets of the estate of the deceased and applying the proceeds for their sole benefit including investing the same in purchase of other properties to the exclusion of the Applicants.

9. THAT the respondents have generally been negligent of the duties and obligations attendant to their role as administrators of the estate of the deceased as a result of which the entire estate and beneficiaries, including the applicants have suffered loss.

10. That the respondents are in the process of subdividing parcel of land known as Bahati/Engoshura Block 4/2(Mwaki Mugi) for reasons best known to them, which reasons, if their conduct is anything to go by, are likely to include selling and /or otherwise disposing off the resultant subdivisions without necessarily sharing the proceeds with the applicant equally or at all therefore unless restrained by the Honourable Court, yet another asset of the deceased will be disposed of without the approval of the family and will only benefit a handful, if not the respondents alone.

11. That in light of the above, it is in the interest of justice that the application herein be allowed in order to salvage what is left of the estate of the deceased and no prejudice will be occasioned to the respondents should this application be allowed which Application is made in utter good faith and for the benefit of all beneficiaries of the estate of the deceased, including the respondents.

12. The 2nd Respondent Joseph Kamau Kibuku opposed the applicants application vide his Replying Affidavit sworn on 24th July 2020.

13. He deponed that he is the son of the late Daniel Kibuku Kamonye and together with his mother and siblings they moved to court and initiated the succession process.

