



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 691 OF 2018

IN THE MATTER OF THE ESTATE OF JOHN GICHIA MACHARIA (DECEASED)

RULING

Summons

Before this court for determination are three applications for revocation of grant as follows:

1. Summons for Revocation of Grant dated 11th June 2019 brought by Lisa Anyango Ameyna, (hereinafter, "Lisa") who is the Interested Party in these proceedings. The Grant sought to be revoked in this application was issued to Samuel K. Macharia and Serah Njeri Macharia, on the 5th April 2019 and rectified on 23rd May 2019.
2. Summons for Revocation of Grant dated 11th June 2019 brought by David Karanja Macharia (David) and Stella Nyanjiru Macharia (Nyanjiru). The Grant sought to be revoked in this application was issued to Samuel K. Macharia and Serah Njeri Macharia, on 5th April 2019 and rectified on 23rd May, 2019.
3. Summons for Revocation of Grant dated 10th December 2020 brought by Samuel Kamau Macharia. The Grant sought to be revoked in this application was issued to Samuel Kamau Macharia on 11th March 2019.

For purposes of clarity in this Ruling and to avoid confusion due to the numerous applications in this Cause, I will refer to Samuel K. Macharia as the 1st Petitioner or Samuel Kamau Macharia interchangeably and Serah Njeri Macharia as the 2nd Petitioner or Serah Njeri Macharia interchangeably.

In her Application dated 11th June 2019, Lisa seeks the following orders:

1. That this application be certified urgent.
2. That this Honourable Court be pleased to revoke the grant herein issued to Samuel K. Macharia and Serah Njeri Macharia on 5th April 2019 and rectified on 23rd May 2019.
3. That costs of this application be provided for.

The grounds in support of the application are that the sole beneficiary of the estate is a minor hence there is a continuing trust; that Serah Njeri Macharia, one of the petitioners, has withdrawn her application for appointment of an administrator and that it is in the interest of justice that the orders sought be granted.

In her Affidavit in support of the Summons, Lisa has deposed that she is the Interested Party in these proceedings; that she is aware that the Petitioners jointly filed a Petition for Grant of Letters of Administration dated 11th December 2018 and that the second petitioner filed a Notice of Withdrawal dated 24th January 2019; that a Grant of Letters of Administration has been issued; that there is a continuing trust as the sole beneficiary is a minor; that the Grant issue is defective and ought to be revoked for failure to comply with the law.

The Summons by David and Nyanjiru seeks similar orders as that of Lisa. Their grounds in support of the Summons are that the proceedings to obtain the Grant are defective in substance in that Serah Njeri Macharia withdrew her Application for Grant on 24th January 2019; that the Grant was obtained by concealment from this Honourable Court of material facts in that the 1st Petitioner has failed to disclose to this court that the 2nd Petitioner has withdrawn her Application for a Grant and that the sole beneficiary of the estate being the minor child of the deceased there is a continuing trust and the 1st Petitioner cannot to the exclusion of all others be issued with a Grant of Letters of

Administration. Further that the 1st Petitioner knowingly failed to disclose that the Corrigenda published on 5th April 2019 to the Gazette Notice 2234 of 2018 showing both he and the 2nd Petitioner as co-petitioners was defective and ought to have been rectified. Finally that the 1st Petitioner has failed to disclose that he has filed a number of contentious applications which are yet to be heard and determined.

In their joint Affidavit in support of the Summons, David and Nyanjiru have reiterated the grounds in support of their application and deposed that the 2nd Petitioner, having withdrawn her application is precluded by law from petitioning for and being issued with the Grant in relation to the estate of the deceased; that the sole beneficiary being a minor child there is a continuing trust and the 2nd Petitioner having withdrawn her application, the 1st Petitioner is not eligible to apply and be issued with a Grant of Letters of Administration on his own.

Both applications, by Lisa and by David and Nyanjiru, are opposed by the 1st Petitioner. In his Replying Affidavit sworn on 10th July 2019 he deposed that both applications are based on a misapprehension on the procedure for filing a withdrawal of Petitions contained in the Probate and Administration Rules; that Serah Njeri did not file a renunciation as provided under Rule 18 of the Probate and Administration Rules nor did she apply for leave to withdraw the Petition as the law requires and therefore the purported withdrawal dated 24th January 2019 is null and void.

The 1st Petitioner deposed further that it is not true that the proceedings to obtain the Grant in issue were defective in substance and that he failed to disclose to the court that the 2nd Petitioner had withdrawn her application given that the facts alluded to were within the court's knowledge since the 2nd Petitioner had filed her Notice of Withdrawal on 25th January 2019; that he denied that the Grant was obtained through deception. He deposed that the grant was properly issued to the two of them being the father and mother of the deceased who left no widow according to the order of priority under Section 66 of the Law of Succession Act; that by the time the 2nd Petitioner purportedly filed her Notice of Withdrawal on 25th January 2019 the court order for instant gazettelement of the Petition of 11th December 2018 had already been made and acted upon pursuant to the order of 15th January 2019; that on 8th February 2019 counsel for Lisa wrote to the court in reference to the court order of 15th January 2019 and requesting for fast tracking of the gazettelement by which time counsel for Lisa already knew of the alleged Notice of Withdrawal; that the Grant was eventually gazetted on 11th March 2019 but it contained errors by indicating wrong names of the Petitioners; that this error was noticed by all the counsel on record prompting Mr. Amin, learned counsel for the David Karanja and Stella Nyanjiru to write to the court seeking to have the error rectified; that all counsel on record also noticed the mistake and requested the court to rectify it; that the error was rectified by a corrigenda published on 5th April 2019 after which no one filed an objection as required.

He further avers that after expiry of 30 days his counsel wrote on 8th May 2019 seeking to have the Grant issued; that this was done on 8th March 2019 but the grant had an error on the date of gazettelement being 5th April 2019; that his advocates wrote to the court to correct that error hence the grant was re-issued on 23rd May 2019; that even at as the date of rectification, 23rd May 2019, there was no objection filed.