14. That all family members were informed of this process and any significant developments through regular meetings, letters and telephone calls and in particular the 4th, 5th and 7th: Cecilia Wangeci Daniel, Lucy Wanjiru Kibuku and Rose Nyambura Kibuku Applicants who have for the longest time lived and worked outside the country in America and Europe received regular and comprehensive reports from himself and other siblings residing and working in Kenya.
15. That on 7th August 2006 this Honourable Court issued letters of administrations to the 1st, 2nd and 3rd respondents who are their father's wife, son and daughter respectively. That a Certificate of Confirmation of Grant was issued to the administrators on 18th August 2010 and the 4th and 5th Applicants gave their consent. He annexed a copy of the duly signed consent. That the applicants did not at any stage file any objection and/or affidavit of protest against the proceedings.
16. He deponed further that the respondents had disclosed to this court all the deceased's properties according to the information available to them at the time, and the said saw mill business at Maji Mazuri went under in 1995, the abandoned structures/properties were looted and burned during the 2007/2008 and therefore had ceased to exist.
17. With regard to L.R 6746/8 Nyathuna Farm Nakuru it was realized during the confirmation that it was purchased in conjunction with the deceased's former business partner one *Kanyiri Iregi* who predeceased him, and this property was subject to *Kanyiri Iregi's* succession and the administrators were negotiating an amicable solution. He attached a letter of offer from the family of *Kanyiri*.
18. With regard to the land in Kasarani near Kibo Primary School he deponed that it was a resultant of Share Certificate Numbers 154, 527, 463, and 626 at Lang'ata Development Company Limited and the land was un-demarcated, unknown and unregistered since Lang'ata Development Company was yet to subdivide the property to shareholders. That these shares were also purchased in partnership with *Kanyiri Iregi* and were subject of negotiations between the two families.
19. That Kenya Finance Bank went under liquidation and the matter was pending in various courts at the Central Bank, the office of the official receiver, and the Kenya Deposit Insurance Corporation.
20. That all Motor Vehicles could be accounted for and Registration Numbers KNA 956 Land Cruiser, KSC 758 Toyota pick-up, KAA 423 W Mitsubishi, KUP 481 Lorry, KXJ 265 Pick-up and KQF 087 Volvo were grounded and deemed to be economically unfeasible to repair or operationalize them.
21. That all proceeds from Le-Rhino Hotel situate on Nakuru/Municipality Block 10/29 were being directed to Family Bank A/C [xxxxxxx] and the applicants were well aware of the income generated from this business received equitable shares of these proceeds as per family agreements.
22. That the decision to charge Nakuru/Municipality Block/2/263 in favour of Family Bank Limited to secure a loan of Kshs. 15,200,000/- was taken with the involvement, approval, and or knowledge of the applicants. This loan facility, which was for a period of sixty (60) months, was fully repaid in 2015, and the applicants approved a further loan facility with the same financial institution. He deponed that the 1st and 2nd Applicants were benefitting from the developments from that loan without accounting to the administrators.
23. He denied that that respondents had disposed of any properties/assets of the estate and/or applied such proceeds to their sole benefit to the exclusion of the Applicants, that to the contrary it was the Applicants who were collecting rent running into hundreds of thousands shillings from different rental houses belonging to the estate and applying the said proceeds for their sole benefit.
24. THAT the respondents were following up with the concerned share registry and the unclaimed financial assets to recoup shares held by Barclays Bank and Old K.C.C
25. That they were in the process of transferring land parcels known as Nakuru/Municipality Block 2/118 and Bahati/Engoshura Block 4/2 (Mwaki Mugi) to their names and they had no intention and or desire to sell and/or otherwise dispose the land parcel known as Bahati/Engoshura Block 4/2 (Mwaki Mugi).
26. That it was family members who on 5th August 2018, agreed to survey the land parcel known as Bahati /Engoshura Block 4/2/ (Mwaki Mugi) for purposes of demarcating and ascertaining the boundaries of the forty one (41) acre property.
27. That they have always shared the proceeds from the estate equitably among all family members in an open and inclusive manner, and upon their various requests. He annexed documentary evidence to support this position. It was his position that more than ten (10) years since the Certificate of Confirmation of Grant the respondents had managed the estate well as evidenced by the fact that the values and monthly income had more than tripled under their watch.
28. That they opposed the Summons for Revocation of Grant dated 3rd February 2020 for being defective, inaccurate, incompetent, and afterthought material, lacking merit in law, and otherwise an abuse of the court process, and therefore sought that it should be struck out /dismissed with costs against the applicants.
29. In a rejoinder the applicants filed a Supplementary Affidavit sworn by the 6th Applicant Jecinta Wairimu Kibuku on 23rd September 2020; that the 4th applicant was never consulted by the respondents in the process of petitioning and applying for the confirmation of the Grant of Letters of Administration; that the 4th and 5th Applicants names were not included in the Consent Form, for Confirmation of Grant contrary to the provisions of **Rule 26 of the Probate and Administration Rules**; that contrary to the allegation of the respondents, the 4th and 5th applicant did not consent in any way to the issuance of the grant to the respondents and the 4th applicant's proposal that a limited liability company be registered with all beneficiaries as shareholders was never considered.

30. That the administrators had denied the 7th applicant who resides in the United States of America (USA) and the 4th applicant who was studying in the United Kingdom (UK) financial assistance when they needed it.
31. That efforts of the 4th Applicant to get the family to meet to discuss concerns herein have always been ignored by the respondents who had given conflicting evidence of family meetings as the minutes presented did not add up. That the respondents ought to have produced the documents and alleged comprehensive reports of the estate they claimed to have furnished the 4th, 5th and the 7th applicants with.
32. That it was not true that sawmill business in Maji Mazuri had collapsed. It was still running and managed by the 2nd respondent. Neither was it true that the applicants were collecting rent from the various rental houses belonging to the estate. That such allegations were evidence of the respondents' incompetence and incapacity to properly administer the estate.
33. That the respondents' admission that motor vehicles they received in good condition were now grounded was evidence that they could not be trusted with the affairs of the estate. In any event those allegations could not be true as the motor vehicles held current insurance covers, and one of the motor vehicles registration number KQF 087 Volvo had been sold to one Darius Thadeus Taruru who was registered as the new owner
34. That the respondents had failed to reclaim the estate's unclaimed shares held at Barclays bank and Old K.C.C.
35. That it was true some applicants were signatories to the Le Rhino Hotel Family Bank Account together with the 2nd and the 3rd respondents but the account was dormant and they were not aware where the hotels proceeds were going.
36. With regard to claims that some of the estate was jointly owned with the late Kanyiri Iregi, she relied on section 91 of the Land Registration Act which recognizes joint tenancies and tenancy in common as forms of co-ownership of land and deponed that the late Kanyiri Iregi predeceased their father and based on the concept of survivorship the property automatically passed to their father, and was in the list of their father's assets during the Confirmation of Grant which could only mean it solely belonged to their late father and there is no way the family of the late Kanyiri Iregi would include the property as part of his estate.
37. That the administrators had allowed one of their siblings Stephen Karanja to take over the role of rent collections and was operating some of the estates bank accounts without the consent of the other beneficiaries, an act of intermeddling, and would only give financial assistance to the other beneficiaries only at demand and at his whim.
38. That since taking over the administration of the estate, the respondents had failed to furnish both the court and the applicants with a full and accurate account of all their dealings with the assets and liabilities contrary to the provisions of **Section 83 of the Law of Succession Act**.
39. That the respondents were happy with status quo having obtained of letters of administration which had granted them indefinite trusteeship under which they would never have to account, apart from giving beneficiaries small handouts.
40. That the estate of the deceased should be administered and distributed so as to bring these proceedings to a close by revoking the grant to the respondents and issuing fresh grant with clear mandates of administration.
41. In addition the 1st respondent Esther Wanjiru Kibuku swore an affidavit on 16th November 2020. She deponed that she is the widow of the deceased and the biological mother of all the Applicants, beneficiaries and the other administrators of the estate.
42. That she had decided to swear this affidavit after consultation with all the beneficiaries dealing with the affairs of the estate of her late husband which she had all along believed was being managed prudently by the more energetic and knowledgeable 2nd respondent who is her eldest son.
43. She deponed that until the applicants approached and complained to her about the manner in which the estate was being managed by the 2nd respondent she was unaware that there were still active proceedings relating to the estate.
44. She stated that indeed it was not even brought to her attention that there was an application against the administrators. That the 2nd respondent took it upon himself to file a response without consulting and disclosing to her the nature of the application and complaints by her daughters.
45. That their appointment as the administrators was done without controversy and upon consultation and consensus among her children and she understood her mandate was to manage the distribution of the estate to all the beneficiaries fairly and expeditiously.
46. That after the initial grant was made, the 2nd administrator however soon took over the running of the estate and had been managing everything; that she thought and believed that the process would lead to the eventual sharing out of the estate to all the beneficiaries and because of her advanced age, she expected all her husband's affairs and hers to be managed fast and fairly while she was still energetic and able to provide guidance.
47. She deponed that she was later informed the grant was confirmed and that as one of the administrators she was supposed to manage the estate for the benefit and in trust of all the beneficiaries.
48. She deponed that she did not remember how the process of confirmation was done and now understood that the applicants were

complaining that they were not consulted and were absent when the confirmation was made. That she could not remember whether they were present in court.

49. She deponed that she had been informed by the applicants that their main grievance was that they did not approve or consent to the proposition to have the administrators appointed to manage the estate in perpetuity in trust for all the beneficiaries without distribution in the manner in which it was being done; that it was now evident that the 2nd and 3rd respondent whom they entrusted to spear head the distribution and management of the estate had taken over the running of the estate's assets and did not want to share the same out or account for the proceeds of the estate income generally and acquisition of new assets from the proceeds of the estate.

50. She stated that she was informed that as a result of their frustration, the Applicants have sought the revocation of the grant. She stated that she had been advised that the estate was in danger of being wasted by one or two of the beneficiaries to the disadvantage of others by this perpetual trust and the refusal or neglect to distribute the estate. She believed that the 2nd respondent was unfairly benefiting from the estate to the exclusion of all others indeed the applicants herein had a genuine complaint which should be considered and addressed by the honorable court.