In opposition to Lisa's Summons, the 1st Petitioner has filed a Replying Affidavit sworn on the 10th July 2019 in which he deposed that Lisa is a former girlfriend of the deceased and that she is not an heir of the estate of the deceased; that Lisa's application is an abuse of the court process because it is made for an improper purpose to assist David Karanja and Stella Nyanyiru, the former interim administrator and administratrix to retain control of Kshs 314,992,768 belonging to the son of the deceased which was obtained by false pretences from Direct Line Assurance Company Ltd; that the said application is fraudulent and is based on a misapprehension on the procedure for filing Petitions contained in Probate and Administration Rules.

The Summons by the 1st Petitioner seeks the following orders:

1. That this Honourable Court be pleased to revoke/annul a grant issued on 11th March 2019 allegedly to Samuel Kamau Macharia alone.
2. That this Honourable Court be pleased to order investigations as to how the grant was obtained and to accordingly punish/reprimand those involved.
3. That the costs of this application be in the cause.

The grounds in support of this Summons are that the grant was issued on the basis of fraudulent or false representation or through deception; that the 2nd Petitioner has set out to interfere with the administration of justice in this cause through false history of the circumstances under which this court issued her and the 1st Petitioner on 5th April 2019 a grant of letters of administration intestate in this cause. In the 1st Petitioner's Replying Affidavit he deposed that he and the 2nd Petitioner applied for a full grant of letters of administration after realizing that the limited grant issue to David Karanja and Stella Nyanjiru had lapsed on 31st August 2018; that the 1st and 2nd Petitioners applied for full grant on 11th December 2019 but their working together did not last and that the 2nd Petitioner claims to have withdrawn from the Petition before the grant was issued to both. He deposed further that the grant purportedly issued on 11th March 2019 is purported to have been signed by Honourable Justice Muchelule who stopped handling this matter 20th December 2019 and secondly the purported grant was issued on 11th March 2019 before the gazettelement which was done on 5th April 2019 was done and before the 30 days period given in the Kenya Gazette had expired.

The 2nd Petitioner who is named as the Respondent in the Summons dated 10th December 2020 filed her Replying Affidavit sworn on 6th April 2021. She has opposed that Summons. She denies that the Grant issued on 11th March 2019 was issued through deception or in contempt of court. She admits to jointly applying for grant of letters of administration with the 1st Petitioner. She deposed that it is not disputed that she filed a Notice of Withdrawal of Application for Grant which was served on all advocates on record. She stated that she wrote to the firm representing both her and the 1st Petitioner and informed them that she longer wished to be an Administrator and asked

them to rectify the situation but the firm of advocates wrote to her on 22nd January 2019 to the effect that they could not carry out the instructions for reasons contained in a letter she attached to her Replying Affidavit advising her to await until after the gazette. She stated that she filed Notice of Intention to act in Person and Notice of Withdrawal of the Application for Grant; that despite having served M/s Gatheru Ng'ang'a & Co. Advocates with the Notice for Withdrawal of Application for Grant the firm wrote to the Deputy Registrar on 8th May 2019 requesting for the issuance of the Grant without disclosing that she had withdrawn from the Application for Grant.

She further deposed that she instructed her current lawyers to represent her in late October 2020; that the firm wrote to the Deputy Registrar informing her about the Notice of Withdrawal and the Grant issue in both their names and asking for directions as to whether the matter should be placed before a Judge for correction of the error on the Grant or whether the correction could be done administratively; that upon follow up on the matter, her advocates learned that the matter had been dealt with administratively and that her name had been removed from the Grant. She deposed that she noted that the Grant was dated 11th March 2019 but she thought it was an error by the Registry; that the protestations by the 1st Petitioner are not genuine because he filed an Application dated 10th July 2019 seeking to replace her with his sister and that in that application it was acknowledged her application to withdraw and that she could not be forced to serve as a legal representative against her will. She further deposed that their grandson has attained the age of majority and that there is no requirement that there should be more than one administrator. She stated that her application to withdraw from being an administratrix is *bona fide* in an attempt to maintain peace and unity in the family and that there was no ulterior motive as alleged. She denied misleading the court. She asked this court to allow her to exit from these proceedings.

Lisa has also filed a Replying Affidavit sworn on 8th April 2021 in respect of the Summons for Revocation dated 10th December 2019. She has deposed that she knows of her own knowledge that the 2nd Petitioner filed a Notice of Withdrawal of her petition on 24th January 2019 and that the 2nd Petitioner appeared before the court on numerous occasions and intimated her intention to withdraw her Petition. Lisa is in support of the withdrawal of the 2nd Petitioner.

Adam Kamau Macharia, the son of the deceased and Lisa, also filed a Replying Affidavit sworn on 7th April 2021. Adam describes himself as the only son and sole beneficiary of the deceased John Gichia Macharia. Adam is in support of the revocation of the grant issued to the Petitioners on account of lack of capacity by the 1st Petitioner to be appointed as administrator and failure by 1st Petitioner to disclose this fact to the court as well as on account of the Notice of Withdrawal by the 2nd Petitioner. He deposed that the 1st Petitioner has been declared bankrupt and Receiving Orders issued by the court on 22nd February 2011 and that he filed, through his advocates, a Notice of Preliminary Objection dated 6th July 2020 challenging the validity of the Grant issued to the 1st Petitioner.

The 1st Petitioner filed a Further Affidavit sworn on the 24th May 2021 in response to 2nd Petitioner's Replying Affidavit sworn on the 6th April 2021. He reiterated his earlier averments in his affidavits that 2nd Petitioner did not renounce her right to be appointed administratrix according to the law and that at the time the grant was issued jointly to them she had not renounced her right to administer the estate because the only way to exercise that right is through an application to court or an instrument not through a letter addressed to the Deputy Registrar of this court or any other document; that the consequence of her stand is to create an impulse in the administration of the estate and to compel the 1st Petitioner to act as an agent of necessity with authority to protect the estate; that her endeavour on 29th October 2020 to move the court through her advocate's letter to revoke a grant administratively when applications for revocation were pending was and remains illegal, null and void.