51. She stated that she was now of very advanced age of 84 years and it was her desire that the affairs of her late husband and hers would be settled and that her children would get their fair share of inheritance now when she was available and capable of offering guidance on how she and her husband would have wanted their property distributed amongst them. Further, notwithstanding the complaint about the manner of confirmation of the grant it was her proposal that to resolve everything about the estate, the honorable court should, instead of revoking the grant, order that the estate be distributed forthwith without delay so that each and every beneficiary can manage their share of the estate as they wish rather than have administrators holding the estate property indefinitely with the challenge of accounting both to beneficiaries and to court as contemplated by law and equity.

52. She averred that she was willing to attend court if necessary to clarify her position in person so that the matter is put to rest.

53. At the close of pleadings the parties filed written submissions through their respective counsel.

54. The Applicants filed their submissions on 30th September 2020 arguing the application invokes the court's jurisdiction under **Section 76 of the Law of Succession Act** to revoke the grant issued to the Respondents for failure to comply with the provisions of Act. They raised four issues for determination:

i. ***Whether or not the issuance of the Confirmed grant to the Respondents was proper in light of the clear failure to obtain consent from all beneficiaries at the confirmation thereof.***

ii. ***Whether or not the Respondents have intermeddled with the deceased's estate and consequences thereof.***

iii. ***Whether or not the Grant of Letters of Administration issued jointly to the Respondents on 18 January, 2010 should be revoked on the basis of.***

a) ***Fraud***

b) ***Concealment of the deceased properties from the court.***

c) ***Failure to proceed diligently with the administration of the estate***

d) ***Failure to produce an inventory or account of administration as required by Section 83 of the Law of Succession Act.***

iv. ***Who should bear the costs of the Application?***

55. On whether or not the issuance and confirmation of the grant to the respondents was proper in the absence of consents from all beneficiaries the Applicant argued **Rule 26 of the Probate and Administration Rules** it's a mandatory requirement for a person who seeks to administer estate for a person who died intestate to obtain consent of those others who are beneficially entitled.. The said rule provides;

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

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

(3) *Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.*

56. The Applicants submitted that failure by the petitioners to comply with the mandatory provisions of **Rule 26 of the Probate and Administration Rules** should lead to the inevitable nullification of the grant. To support this submission they cited the following cases:.

a. *Al-Amin Abdulrehman Hatimy vs. Mohamed Abdulrehman Mohamed & Another [2013]eKLR* the where the court held that;

“The Law of Succession by virtue of Rule 26 requires that any petition for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share of the same estate”

b. In *The Matter of Estate of Isaac Kireru Njuguna (Deceased) Nairobi In Succession Cause No. 1046 Of 1994* the court found out that:

“a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed”

57. The applicants demonstrated that the consent form marked as annexure “JWK” contained a glaring anomaly whereby the names of 4th and 5th Applicants were simply hand written onto the typed list. Secondly the court record does not show that they consented to the confirmation of the grant or that they were present in court during confirmation proceedings. The respondents did not demonstrate that they had informed them or even involved them in the process.

58. On whether or not the respondents have intermeddled with the deceased’s estate the Applicants posited that the estate of a deceased person is protected under **Section 45 of the Law of Succession Act** which lays down the rule on intermeddling in the following terms:

“1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a Deceased person,

2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment, and

b) Be answerable to the rightful executor or administrator, be the extent of the assets with which he had intermeddled after deducting any payments made in the due cause of administration.”

59. The Applicants cited the case of *Gitau & 2 Others vs Wandai & 5 Others (1989) KLR 231 (Tanui J)* held:

“Any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”

And in The Matter of *Wilson Nzuki Ngolo (Deceased) Machakos High Court Probate and Administration Cause Number 152 of 2000 (Mwera J)* held that.

“Only a person who has a grant or other legal authorization may handle the property of a deceased person.”

60. The Applicants argued that on the basis of material provided in both the application and the supplementary affidavit to the extent that the Applicants younger brother one Stephen Karanja was mandated by the respondents and without consent of the applicants to collect rental money from the estate’s rental properties and operate some of the estate’s bank accounts without providing the Applicants with the account records for the past ten (10) years, the said Stephen has been intermeddling with the estate with the sanction of the respondents herein because he is not an administrator of the estate. That ceding their mandate to the said Stephen was *ultra vires* their mandate as administrators and to the overall untrustworthy conduct of the Respondents in the administration of the estate.

61. That the respondents had failed in their primary and sole obligation, mandate and responsibility making sure that the deceased estate is protected and the properties preserved and accounted for and ultimately distributed fairly and equitably as sanctioned by court. That instead the Respondents ensured that the estate would forever remain in their charge to use for their own benefit without account to the beneficiaries. That the Respondents had refused neglected and or failed to distribute the estate to the Applicants who are beneficiaries which is a clear show of greed since both parties are entitled to an equal share of the estate.

62. On whether or not the grant of letters of administration issued jointly to the respondents on 18th January 2010 should be revoked the applicants relied entirely on the provisions of **section 76 of the Law of Succession Act (Cap 160 Laws of Kenya)** and the cases of;

(a) *In the Matter of the Estate of L.A K - (Deceased) (2014) eKLR* the court held that,

“Revocation of grants in governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

(b) In *Josse Karaya Gatimu Mary Wanjiku Githinji [2014] eKLR*, the court was of the view that;

“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.”

(c) The Court of Appeal in Matheka and Another vs. Matheka (2005) 2 KLR 455 laid down the following guiding principles revocation of grant either on application by an interested party or by the court on its own motion;

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

(d) Joyce Ngima Njeru & another vs. Ann Wambeti Njue [2012] eKLR where it held that;

“The central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or inactive use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits.”

63. The Applicants submitted that the Letters of Administration were obtained fraudulently, with the respondents concealing some of the deceased properties from the court.

64. On *fraud* the Applicants submitted that they had demonstrated that the Respondents obtained the said Grant of Letters of Administration based on false, untrue allegations and/or representation by alleging that the 4th and 5th Applicants had consented to the making of the said grant and to the proposed mode of distribution of the estate by the falsity of the annexure marked “JWK-3” to the supporting affidavit and the court record at the time of the confirmation. They argued that the respondents’ false statements about the 4th and 5th Applicants were not only fraudulent but also criminal. They relied on **Section 52 of Law of Succession Act** which makes it an offence for any person to make willful and reckless statements in the following terms:

“Any person who, in an application for representation, willfully or recklessly makes a statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment”.

65. That all these rendered the entire proceedings leading to the Confirmation of Grant defective in substance and thus it was in the interest of justice and fairness that the Grant be revoked. On *concealment* of the deceased properties from the court. Applicant submitted that the Respondents did not disclose the entire inventory of the deceased properties forming part of his estate. That the sawmill business at Maji Mazuri and a parcel of land at Kasarani near Kibo Primary School were left out. They relied on the case of Priscilla Ndubi & Another vs Gerishon Gatobu Mbui 2018 eKLR where the Court ordered the grant to be revoked for none disclosure of material facts during the confirmation of grant. The Judge Stated;

“Needless to state that in any Judicial proceedings, parties must make all disclosures to the court of all material facts to the case including successions cases. This general rule of Law emphasizes utmost good faith (uberima fidae) from parties who take out or are subject to court proceedings. The said responsibility is part of justice itself. Accordingly, none disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice such must immediately be subjected to serious reverse osmosis to purify the streams of justice if society is to be accordingly regulated by law.... The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries” °

and in the matter of estate of Isaac Kireru Njuguna (deceased) Nairobi in Succession Cause No.1046 of 1994 where the court found that ***“a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed”***

66. On *failure to proceed diligently with the administration of the estate* the applicants relied on **Section 94 of the Succession Act** provides that;

“neglect or misappropriation of assets of estate by personal representative which personal representative has been granted to him, or misapplies any such asset or subject it to loss or damage he shall be liable to make good of loss or damage so occasioned whether he has committed offence or not.