In his Further Affidavit in response to Adam's Replying Affidavit dated 7th April 2021, the 1st Petitioner deposed that Adam has made mistakes including acting on incompetent advice; that he is being used by 1st Petitioner's opponents in litigation (reference was made to other disputes pending in other divisions of this court in this regard); that Adam is acting on mistaken belief that the deceased, his late father, had proprietary interests in the assets of Directline Assurance Company Ltd in which his company AKM Investment Ltd was a shareholder; that the purported Preliminary Objection is misconceived because it is based on disputed facts and according to the law as stated in **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors (1969) EA at 696 at page 701:**

“A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

He deposed further that this court has no jurisdiction to determine the issue of alleged bankruptcy as the same is before the Commercial Division of this court, the Court of Appeal and the Supreme Court: that because of the pendency of the pending applications in the Court of Appeal this court from which the appeal came is *functus officio* and has no jurisdiction to revisit the issue; that one of the orders sought in the application dated 5th October 2011 is quashing of a purported Kenya Gazette Notice purporting to publish the alleged fact of bankruptcy orders and that Adam's exhibit AK1 which is made up of bankruptcy petition judgment in Civil Appeal No. 62 of 2011 concern matters which are pending in the Court of Appeal over which this honourable court has no jurisdiction.

Submissions

On 20th September 2019 and 23rd March 2021, this Court directed that the three applications under consideration herein be determined together and be disposed of by way of written submissions. All the parties have filed their respective written submissions.

Lisa has filed two sets of submissions dated 7th October 2019. She has submitted that the 1st Petitioner has failed to disclose to the court that his co-administrator has left office vide her Notice of Withdrawal dated 24th January 2019 before the grant of letters of administration dated 5th April 2019 and rectified on 23rd May 2019 was issued; that the 1st Petitioner was under a legal obligation as a co-administrator to inform the court of this fact; that the 1st Petitioner concealed material facts when his Advocate on record wrote to the Deputy Registrar of the High Court vide letter dated 8th May 2019 requesting the Deputy Registrar to issue a grant to the Petitioners yet he knew that the 2nd Petitioner had

withdrawn her application on 24th January 2018; that the 1st Petitioner never made any efforts to have the grant issue on 5th April 2019 rectified despite knowing that it was defective.

Lisa has relied on Section 58(1) of the Law of Succession Act and the following authorities:

1. ***In re Estate of G N C (Deceased) [2017] eKLR.***
2. ***Esther Mugure Mwangi v Naftally Mwangi Muthende & another [2014] eKLR.***
3. ***IN THE MATTER OF THE ESTATE OF RAPHAEL CHESSA OYEYO (DECEASED) [2013] eKLR.***

In her submissions dated 31st May 2021 in opposition to the 1st Petitioner's Summons for revocation dated 10th December 2020, Lisa submitted that the 2nd Petitioner had indicated her unwillingness to be appointed as a petitioner alongside the 1st Petitioner; that the 2nd Petitioner did appear in court and intimate to the court her intention to withdraw her petition and that the 2nd Petitioner ought not to have been appointed as administratrix because she had already withdrawn her application and therefore her appointment is unlawful. Lisa cited Section 74 and 76 of the Law of Succession Act to buttress her submissions and urged that the Summons dated 10th December 2020 be dismissed with costs.

David and Nyanjiru filed their submissions on 2nd October 2019. They have reiterated the grounds in support of their summons and the averments in their supporting affidavit. They have invoked the provisions of Section 58 of the Law of Succession Act and Rule 14 of the Probate and Administration Rules and cited In the Matter of the **Estate of Raphael Chessa Oyeyo (Deceased) [2013] eKLR** where the court held that:

“It should be stated that the grant made in this matter is a nullity as long as it is issued in circumstances that were not in keeping with Section 58 of the Law of Succession Act.... The law is clear. No grant is to be issued in such circumstances. No grant should have been made in this case. The grant made herein was a nullity. It is useless and inoperative. Section 76 of the Law of Succession Act provides that the same is liable to revocation. The same provision grants me the power to revoke such grant on my own motion.... It should also be mentioned that a grant is an order made by the court in the form of a certificate. A certificate issues to a particular person or group of persons. Where the certificate of grant is found to be useless or inoperative, say where the holder dies or the grant is a nullity as is the case here, the same cannot be cured by amendment or rectification. The only available remedy in the circumstances is the revocation of the grant to pave way for the making of a fresh one.”

They conclude their submissions by urging that the Grant as issued is defective in substance and a nullity in law and incapable of being rectified by amendment, rectification or substitution and ought to be revoked by this court as prayed in their summons dated 11th June 2019.

The 1st Petitioner filed his detailed submissions dated 24th May 2021. The gist of these submissions are that following the lapse of the Limited Grant issued to David Karanja and Stella Nyanjiru, the 1st and 2nd Petitioners petitioned for a grant on 11th December 2018; that on 15th January 2019 when the matter came for mention the parties agreed to have the petition advertised in the Kenya Gazette for any objections to be raised; that the matter was gazetted but with wrong names of David Karanja and Stella Nyanjiru; that the Petitioners' advocates pointed the error to the Deputy Registrar who made a correction in a subsequent issue of the Kenya Gazette which came out on 5th April 2019; that the Grant was initially dated 11th March 2019 necessitating writing to the court by the Petitioners' advocates for correction leading to the rectification of the Grant on 23rd May 2019; that the rectified Grant now bore the date of 5th April 2019.