67. They submitted that the Respondents had misapplied and/or subjected the following properties of the estate to loss to the detriment of the Applicants: Motor vehicles Registration Numbers KNA 956, KSC 758, KAA 423W, KUP 481, KXJ 265J and KQF 087.

68. The Applicants contended that the respondents had not disclosed the specific properties where the vehicles are stored, neither did they explain the fact that the insurance covers had been paid for the same, or the fact that motor vehicle KXJ 265 is registered in the name of one Peter Thiong’o Kamo as per the copy of the insurance certificate who is not the deceased or any of the beneficiaries; or the sale of Motor Vehicle registration number KQF 087, Volvo was sold to one Darius Thadeus Taruru. With regards to Le Rhino Hotel situated in Nakuru/Municipality Block 10 Applicants submitted that the respondents had not explained what had happened to the proceeds as the account named was dormant.

69. With regards to Nakuru/Municipality Block 2/263 the Applicant argued that the property was charged without their consent and approval to secure a loan of KShs. 15, 200,000/=. That the claim by the 2nd respondent that the proceeds were used to invest for the estate had not been supported with any documentary evidence.

70. With regard to Share Certificate Numbers 154, 527, 463 and 626 Lang'ata Development Company Limited the Applicants contend that the claim that shares to the land were purchased in partnership with one Kanyiri Iregi were untenable and in entering into negotiations with the family of Kanyiri Iregi they were not acting in the best interests of the estate and the beneficiaries in the said Kanyiri predeceased their father and pursuant to the principle of survivorship, the properties belonged to their father's estate. The Applicants relied on the case of Mwangi Gakuri vs Bernard Kigotho Maina & Another, H. C NBI. Succ. Cause No. 2335/2011 where it was stated:

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of the Joint tenants.”

71. In light of the above, Applicants submitted that property L.R 6746/8 Nyathuna Farm Nakuru and any other properties alleged to have been owned jointly with the late Kanyiri passed to the deceased's estate upon the death of Kanyiri. In any case, the applicants wondered how there could be negotiations on land that is un-demarcated, unknown and unregistered. That the excuses tendered by the Respondent in relation to these properties are malicious, invalid and a ploy by the Respondent to deny them their rightful share of their late father's property.

72. On the issue of failure to produce an inventory or account of administration as required by Section 83 of the Law of Succession Act, the Applicants relied on **section 3 and 83 of the Law of Succession Act** and submitted that the duty to account is imposed by statute whether the deceased died testate or not. That the discharge of the duties provided herein above naturally attract an account and they averred that Section 83(e) vests the duty to the personal representatives to produce in court a full and accurate inventory of the assets and liabilities and an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account on two (2) instances the first after six months of the administration and the second one at the conclusion of the administration.

73. That no evidence of the alleged comprehensive report sent to their siblings abroad was presented to court by the respondents. They had failed to account.

74. On who should bear the costs of the application: the Applicants relied on **section 27 of the Civil Procedure Act** and the Ugandan case of Re Ebuneiri Waisswa Kafuku Kampala HCMA No. 81 of 1993 where the court stated:

“The judge in his direction may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge's discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.”

75. The Applicants also relied on the Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, where the court with regards to issue of costs stated as follows;

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion ..., but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so,”

76. The Applicants urged the court to look at the circumstances that led to the institution of this application and award costs.