It is submitted that in October 2019, counsel for the 2nd Petitioner wrote a letter to the court, which letter is the foundation of the application dated 10th December 2019; that the said letter contravened Rule 43 of the Probate and Administration Rules. That the letter was not copied to the parties whose applications were pending as from 11th June 2019. It is submitted that the 2nd Petitioner deceived the court in implying that it was through a clerical mistake or inadvertent error on the part of the court that a grant was issued in both the Petitioner's names and that she was aware that David Karanja and Stella Nyanyiru and Lisa had filed applications for revocation of the grant she was complaining of.

It is submitted that by not copying the letter to the 1st Petitioner, the 2nd Petitioner wanted her matter to be dealt with administratively; that she knew that her Notice of Withdrawal was invalid and did not amount to renunciation of her right to administer the estate; that she sought legal advice from the court as to whether her letter would be acted on administratively or she files a formal application; that because of her failure to refer to the pending applications in which the issues contained in her letter were in issue, a purported grant was issued administratively because of her deception; that she is in contempt of the court in the form of abusing the court process due to that deception. To buttress that submission, the 1st Petitioner cited the **Halsbury's Laws of England Vol. 9 4th Edition Paragraph 8** to the effect that:

“The court has power to punish as contempt any misuse of the court's process. Thus the forging or altering of the court's documents and other deceits of like kind are punishable as serious contempts....”

He also cited Speaker of the **National Assembly v James Njenga Karume [1992] eKLR** to stress the point that where a procedure of the court is provided it must be strictly followed.

It is submitted that the 2nd Petitioner ignored procedure laid down for rectification and failed to wait for the court to rule on that issue because the issue was pending before this court for determination.

It is submitted that the 1st Petitioner seeks revocation of the grant obtained by the 2nd Petitioner in October 2020 and backdated to 11th March 2019 basing this prayer on Section 76 of the Law of the Succession on the grounds that the proceedings and procedure to obtain the said grant were defective in substance; 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 and 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 allegations made in ignorance or inadvertently. See also ***Kakamega Succession Cause No. 491 of 2019: In the matter of the estate of Akwera (deceased)*** cited at length by the 1st Petitioner on the issue of the three general grounds set out in Section 76 of the Law of Succession Act on the revocation of grant. It is submitted that the grant issued administratively is tainted with the dishonesty of the 2nd Petitioner.

It is submitted that in her Replying Affidavit sworn on 6th April 2021, the 2nd Petitioner admitted that the procedure she used to obtain the said grant is a letter written by her Advocates for the court Registry on 29th October 2020 through which the 2nd Petitioner asked the **“court to rectify the grant by removing the name of the her client.”** It is submitted that it is clear and undisputed that the said letter was not copied to the other parties whose applications would be affected by her actions as it would contravene their right to a fair hearing under Article 50 of the Constitution. The 1st Petitioner cited ***M.S.K v S. N. K [2010] eKLR*** on the issue of contravention of the right to fair hearing. It is submitted that a letter which is not copied by one party to the other parties cannot in any case serve any purpose as it contravenes the rights of the parties to be heard and that the grant is a product of illegal process and ought to be revoked. It is submitted that the actions of the 2nd Petitioner are null and void as they offend the rules of natural justice.

Further submissions that there are other procedural flows and defects with the regard to the procedure in that the 2nd Petitioner applied for rectification of the grant through a letter, that was not copied to the other parties, and not through the summons as provided under Rule 43 of the Probate and Administration Rules and that the wrong application was not even placed before the Judge as required by that Rule; that the grant was purportedly signed by Honourable Justice Muchelule who stopped handling this Cause on 20th December 2020 and the matter assigned to Honourable Justice Onyiego; that had the matter been placed before the right judge, he could not obviously have signed the grant and that the grant is allegedly issued on 11th March 2019 before the correct gazettement of the petition which happened on 5th April 2019 and before the 30 days’ period given in the Kenya Gazette had expired all going to demonstrate how defective the procedure for issuing the grant was. It is submitted that had the said grant been a valid grant it should have indicated that it was a rectified grant when it was rectified.

On the issue that the said grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case it was submitted that the 2nd Petitioner was aware of the various applications in the Cause and that the effect of the grant obtained by the 2nd Petitioner and backdated to 11th March 2019 was to compromise the applications pending before the court and to deny the 1st Petitioner a chance to be heard in opposition to the application for revocation of grant.

It was submitted that this court does not have jurisdiction to entertain the issue of alleged bankruptcy raised by Adam. Several authorities have been cited to support that submission.

Lastly it was submitted that the circumstances of this case go beyond just revoking the grant; that it is clear that a criminal offence and/or serious misconduct has been committed in the manner in which that grant was issued and therefore there is need for the court to intervene and order investigations into the circumstances in which the grant was obtained so that the misdeeds and irregularities do not happen in the future in order to protect the integrity of the court process. It is prayed that the application dated 10th December 2019 be allowed with costs.

The 2nd Petitioner filed her submissions dated 2nd June 2021. She has raised three issues for determination in respect of the grant issued on 11th March 2019, namely:

1. Whether the Grant should be revoked/annulled as sought by the Applicant.
2. Whether investigations should be carried out as requested.
3. Whether the Applicant has come to court with clean hands.

On the first issue it is submitted that in December 2018 the Petitioners jointly applied for letters of administration in respect of their late son’s estate through the firm of Gacheru Ng’ang’a & Co Advocates; that the 2nd Petitioner wrote to the said law firm instructing them to withdraw her name from the Petition for the purpose of protecting her family unity; that the said firm of advocates responded that they could not carry out those instructions; that the 2nd Petitioner opted to act in person and filed a Notice of Intention to act in person dated 24th January 2019; that on 25th January 2019 she filed a Notice of Withdrawal of Application for Grant in accordance with Rule 14(1) of the Probate and Administration Rules and that the firm of advocates wrote to court asking to urgently issue the Grant as there was no objection filed despite their having been served with the Notice of Withdrawal of the Application for Grant. She submitted that consequent to the failure to inform the Registry of the Notice of Withdrawal the Grant was issued in the names of both Petitioners with 11th March 2019 as the date of issue thereby prompting Gacheru Ng’ang’a & Co. Advocates to write to the Registrar on 23rd May 2019 to rectify the date and that by an application dated 10th July 2019 the 1st Petitioner sought to remove the 2nd Petitioner and replace her with his sister for the reason that she had filed a Notice to withdraw her Application.

It is further submitted that on 23rd October 2019 the 2nd Petitioner’s new advocates wrote to the Deputy Registrar informing the Deputy Registrar that their client had filed a Notice of Withdrawal on 25th January 2019 but a Grant had been issued including her name and that they sought to have that rectified as soon as possible. They sought to know whether there was need to place the file before a Judge for that purpose or whether this could be done administratively. It is submitted that they were informed that the court had removed the name of the 2nd Petitioner from the Grant and that this is the Grant now sought to be revoked/annulled.

It is submitted that the Summons for revocation dated 10th December 2019 presumes that there were proceedings before the court that lead to the issuance of the Grant which is not true; that the letter to the Deputy Registrar that is the subject of attack cannot be construed to be a proceedings for purposes of Section 76 of the Law of Succession Act; that such a letter does not amount to a judicial process but an administrative one; that the letter was addressed to the Registrar from whom directions were sought and did not mandate the court to take action. It is submitted that the Grant could only have been rectified *suo moto* which the court has the discretion to do under Sections 74 and 76 of the Law of Succession Act and therefore the Application has no basis, is misconceived and ought to be dismissed. It ought to have been directed at the court's power to rectify the Grant.

It is submitted that the Applicant should have moved the court by way of review of the Grant under Order 45 of the Civil Procedure Rules; that by stating that the Letter was not served on all the advocates on record he is guilty of double speak as it is on record that his counsel wrote to the Deputy Registrar on 23rd May 2019 seeking to correct an error on the date of the Grant without serving advocates and yet the amendment was done; that there is no requirement in law to serve the letter to other parties.

On the issue of fraud in obtaining the Grant, it was submitted that the Applicant has not proved fraud which requires a higher standard of proof than in ordinary Civil cases. She cited **Christopher Ndaru Kagina v. Esther Mbandi Kagina & Another [2016]** and **In the Estate of Johnson Kirigia Kirimi [2017] eKLR** so support her case and submitted that in the matter under consideration no fraud or dishonesty has been proved and that there was no concealment of material facts.

On whether investigations should be carried out she submitted that no submissions have been made in respect of this prayer and the assumption is that the prayer was abandoned. It was submitted that there would be no basis for any investigations.

On whether the Applicant has come to court with clean hands, it is submitted that had the Applicant's counsel carried out the 2nd Petitioner's instructions in December 2018 all the applications now pending would not have been necessary and that while fully aware that the 2nd Petitioner has filed her Notice of Withdrawal the 1st Petitioner's Advocates informed the court that there was no objection and that the Grant should issue. She concluded by submitting that she does not wish to be an administratrix of her late son's estate, which position she has held since 2019. She prays that this court grants her wish so that ends of justice may be met and urges the court to dismiss the application with costs.

In his submissions dated 31st May 2021, Adam supports prayer 1 of Summons for Revocation dated 10th December 2019 for reasons that the 1st Petitioner had no legal capacity to be an administrator when the grant was issued. He submitted that prayer 2 of that Summons lacks merit as there is no justification in law or otherwise to warrant an order for investigations as sought; that the grant issued on 11th March 2019 was within the law given that the 2nd Petitioner had filed her notice of withdrawal.

Adam made detailed submissions on the 1st Petitioner's lack of capacity to act as an administrator by virtue of his having been adjudged bankrupt. He has reiterated his earlier averments in his Replying Affidavit in opposition to the Summons dated 10th December 2019 and urged the court to appoint him as Administrator of the estate of the deceased herein.

Analysis and Determination

I have taken time to read the three applications and the supporting affidavits, replying affidavits and submissions. All these are part of the court record and I need not repeat everything that has been stated therein. On the first two applications, the grant, the subject matter in the two applications is the one dated 5th April 2019 and rectified on 23rd May 2019. Both David and Nyanjiru, in the Summons dated 11th June 2019 and Lisa Anyango in the Summons bearing the same date, 11th June 2019, seek to have this Grant revoked. They base their contentions on Section 58 of the Law of Succession Act and blame the 1st Petitioner for concealing material facts from the court to the effect that the 2nd Petitioner had withdrawn her Application for Petition for Letters of Administration through her Notice of Withdrawal dated 24th January 2019.

I understand them to be saying that since the 2nd Petitioner has withdrawn her application for grant, the grant should not have been issued in the two names of the 1st and 2nd petitioners and that the law under Section 58 of the Act does not allow appointment of one administrator where a continuing trust exists.

Section 58 of the Act provides that:

58. Number of administrators where there is a continuing trust

(1) Where a continuing trust arises—

(a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation;

(b)

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.

It is their case that the 1st Petitioner was aware that the 2nd Petitioner had withdrawn her petition but failed to inform the court. This is denied

by the 1st Petitioner who asserts that the Notice of Withdrawal by the 2nd Petitioner offends the law and is therefore null and void. He asserts that the court was in any case aware of the Notice of Withdrawal as at the time it issued the Grant in issue. Before I examine the circumstances under which the Grant issued on 5th April 2019 and rectified on 23rd May 2019 was issued, let me look at the law on revocation or annulment of grants.

Section 76 of the Law of Succession Act addresses this issue. It is headed “**Revocation or annulment of grant**” and provides 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.