77. The Applicants also filed supplementary submissions on 29th October 2020 reiterating the contents of their earlier filed submissions and further they relied on the entire provisions of **Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration rules** and submitted that litigation should come to an end. The applicants stated that one of the duties imposed on the respondents by **section 83 of the Law of Succession Act** is to complete administration within the stated timelines. They relied on the cases of In re Estate of David Kyuli Kaindi (Deceased) [2015] eKLR the court stated:

“Section 83 of the Law of Succession is in mandatory terms. It creates statutory obligations. Under (g) there is a statutory obligation on ‘personal representatives to complete administration of estates within six 6 months after they obtain confirmation of the grants they hold. It is a command that the personal representatives must respect and comply with. It leaves them with no option except that in cases of difficult the can approach the court for extension of time. This rule is of critical importance.”

78. The Applicants cited the Matter of the Estate of M' Twerandu M' Irung'u (Deceased) the Learned Judge stated;

“Nevertheless as i have said in great number of cases a party should not be prejudiced because he set out on numerous judicial journey as long as those journeys were bona fide quest for justice. I do not blame the respondent for the litigation he has to endure over this matter; it is his right. Except, however, as a tenet of justice, every litigation must have an end”

79. Applicants thus prayed that the grant issued to the Respondents be revoked for failure to fulfill their mandate pursuant to the law.
80. The respondent filed their submissions on 10th March 2021. They relied on the entire provision of **Section 76 of the Law of Succession Act** on revocation of grants and submitted that the Applicants anchored their cases on the first two general grounds and adduced no evidence on the third ground.
81. *On the issue of fraud* the respondent submitted that the 6th Applicant totally failed to substantiate her claim.
82. That the 1st Respondents is the biological mother to all Applicants and the 2nd and 3rd respondents and as the widow has priority in applying for letters of Administration to the estate of her deceased husband. That according to **Section 66 of the Law of Succession Act** the order of preference with regard to who ought to apply and be appointed Administrator in intestacy, is set and priority is given to surviving spouse. That the 1st respondent involved all beneficiaries and appointed the 2nd and 3rd respondents as co-administrators; further that the 2nd respondent was appointed to be the manager of the entire estate.
83. The respondents also submitted that that administrators pursuant to section **51(2) (g) of the Law of Succession Act** disclosed all the beneficiaries to the estate and the assets and that the administrators herein fully complied with the said provision.
84. They urged this Court to dismiss the Applicants’ summons dated 3rd February 2020.
85. After considering the Application, parties’ Affidavits and submissions, the issue is whether the applicants grounds for revocation of the grant pursuant to the provisions of **Section 76 of the Law of Succession Act**.
86. It is not in dispute that the 1st respondent is the widow of the deceased and hence has the priority under **Section 66 of the Law of Succession Act** to apply for and be granted letters of administration without the consent of the other beneficiaries. In this case she has sworn an affidavit confirming that indeed she and 2nd and 3rd respondents were granted letters of administration for the estate of her husband. It was her understanding that all her children had been involved and she was surprised that there were running disputes this late in the day. She, the one with the priority, as submitted by the 2nd respondent, confirmed that the 2nd respondent had hijacked the whole process. She was not satisfied with the manner in which he was running the affairs of the estate as she had expected that by now it would have been distributed to the beneficiaries. The 3rd Respondent administrator did not respond to the application.
87. From the 1st respondents affidavit it is clear that the administrators are not working together and the 2nd respondent has taken over the administration of the estate, contrary to the wishes of the widow and to the detriment of the other administrators and beneficiaries. Going by the Widow’s affidavit she has no trust in the second respondent as he has not acted to her expectations that by now the estate would have been distributed to the beneficiaries.
88. The circumstances in which a grant may be revoked or annulled are set out in **section 76 of the Law of Succession Act** as follows:
- “A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
- (a) that the proceedings to obtain the grant were defective in substance;*
 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;*
or
 - (ii) to proceed diligently with the administration of the estate; or*
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
 - (e) that the grant has become useless and inoperative through subsequent circumstances.*

89. The administrators are bound by the law **Section 83 of the Law of Succession Act** provides the *Duties of personal representative's inter alia*—

“(a);

(b);

(c);

(d);

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.”