I have ascertained from the record of the court that as at the time the Grant of representation in this Cause was being sought, the sole beneficiary of the estate, Adam Kamau Macharia, was a minor. This is the reason the two application dated 11th June 2019 claim that the law was breached by the 1st Petitioner for his failure to inform the court that the 2nd Petitioner had withdrawn her petition for a Grant resulting in the court issuing the Grant in both names of the 1st and 2nd Petitioners but in effect the 2nd Petitioner had withdrawn her petition. The result of all this is that although the Grant dated 5th April 2019 and rectified on 23rd May 2019 bears both names of the petitioners, the 2nd Petitioner had withdrawn her petition making the 1st Petitioner the only party left in the Petition as argued by David, Nyanjiru and Lisa. It is their arguments that given there was continuing trust, a grant cannot be issued to one person because the law forbids it.

It is true that as at the time of issuing the grant herein, there was a continuing trust in respect of this estate. It is the argument of the 1st Petitioner that the grant was properly issued to him and the 2nd Petitioner and that the Notice of Withdrawal was not properly filed and therefore the grant is properly on record. It is claimed that the 2nd Petitioner has offended the law on renunciation as provided under Rule 18 of the Probate and Administration Rules. Rule 18, which is headed, “**Renunciation of probate or of right to apply for administration**” provides that:

(1) A renunciation of probate whether of a written or an oral will, or of the right to apply for administration, may be in one of the Forms 98 to 102 as appropriate.

(2) A renunciation of probate by an executor, whether by oral declaration or in writing, shall not operate as a renunciation of any right which he may have to a grant of letters of administration in some other capacity unless he expressly renounces such right.

(3) Unless the court otherwise directs for reasons to be recorded, a renunciation of a right to apply for letters of administration intestate may not be retracted.

The 1st Petitioner has argued that the 2nd Petitioner ought to have followed the law as provided in Rule 18 cited above. But the 2nd Petitioner holds a different view. According to her she came to court in the right way. She stated that she filed her Notice of Withdrawal of her application for grant as the law under Rule 14 of the Probate and Administration Rules permit and therefore failure by the 1st Petitioner to inform the court of this fact is a concealment from the court of a fact material to the case. Rule 14 of the Probate and Administration Rules, which headed, “**Amendment or withdrawal of application for grant**” provides that:

(1) An applicant for a grant may amend his application before the making of the grant by notice in Form 62 to be filed in the registry in which his original application was filed and serving forthwith a copy of such notice upon every objector who has lodged an objection and cross-application in the matter; and he shall pay to every such objector such costs (if any) as the court may direct: Provided that where the proposed amendment is of a minor nature the registrar may permit the amendment to be made forthwith without notice to any party.

(2) An applicant for a grant may withdraw his application at any time before the making of the grant by notice in Form 65 and shall pay to the other parties to the proceedings such costs (if any) as the court may direct.

(3) Every district registry shall forthwith upon the filing in it of a notice of amendment or withdrawal of an application for a grant notify the principal registry accordingly.

(4) If at the time of the filing of a notice of withdrawal of an application there has been filed in any registry an objection to the making of the grant, that registry shall forthwith notify in writing every person who has filed an objection therein.

(5) A notice of withdrawal of an application for a grant shall preclude the making of a subsequent application by the same person for a grant in relation to the same deceased.

The 2nd Petitioner has explained the circumstances under which the grant dated 5th April 2019 and rectified on 23rd May 2019 was issued. She admitted that both her and the 1st Petitioner applied for a grant in both their names but she changed her mind to participate as a petitioner in this matter for her family's unity. She explained that she took steps to have her application withdrawn. According to her, at the time in issue, the firm of Gacheru Ng'ang'a & Co. Advocates was acting for both Petitioners. She explained that she wrote to them vide her letter dated 17th January 2019 expressing her decision to withdraw from the matter and instructing them to take necessary action to have her named removed. She explained that the firm did not act as instructed but instead wrote to her a letter dated 22nd January 2019 advising her that it was not wise to carry out her instructions given that the court had directed that the grant be gazetted immediately to allow for objections if any. She said she was advised that taking the action she was contemplating would amount to contempt of court. She explained that this dissatisfied her and she decided to act in person leading to her filing Notice of Intention to Act in Person dated 24th January 2019 which she served on the said firm of advocates.

I have seen the letter by the 2nd Petitioner instructing Gacheru Ng'ang'a & Co. Advocates and their response to her. I have also seen her Notice of Intention to Act in Person and her Notice of Withdrawal of her Application for grant dated 24th January 2019. I have noticed that this firm of advocates, which is still the advocates for the 1st Petitioner, has not addressed the court on this issue of instructions from the 2nd Petitioner to remove her name from the application for grant and their advice to her contained in their letter dated 22nd January 2019. The 1st Petitioner did not address the issue either.

It is clear to me therefore that the firm of Gacheru Ng'ang'a & Co. Advocates was aware of the intention of the 2nd Petitioner to withdraw her application. The firm was aware that she did not wish to be one of the administrators of this estate. The said Notice of Withdrawal was also in the court records as at the time the grant issued on 11th March 2019 was granted. It cannot therefore be true that by the time grant was issued the 2nd Petitioner had not filed her Notice of Withdrawal as deposed to by the 1st Petitioner. The only issue therefore, given these circumstances, is whether she used the correct procedure to make her intention of withdrawing known to the court and to her advocates at the time.

Procedure in applying for withdrawal of application is provided under Rule 14 of Probate and Administration Rules. A party wishing to withdraw her application for grant files Form 65. Procedure for renunciation is provided for under Rule 18 of the same Rules and the correct Form is 98. The 2nd Petitioner's Notice of Withdrawal dated 24th January 2019 is drawn in compliance with Rule 14 (2) of the Probate and Administration Rules and it is my view that her intention was to withdraw her application. I find nothing in the 2nd Petitioner's Replying Affidavit or her Submissions to suggest that her intention was to renounce her right to apply for grant. I will therefore take her at her words as stated in that Notice that she was seeking to withdraw from applying for grant of representation in this estate and I so find. It is my considered view therefore that her Notice of Withdrawal dated 24th January 2019 is properly in the file and cannot therefore be null and void as submitted.

I cannot help myself but ask, who is to blame for what happened in this matter? I pose this question because it is obvious to me that there is something amiss. One of the instructing clients, the 2nd Petitioner, expressed her intention to discontinue with the application for a grant and instructed her lawyers at the time to take appropriate action and ensure that her name is removed from the court proceedings. The instructed lawyer advised the client differently to the effect that her instructions cannot be carried out for reasons advanced. She was unhappy and withdrew her instructions choosing to act in person. She filed Notice to act in person and proceeded to file Notice to Withdraw her application for the grant. This was done in on 24th January 2019, way before the grant was issued. The grant was issued anyway even when her Notice to withdraw was in the court file and her former lawyers knew about her intentions. It is submitted that her former lawyers wrote to the Deputy Registrar to fast track the gazetting of the Grant even when they knew she has filed a Notice to withdraw her application. The grant was issued bearing the date 11th March 2019. The same former advocates wrote to the Deputy Registrar to have the date corrected and the grant rectified. This was done. The grant in issue now bears the date of issue as 5th April 2019 and date of rectification as 23rd May 2019.

I have read the court proceedings. I did not see any record that this matter was ever mentioned in court in respect of correcting the errors in the grant. This can only mean that the matter was dealt with administratively. If this is what happened, is the 1st Petitioner to blame for this rectification of the grant administratively? I do not think so. Is his advocate to blame for this? While I find that the firm of Gacheru Ng'ang'a & o. Advocates was aware of the intention of the 2nd Petitioner to withdraw her application, it is my view that the 1st Petitioner or his advocates was not in control of the actual rectification of the grant. I have no evidence that the action taken administratively was ill-intentioned or that any of the parties has a role to play in it. I will get back on this issue when making my conclusions.

In respect to the Summons dated 10th December 2019, the 1st Petitioner heaped all the blame on the 2nd Petitioner. I have also noted that in some of the submissions, some of the language used and aimed at the Court and its officials, is rather strong. It is my view that we owe it to the court and to each other to remain courteous, observe etiquette and carry ourselves with decorum as befits our profession even when we feel that things are not going as we expected them to.

The bone of contention in respect of the Summons dated 10th December 2019 is the letter by the 2nd Petitioner to the Deputy Registrar dated 29th October 2020, which I reproduce here for effect:

29th October 2020

The Deputy Registrar

High Court of Kenya

Family Division

Nairobi

Dear Sir,

RE: SUCCESSION CAUSE NO. 691 OF 2018 ESTATE OF JOHN GICHIA MACHARIA (DECEASED)

We refer to the above matter in respect of which we have been instructed to act for Serah Njeri Macharia for the limited purpose of informing you that on 25th January 2019 she filed a Notice of Withdrawal of Application for Grant.

That unfortunately, the Grant still included her as one of the administrators. That error has caused confusion even in other Courts where the Estate of John Gichia Macharia has been sued and our client would be grateful to have the same rectified as soon as possible.

Kindly let us know whether we need to place the file before a Judge for that purpose or whether the same can be effected administratively (emphasis mine).

Yours faithfully,

Jude Thongori & Co. Advocates

My simple understanding of the contents of this letter is that it was the intention of the 2nd Petitioner to have the grant that was issued including her name rectified. I do not think she sought rectification in that letter. She went ahead to ask whether the matter should be placed before a judge for that purpose or it could be dealt with administratively. The letter was acted upon. From what I understand from the submissions, this was done administratively. Since I do not have the evidence to what happened, I can only go by the fact that there exists a grant with one name only, that of the 1st Petitioner. There are no proceedings to indicate that the matter was mentioned in the presence of any party when that rectification was done. But some action was taken and the 2nd Petitioner's name was removed from the grant. Again, I did not see any record of proceedings in court file in regard to the advice sought by the 2nd Petitioner in respect of this letter.

It is claimed that the 2nd Respondent did not serve the other parties with this letter and that her failure to serve the parties whose applications were pending in the Cause interfered with their right to fair trial. On the face of that letter, there is no indication that it was to be served on anyone else other than the client. Going by the admission of the 2nd Petitioner in her submissions, the letter was not served on the other parties. Was she required under the law to serve them? She has argued that she was not required to serve the other parties with her letter to the Deputy Registrar given that this is not a Notice of Appeal. Counsel for the 1st Petitioner thinks differently on that issue. He argued that law demands that she served all the parties whose applications were pending at the time. He cited *M.S.K v S. N. K [2010] eKLR* on the issue of contravention of the right to fair hearing by the failure to serve the letter. However, I have noted that this authority deals with Notice of Appeal and not a letter. Be that as it may, it is my view that it is good practice that every communication regarding a matter in court and more so a contested matter like this one, ought to be served on all parties. We are living in an age where disclosure of information is key and parties cannot continue "***to hold their cards close to their chest.***"

To complicate issues further, the amended or corrected or rectified grant with the name of the 1st Petitioner alone, bore the same date as the other one that was rectified on 23rd May 2019. It was dated 11th March 2019. It is argued that it was signed by a Judge who was not handling the matter and hence the error in dating it. I reiterate that I have no evidence as to what happened leading to the rectification or correction of the grant to remove the name of the 2nd Petitioner from the grant.

I will pose the same question again: who is to blame in this matter? I doubt that the 2nd Petitioner had a role to play in what happened administratively. Even if I were to stretch my imagination that far and believe she had anything to do with it, I have no evidence to support it. I do not think blaming her for what happened administratively will serve the purpose.

Is the court and its officials to blame? This court can only act on evidence tabled before it. It is not the business of the court to speculate on what may have happened or for the court to read ill motive or fraud in the actions in respect of this matter. But my honest view of the matter is that any party should have moved the court for mention to have the judge handling the matter at the time call for a detailed report from the Deputy Registrar on what may have happened. Or better still, any party should have moved the court for review of its orders or write to the Presiding Judge to cause a report on the issue. Probate and Administration procedure includes administrative work by the Deputy Registrar with the judge coming in only to sign the already prepared documents in some instances. An oversight could occur. In stating this, I am not in any way trying to explain what happened here nor am I trying to excuse any lapse of judgment on the part of the Registry staff. As can be seen in this file, there are many letters to the Deputy Registrar requiring some action or another in the court file without necessarily having

the file placed before a judge for any action.