90. The administrator is required to provide an account of the estate vide Section 83 (e) of the Law of Succession Act in the 10 years or so since the grant was issued. The relationship between personal representatives of a deceased and his heirs is one of a fiduciary and beneficiaries. The administrators herein are in a fiduciary relationship with the beneficiaries of the deceased, a duty to account exists by law under the Law of Succession. Taking into consideration that they have held the estate in trust for the other beneficiaries, the respondents owed it to themselves, to the applicants and the law to account for the estate. Their claims that they had done so is not supported by any evidence and it is clear even from the affidavit of the 1st respondent and the nonparticipation of the 3rd respondent that they are not working together and the grant has effectively *become useless and inoperative through subsequent circumstances*. The moment one of the administrators *took* it and ran away with it, then ceding his mandate to non-administrators, the mandate of the three administrators appears to have lapsed as the three, as everything was left to him. The other two, being dissatisfied with the manner of his acting ought to have brought the matter to the attention of the court because his actions bind them, and they are all held accountable. Being joint administrator means that decisions are taken together in the best interests of the estate and the beneficiaries. When that does not happen then that grant cannot be said to be operative as envisaged by law. I find therefore in view of the affidavit of the 1st respondent, the non-participation of the 3rd respondent, the grant falls under Section 76(e) of the Law of Succession Act.

91. It is also evident that the 4th and 5th applicants were not involved in the obtaining the grant of letters of administration and in the process leading to confirmation of the grant, neither did they consent to the confirmation of the grant made to the respondents.

92. The court record is clear that these applicants were not involved and the 2nd respondent did not produce evidence to support this. The 1st respondent was under the mistaken belief that the 2nd respondent had involved them. The respondent therefore left out the 4th and 5th respondents. They are guilty of concealing this from the court, and lying to court that every beneficiary had consented to the confirmation of the grant.

93. The respondents have also not been trust worthy in dealing with the estate. They are not worthy of the trust bestowed to them jointly to administer the estate is clear from the affidavit of the 2nd Respondent.

94. They have not been forthright with some of the properties belonging to the deceased and in particular, the Maji Mazuri Sawmill, the properties alleged to be co-owned with one Kanyriri Iregi and also the obtaining of loans and development of other assets for the estate. The Respondents have also not produced to the court, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

95. Though the 2nd respondent cannot be accused of intermeddling with the estate because he has grant of letters of administration. He did not contest the claim that he had given one Stephen Karanja, who is a sibling to him and the other beneficiaries, a free hand with some of the assets of the estate without the consent of the other beneficiaries.

96. In the upshot I find that the applicants have established good reason for the holding to account the second respondents for the last 10 years when he administered the estate.

97. **Section “76 (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**

(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;”

98. I find therefore that the application herein is successful and the following orders issue:

a. The respondents within 60 days hereof to render an account as per Section 76(d) of the Law of Succession Act as read with section 83(h) which states; to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

b. In the meantime the grant of letters of administration made herein on 7.8.2006 and confirmed on 18.1.2010 jointly to Esther Wanjiru Kibuku, Joseph Kamau Kibuku and Grace Wambui Kibuku be and is hereby revoked.

c. The 6th applicant JACINTAH WAIRIMU KIBUKU is appointed administrator pending the applicants' proposal of additional names if need be within 15 days hereof. In default, a fresh grant to issue in the name of JACINTAH WAIRIMU KIBUKU

d. The administrators, within 45 days hereof, to file a fresh Summons for Confirmation of Grant on the basis of the assets and liabilities of the estate known to them within.

e. Taking into consideration the circumstances of this case the costs be in the cause.

DATED AND DELIVERED VIA EMAIL THIS 31ST DAY OF MAY 2021

MUMBUA T MATHEKA

JUDGE

Court Assistant Edna

Maingi Kamau & Associates Advocates

Nancy Njoroge & Co Advocates

Sheth & Wathigo Advocates