My question is whether, in the the three application under consideration here, the applicants have satisfied the requirements of Section 76 of the Act? To answer that question I need to analyse the requirements of Section 76 of the Act. In view of the material placed before the court in the three (3) applications under consideration, it is my considered view that there is no evidence to prove that proceedings leading to the granting of letters of administration were defective in substance. The 2nd Petitioner has argued in her submissions that the in respect of the application dated 10th December 2021, there were no proceedings that can be termed as defective. She argued that she wrote a letter and the matter was dealt with administratively and therefore this was not a judicial function but an administrative one. I have stated above that I have not seen any record showing that this matter was ever mentioned before a judge for rectification or amendment of the grants in respect of all the applications. The 2nd Petitioner, through her counsel, sought from the Deputy Registrar whether the file should be placed before a judge or the matter would be handled administratively. The response from the Deputy Registrar, if there was any, has not been provided. This led me to believe, in the absence of any evidence to the contrary, that this matter may have been dealt with administratively.

Secondly I find no evidence of fraud in the manner the grants in issue were issued. Standard of proof where fraud is alleged in a civil dispute is higher than **“a balance of probabilities”** as is the requirement in civil cases. In the case of **Christopher Ndaru Kagina v. Esther Mbandi Kagina & Another [2016] eKLR** the court addressed the issue of standard of proof where fraud is alleged by stating that:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank Ltd v. Trust Bank Ltd & 4 others the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary civil case.”

I repeat that I do not have evidence of what happened in this matter. None of the parties has presented me with evidence on what happened. They instead blame each other and read ill motive in each other’s actions. If all the parties in this matter were appearing before Jesus, He would have told them what he told the crowd that was baying for the blood of the woman they had caught sinning:

“If any of you have never sinned, then go ahead and throw the first stone at her.” (see John 8:7).

While I apportion some blame on the parties in this Cause for their failure in one way or another, no matter how minor, to facilitate the expeditious and transparent handling of this matter it is my view that the court through its Registry officials cannot escape blame. I think this matter should have been handled better by the Registry. It is always good practice, in the name of transparency and full disclosure of the action taken by the court, to involve all parties. In my view it would have eliminated suspicion between parties in this case if this matter was handled by placing the file before a judge and having anything that requires action, be it rectification or correction of an error, done in the presence of all parties. Succession matters, by their very nature, are emotive disputes. To satisfy everyone, it is good practice to have all parties present in court before orders making any changes in the file are given. This is my personal view. I believe doing so would ensure that every party to a matter is aware of what is happening and can ventilate her/his issues before the court in the presence of everyone else.

My view after considering all the issues is that there was concealment of material facts. The 2nd Petitioner instructed her lawyers at the time to withdraw her name from the Petition for grant but this was not done. She gave notice to act in person and filed Notice of Withdrawal. The other parties, including her former lawyers knew she had filed the Notice but did not do anything. It is true the facts of the Notice of Withdrawal may have been known by the Registry officials, but were these facts known to the judge handling the matter at the time? I have no answer to that question.

In respect of the issues of lack of capacity of the 1st Petitioner to seek a grant of representation because of bankruptcy related allegations, I decline to determine that issue for reasons that this court has been told that the issue is alive in our courts. I have no evidence to the contrary and therefore I will leave the matter to be handled by the correct forum. I have also noted that Adam has submitted at length on this issue. This being a Probate and Administration Court I decline the invitation to delve into issues that are outside this court’s jurisdiction.

Although this court has pronounced itself to the fact that the parties have failed to satisfy this court that their respective applications properly fall under the purview of Section 76 of the Act other than on the issue of concealment of material facts in respect of the grant dated 5th April 2019, I note that the circumstances of this cause are such that both grants, the one dated 5th April 2019 and rectified on 23rd May 2019 and the one dated 11th March 2019 have been rendered useless and inoperative through subsequent circumstances as provided under Section 76 (e) of the Act. The former grant has been overtaken by events. The beneficiary of the estate who is described as the sole beneficiary has since attained age of majority. There is a petition brought by him seeking to be issued with a grant of representation. This petition is pending. The latter grant serves no purpose. The 1st Petitioner wants it revoked and the 2nd Petitioner is not interested in the administration of the estate herein. It is my considered view that due to changed circumstances, subsequent to the issuing of the two grants, the two grants are better off revoked. The circumstances dictate that this court re-looks at the issues of representation in this estate afresh and make appropriate orders after hearing the parties. It is also clear to me that as at the time the two grants were issued, the sole beneficiary was a minor. Further, given the circumstances as explained in this ruling, the grant issued on 5th April 2019 and rectified on 23rd May 2019 ought not to have been issued had all the issues been revealed to the court, or at least it ought not to have been issued in the name of the 1st and 2nd Petitioners as was done. The grant issued on 11th March 2019 ought not to have been issued to one person given there was a continuing trust.

Consequently, I allow the Summons dated 11th June 2019 by Lisa Anyanngo, the Summons of the same date by David Karanja and Stella Nyanjiru and the Summons dated 10th December 2019 by Samuel K. Macharia. The effect of that order is that the grant dated 5th April 2019 and rectified on 23rd May 2019 and issued to the 1st and 2nd Petitioners stands revoked. Further the grant issued on 11th March 2019 to the 1st Petitioner stands revoked. To avoid the situation where this estate is left without representation, this court allows parties to move with haste within 30 days and propose an administrator pending the hearing and determination of the pending applications. This being a family

dispute I decline to order costs payable by any party. Let each party bear own costs. Orders shall issue accordingly.

Dated, signed and delivered this 28th July 2021.

S. N. MUTUKU

JUDGE